7-05

OAL DKT. NO. EDU 11289-04
AGENCY DKT. NO. 371-10/04

D.W., on behalf of minor child, S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/6/05

Date of Mailing: 1/6/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11289-04

AGENCY REF.NO.371-10/04

D.W. ON BEHALF OF MINOR CHILD,

S.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF BELLVILLE,

ESSEX COUNTY,

Respondent.

Deborah Waters, *pro se*

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

Record Closed: December 6, 2004 Decided: December 6, 2004

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on October 26, 2004 for determination as a contested case. A hearing was scheduled for November 16, 2004.

On the date of the hearing the parties were able to resolve the matter and submitted the attached Settlement Agreement. On December 6, 2004, the parties submitted the attached Board resolution approving the Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

Dec. 6, 2004
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

12-10-04
DATE

DEPARTMENT OF EDUCATION

DEC 13 2004
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

Township of Belleville
BOARD OF EDUCATION
102 PASSAIC AVENUE
BELLEVILLE, NEW JERSEY 07109
Web Site: www.belleville.k12.nj.us

Edward J. Appleton
Board Secretary/ Business Administrator

Phone (973) 450-3500
ext. 3553
Fax: (973) 450-3504

November 23, 2004

The following resolution was passed at the November 22, 2004 public business meeting of the Belleville Board of Education:

RESOLVED, That the Board of Education approve the tuition contract for the 2004-05 school year between D.W. on behalf of S.W. and the Belleville Board of Education, in the amount of $8,372, in accordance with the settlement agreement dated November 16, 2004, OAL Docket #EDU 11289-04. (Attachment to follow in minutes)

Edward J. Appleton

EJA:bg

CERTIFIED COPY

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 DEC -6 P 3:38

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

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2004 DEC -6 P 3:38

D.W. o/b/o S.W.	OFFICE OF ADMINISTRATIVE LAW
	OAL DKT. NO. EDU-11289-04
Petitioner,	
vs.	**SETTLEMENT AGREEMENT**
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE	
Respondent	

WHEREAS, this matter was brought before the court by emergent application of the Petitioner, D.W., and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim and a Motion for Summary Disposition, and this matter having been set down for a hearing on November 16, 2004, and the parties having reached a settlement to amicably adjust their differences as follows:

1. D.W. shall pay the Belleville Board of Education the sum of $1,196.00 beginning on December 1, 2004 and continuing on the first day of each month thereafter through June 1, 2005 in payments of tuition of eight thousand three hundred and seventy two dollars ($8,372.00) for the 2004-2005 school year so

that her daughter, S.W., may continue to attend the Belleville High School during this, her senior year.

2. Petitioner acknowledges that neither she or her daughter, S.W., reside in the Township of Belleville and that they have not resided in Belleville since the beginning of the 2004-2005 school year.

3. In the event payment is not received by the Belleville Board of Education at 102 Passaic Avenue, Belleville, New Jersey 07109 on or before the first day of each month (with a four day grace period) for the remainder of the school year, S.W. shall be disenrolled from the Belleville Public Schools immediately. D.W. waives her right to file for relief from such disenrollment.

4. This Agreement pertains to the 2004-2005 school year and the claims which were or could have been brought in this action.

5. The Petitioner, of course, may pay tuition in advance.

6. The parties hereby release each other from any claims which were or could have ben asserted in this action, except as set forth in this Agreement.

7. Nothing in this Agreement shall be construed as absolving S.W. from meeting all requirements of the Belleville Public Schools to graduate.

8. This Agreement is subject to Board approval.

Dated: November 16, 2004

D.W. o/b/o S.W. Petitioner	OAL DOCKET NO. EDU 11289-04
v.	AGENCY REFERENCE NO. 371-10/04
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE Respondent	~~ORDER~~ SETTLEMENT AGREEMENT

WHEREAS this matter was brought before the Court by emergent application of the petitioner, D.W., and the respondent, Belleville BOE, having filed an Answer + Counterclaim + a motion for summary disposition, and this matter having been set down for a hearing on November 16, 2004, and the parties having reached a settlement to amicably adjust their differences as follows:

1. D.W. shall pay the ~~Board~~ Belleville BOE the sum of $1,196.00 beginning on December 1, 2004 and continuing on the first day of each month thereafter through June 1, 2005 in payment of tuition of ($8372.00) for the 2004-2005 school year so that her daughter S.W. may continue to attend the Belleville High School during this her senior year.

2. Petitioner acknowledges that neither she or her daughter, S.W., reside

in the Township of Belleville and the they have not resided in Belleville since the beginning of the 2004-2005 school year.

3. In the ~~ev~~ event payment is not received by the Belleville BOE at 102 Passaic Avenue, Belleville, NJ. 07109 on or before the 1st day of each month (with a four day grace period) for the remainder of ~~the~~ the 2004-2005 school year, S.W. shall be disenrolled from the Belleville Public Schools immediately. D.W. waives her right to file for relief from such disenrollment.

D.W. J.W.

J.W. J.W.

4. This agreement pertains to the 2004-2005 school year ~~only~~ and the claims which were or could have been brought in this action.

5. The Petitioner of course may pay tuition in advance.

6. The parties hereby release each other from any claims which were or could have been asserted in this action, except as set forth in this agreement.

7. Nothing in this agreement shall be construed as absolving S.W. from meeting all requirements of the Belleville Public Schools to graduate.

8. This agreement is subject to Board approval.

Nov. 16, 2004

Deborah Waters

DEBORAH WATERS, Petitioner

JOSEPH KRAEMER, Acting Superintendent
Belleville BOE
Respondent

8-05

OAL DKT. NO. EDU 1801-04
AGENCY DKT. NO. 460-12/03

ROBERT NATIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' 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 settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/05

Date of Mailing: 1/06/05

* The Commissioner notes that the record includes Board resolutions approving both the original settlement agreement and a subsequent modification to it. The Commissioner further notes that the agreement pertains both to the instant matter and to petitioner's appeal of the withholding of his 2004-05 increment, Agency Dkt. No. 176-5/04, OAL Dkt. No. EDU 5901-04.

COPY

COPY

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01801-04
AGENCY REF.NO.460-12/03

ROBERT NATIELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Steven M. Fleischer, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: November 24, 2004 Decided: December 6, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on February 26, 2004 for determination as a contested case. A hearing was scheduled for September 22 and 23, 2004. At that time the parties asked for an adjournment to work on settlement negotiations. The matter was rescheduled for October 18, 2004.

On the date of the hearing the parties were able to resolve the matter. On November 24, 2004, the parties submitted the attached Original Settlement Agreement indicating the terms of the agreement along with the original Board resolution adopting and approving the Agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

12/6/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

12-10-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

ER-4

SETTLEMENT AGREEMENT AND RELEASE

2004 NOV 24 A 10:12

WHEREAS, Robert Natiello ("Petitioner") has made certain claims against the Paramus Board of Education ("Paramus" "Board" or "Respondent") in two separate Actions entitled "Robert Natiello v. Borough of Paramus Board of Education," filed in the Office of Administrative Law and transferred to the Department of Education, bearing Docket Nos. EDUOR-01801-2004N (for the 2003-2004 increment withholding) and EDUOR-05901-2004N (for the 2004-2005 increment withholding) (collectively the "Claims"); and

WHEREAS, Petitioner and Respondent desire to reach an amicable and final resolution of all claims of Petitioner against Respondent, its employees, agents, representatives and board members, divisions, affiliated entities and their present and former employees, agents, representatives, and board members and the agents, successors, assignees, trustees, heirs, administrators, executors, representatives and principals thereof (hereinafter referred to as "Releasees");

NOW, THEREFORE, in consideration of the obligations upon Petitioner and Respondent set forth in this Settlement Agreement and Release (the "Agreement"), and in full settlement of such claims, Petitioner and Respondent agree as follows:

1. Without admitting any liability or wrongdoing whatsoever, Paramus agrees to:

(a) Restore Petitioner's salary increments which were withheld for the 2003-2004 and 2004-2005 school years. Specifically, the Board shall pay Petitioner the sum of two thousand twenty-nine dollars and zero cents ($2,029.00), less applicable federal, state, and local withholdings and deductions, to reinstate Petitioner's increment for the 2003-2004 school year. In addition, the Board shall provide Petitioner with the appropriate salary for the 2004-2005 school year as if the increment withholdings had not occurred. Specifically, pursuant to the

Collective Bargaining Agreement between the Paramus Education Association and the Board, Petitioner's salary for the 2004-2005 school year shall be $80,720.00; (his salary shall include the base salary provided in the collective bargaining agreement for his years of service in the district and any applicable advanced education and longevity supplement provided in the agreement for the 2004-2005 school year) and

(b) To provide Petitioner with the pension credits for the salary he would have received if the withholding did not occur for the 2003-2004 school year and to make appropriate pension contributions for the 2004-2005 school year based on Petitioner's salary as set forth above; and

(c) To employ Petitioner as a permanent substitute for the 2004-2005 school year at the salary set forth above and with those benefits provided to full-time teaching staff members employed by the Board. Petitioner understands that he may be assigned to any school in the District at Respondent's discretion and shall work in accordance with the schedule for that school building.

2. The consideration set forth in paragraph 1 is being provided in full settlement of any and all claims Petitioner may have against Respondent and Releasees relating to his employment with the Paramus Board of Education, including any attorneys' fees he claims he incurred.

3. In exchange for the consideration set forth in paragraph 1, and other promises contained herein, Petitioner further agrees as follows:

(a) To tender his resignation effective June 30, 2005 and, simultaneous with the execution of this Agreement, to provide the Board with an irrevocable letter of resignation effective on June 30, 2005, subject to the full performance of the terms of this settlement agreement.

(b) To immediately dismiss with prejudice the Claims against Respondent. Petitioner hereby warrants, represents and certifies that he has not filed or instituted, jointly or individually (and no person or agency has filed or instituted on his behalf), any other complaints, suits, actions, charges, grievances, claims and/or proceedings against Respondent or Releasees in any forum including, but not limited to, the Equal Employment Opportunity Commission, the New Jersey Division on Civil Rights, the United States Department of Labor, the New Jersey Department of Labor, the New Jersey Public Employment Relations Commission or any other state or federal court or agency; and

(c) To knowingly and voluntarily completely release Respondent and Releasees from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, 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 New Jersey Employer-Employee Relations Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, as amended, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, the Older Workers Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Omnibus Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, ~~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 claims similar thereto against Respondent and Releasees, including any claim for attorneys' fees and/or costs, that Petitioner, 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 up to and including the date of execution of this Agreement and shall not, from any source or proceeding whatsoever, seek, or in any way personally obtain or accept any monetary award, recovery, settlement or relief therefrom; and As an exception, Petitioner may pursue pending claims under the New Jersey Workers' Compensation Act. J.F.

(d) To immediately seek and obtain dismissal with prejudice of any complaint, suit, action, charge, claim or proceeding (unless such proceeding is a class action in which case Petitioner agrees to "opt out" of the class and not participate in the class action) in the event that, for any reason, any complaint, suit, action, charge, claim or proceeding covered by paragraph 3(b) or (c) is pending or is instituted on his behalf, and to not, unless required by law to do so (and then subject to the terms of paragraph 6 below), testify, provide documents or otherwise participate or permit others to participate on his behalf in any such proceedings or litigation arising therefrom or associated therewith, and, in no event, from any such source or proceeding whatsoever, to seek, or in any way obtain or accept any award, recovery, settlement

or monetary or equitable relief therefrom. Should Petitioner fail to seek and obtain such dismissal, he will, at the option of Respondent, be considered in breach of this Agreement; and

(e) To perform his job duties as a permanent substitute to the best of his abilities and in a satisfactory manner. Petitioner shall be subject to the same rights and obligations as all teaching staff members. The Board specifically retains the right, in accordance with statute and the Collective Bargaining Agreement, to request a doctor's note in connection with the use of any sick days.

(f) To comply with all other obligations provided for by this Agreement.

4. Petitioner and Respondent agree that they will not at any time disparage or impugn the reputation of the other party. Regarding employment references, the Board agrees that it will place a note in Petitioner's personnel file identifying his dates of employment, positions held, final salary, and that he retired in good standing from his employment with the Board. This note will instruct Board employees to provide only this information to prospective employers.

5. Petitioner shall not apply in the future for employment with the Paramus Board of Education or its subsidiaries, affiliates, or related entities operated or controlled by the Board and agrees that this Agreement shall be a complete bar to any such application. Petitioner further agrees that neither Paramus nor its subsidiaries, affiliates, or related entities have any obligation, contractual or otherwise, to hire or employ him in the future.

6. Both parties agree not to disclose or cause to be disclosed to, directly or indirectly, any person including, but not limited to, members of the general public and current

and former employees of the Paramus Board of Education, the existence of or terms of this Agreement except as required by applicable law. If anyone with prior knowledge of the pursuit of legal claims in this matter asks about the status of Petitioner's claims against Respondent, Petitioner and Respondent agree to state solely "The matter has been resolved." As an exception to this provision, it is understood that either party may disclose the terms of this Agreement to his counsel and tax preparer, provided that those persons are instructed to comply with the non-disclosure terms of this Agreement. Additionally, should either party be required by law, legal process or subpoena to provide information related either to his or to anyone else's employment or application for employment with Paramus, the parties shall, to the extent reasonably practicable, in advance of providing any response to such law, legal process or subpoena, and, provide written notice of such law, legal process or subpoena by facsimile, delivery service or other reasonable means to the other party's counsel; Steven M. Fleischer, Esq. of Sills Cummis Epstein & Gross P.C., One Riverfront Plaza, Newark, New Jersey 07102-5400, for Respondent, Alfred F. Maurice, Esq., of Springstead & Maurice, 39 Hudson Street Hackensack, New Jersey 07601 for Petitioner so that either party may seek to assert its rights and interests in connection therewith.

7. Petitioner agrees and understands that he will fully assume all tax obligations, if any, on the Sum provided to him as set forth in paragraph 1 of this Agreement, and that he shall be exclusively liable for the payment of all federal, state and local taxes which may be determined to be due as a result of any consideration or payment received by him pursuant to this Agreement. Petitioner agrees to fully indemnify and hold harmless Respondent and Releasees from payment of any and all taxes, interest or penalties that may be required of him by any government agency at any time as a result of any consideration provided pursuant to this

Agreement, except, however, that Respondent agrees to withhold and pay to all relevant taxing authorities all sums required to be so withheld and paid on behalf of all other employees in the district. Petitioner further acknowledges that neither Respondent nor any representatives of Respondent have made any promise, representation or warranty, express or implied, regarding the tax consequences of any consideration provided pursuant to this Agreement.

8. Neither party's breach of any of the paragraphs of this Agreement, nor either party's pursuit of any remedies for such breach, shall release either party from any other obligations under this Agreement.

9. Petitioner understands and acknowledges that, the consideration is accorded in exchange for his agreement to the terms and conditions set forth in this Agreement and is in full and final settlement of any and all claims, known or unknown, suspected or unsuspected, that Petitioner may have against Respondent and Releasees; and that Respondent's obligations under this Agreement are in lieu of any and all other amounts to which Petitioner might be or is now entitled to receive from Respondent and Releasees upon any claim whatsoever.

10. If either party should bring any action arising out of the subject matter of this Agreement, the prevailing party shall pay the other party's costs and expenses of the defense of such issues authorized by law. This paragraph is not intended to preclude Petitioner from: (1) enforcing the terms of this Agreement; (2) challenging the knowing and voluntary nature of the Agreement; or (3) participating in any investigation or proceeding conducted by the EEOC with respect to any claims under the Age Discrimination in Employment Act.

11. Petitioner agrees and acknowledges that he has the right to reflect upon this Agreement for a period of twenty-one (21) days before executing it, and will have an additional

period of seven (7) days after executing the Agreement to revoke it under the terms of the Older Workers Benefit Protection Act. Petitioner has seven (7) days after he signs this Agreement to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: Steven M. Fleischer, Esq. of Sills Cummis Epstein & Gross P.C., One Riverfront Plaza, Newark, New Jersey 07102. Petitioner understands and acknowledges that if he signs this Agreement prior to the expiration of the twenty-one day review period, he is voluntarily and knowingly waiving his twenty-one (21) day review period. This Agreement shall not be effective nor shall the Board take any actions hereunder until after the expiration of the seven (7) day revocation period set forth in the Older Workers Benefit Protection Act.

12. Petitioner and Respondent further agree that this Agreement will be governed by the laws of the State of New Jersey and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

13. Petitioner and Respondent further agree that if any of the provisions, terms, clauses, waivers or releases of claims and rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers or releases of claims and rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect, except that Petitioner's restoration and payment of his withheld 2003-2004 increment, the payment of the stated salary for the 2004-2005 school year, and Petitioner's agreement to retire June 30, 2005 are of the

essence of this agreement. In the event these provisions are determined to be void or of no effect than this agreement shall be void in its entirety.

14. Petitioner and Respondent 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.

15. This Agreement sets forth the entire agreement between Petitioner and Respondent, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

16. By signing this Agreement, Petitioner and Respondent acknowledge:

i. THEY HAVE READ THIS AGREEMENT COMPLETELY.

ii. THEY HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT.

iii. THEY HAVE CONSULTED WITH AN ATTORNEY OF THEIR CHOOSING, INCLUDING, BUT NOT LIMITED TO, ALFRED MAURICE, FOR PETITIONER AND STEVEN FLEISCHER FOR RESPONDENT, PRIOR TO EXECUTING THIS AGREEMENT TO EXPLAIN THIS AGREEMENT AND ITS CONSEQUENCES.

iv. THEY KNOW THAT THEY ARE GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT.

v. THEY UNDERSTAND EVERYTHING THAT IS STATED IN THIS AGREEMENT, AND THEY UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. THEY HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT.

vii. THEY HAVE SIGNED THIS AGREEMENT VOLUNTARILY AND ENTIRELY OF THEIR OWN FREE WILL.

To signify their agreement to the terms of this Agreement, the parties have executed this Agreement on the dates set forth below.

Robert C Natiello
ROBERT NATIELLO

Sworn and subscribe to before me on this ~~day of~~ ~~2004~~ 8/12/04

PARAMUS BOARD OF EDUCATION

Dated: Aug. 31, 2004

By: [signature]
Board President

Jeanne Bohnert
Sch. Bus. Adm/Bd Sec'y

9-05

OAL DKT. NO. EDU 5901-04
AGENCY DKT. NO. 176-5/04

ROBERT NATIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' 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 settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/05

Date of Mailing: 1/06/05

* The Commissioner notes that the record includes Board resolutions approving both the original settlement agreement and a subsequent modification to it. The Commissioner further notes that the agreement pertains both to the instant matter and to petitioner's concurrent appeal of the withholding of his 2003-04 increment, Agency Dkt. No. 460-12/03, OAL Dkt. No. EDU 1801-04.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05901-04

AGENCY REF.NO.176-5/04

ROBERT NATIELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Steven M. Fleischer, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: November 24, 2004 Decided: December 6, 2004

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on June 23, 2004 for determination as a contested case. A hearing was scheduled for December 16, 2004.

The parties were able to resolve the matter before the hearing date. On November 24, 2004, the parties submitted the attached Original Settlement Agreement indicating the terms of the agreement along with the original Board resolution adopting and approving the Agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

Dec. 6 2004
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

12-10-04
DATE

M Kathleen Duncan
DEPARTMENT OF EDUCATION

DEC 13 2004
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

P-ER-4

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, Robert Natiello ("Petitioner") has made certain claims against the Paramus Board of Education ("Paramus" "Board" or "Respondent") in two separate Actions entitled "Robert Natiello v. Borough of Paramus Board of Education," filed in the Office of Administrative Law and transferred to the Department of Education, bearing Docket Nos. EDUOR-01801-2004N (for the 2003-2004 increment withholding) and EDUOR-05901-2004N (for the 2004-2005 increment withholding) (collectively the "Claims"); and

WHEREAS, Petitioner and Respondent desire to reach an amicable and final resolution of all claims of Petitioner against Respondent, its employees, agents, representatives and board members, divisions, affiliated entities and their present and former employees, agents, representatives, and board members and the agents, successors, assignees, trustees, heirs, administrators, executors, representatives and principals thereof (hereinafter referred to as "Releasees");

NOW, THEREFORE, in consideration of the obligations upon Petitioner and Respondent set forth in this Settlement Agreement and Release (the "Agreement"), and in full settlement of such claims, Petitioner and Respondent agree as follows:

1. Without admitting any liability or wrongdoing whatsoever, Paramus agrees to:

(a) Restore Petitioner's salary increments which were withheld for the 2003-2004 and 2004-2005 school years. Specifically, the Board shall pay Petitioner the sum of two thousand twenty-nine dollars and zero cents ($2,029.00), less applicable federal, state, and local withholdings and deductions, to reinstate Petitioner's increment for the 2003-2004 school year. In addition, the Board shall provide Petitioner with the appropriate salary for the 2004-2005 school year as if the increment withholdings had not occurred. Specifically, pursuant to the

Collective Bargaining Agreement between the Paramus Education Association and the Board, Petitioner's salary for the 2004-2005 school year shall be $80,720.00; (his salary shall include the base salary provided in the collective bargaining agreement for his years of service in the district and any applicable advanced education and longevity supplement provided in the agreement for the 2004-2005 school year) and

(b) To provide Petitioner with the pension credits for the salary he would have received if the withholding did not occur for the 2003-2004 school year and to make appropriate pension contributions for the 2004-2005 school year based on Petitioner's salary as set forth above; and

(c) To employ Petitioner as a permanent substitute for the 2004-2005 school year at the salary set forth above and with those benefits provided to full-time teaching staff members employed by the Board. Petitioner understands that he may be assigned to any school in the District at Respondent's discretion and shall work in accordance with the schedule for that school building.

2. The consideration set forth in paragraph 1 is being provided in full settlement of any and all claims Petitioner may have against Respondent and Releasees relating to his employment with the Paramus Board of Education, including any attorneys' fees he claims he incurred.

3. In exchange for the consideration set forth in paragraph 1, and other promises contained herein, Petitioner further agrees as follows:

(a) To tender his resignation effective June 30, 2005 and, simultaneous with the execution of this Agreement, to provide the Board with an irrevocable letter of resignation effective on June 30, 2005, subject to the full performance of the terms of this settlement agreement.

(b) To immediately dismiss with prejudice the Claims against Respondent. Petitioner hereby warrants, represents and certifies that he has not filed or instituted, jointly or individually (and no person or agency has filed or instituted on his behalf), any other complaints, suits, actions, charges, grievances, claims and/or proceedings against Respondent or Releasees in any forum including, but not limited to, the Equal Employment Opportunity Commission, the New Jersey Division on Civil Rights, the United States Department of Labor, the New Jersey Department of Labor, the New Jersey Public Employment Relations Commission or any other state or federal court or agency; and

(c) To knowingly and voluntarily completely release Respondent and Releasees from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, 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 New Jersey Employer-Employee Relations Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, as amended, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, the Older Workers Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Omnibus Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, ~~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 claims similar thereto against Respondent and Releasees, including any claim for attorneys' fees and/or costs, that Petitioner, 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 up to and including the date of execution of this Agreement and shall not, from any source or proceeding whatsoever, seek, or in any way personally obtain or accept any monetary award, recovery, settlement or relief therefrom; and

(d) To immediately seek and obtain dismissal with prejudice of any complaint, suit, action, charge, claim or proceeding (unless such proceeding is a class action in which case Petitioner agrees to "opt out" of the class and not participate in the class action) in the event that, for any reason, any complaint, suit, action, charge, claim or proceeding covered by paragraph 3(b) or (c) is pending or is instituted on his behalf, and to not, unless required by law to do so (and then subject to the terms of paragraph 6 below), testify, provide documents or otherwise participate or permit others to participate on his behalf in any such proceedings or litigation arising therefrom or associated therewith, and, in no event, from any such source or proceeding whatsoever, to seek, or in any way obtain or accept any award, recovery, settlement

S.F. As an exception, Petitioner may pursue pending claims under the New Jersey Workers' Compensation Act.

or monetary or equitable relief therefrom. Should Petitioner fail to seek and obtain such dismissal, he will, at the option of Respondent, be considered in breach of this Agreement; and

(e) To perform his job duties as a permanent substitute to the best of his abilities and in a satisfactory manner. Petitioner shall be subject to the same rights and obligations as all teaching staff members. The Board specifically retains the right, in accordance with statute and the Collective Bargaining Agreement, to request a doctor's note in connection with the use of any sick days.

(f) To comply with all other obligations provided for by this Agreement.

4. Petitioner and Respondent agree that they will not at any time disparage or impugn the reputation of the other party. Regarding employment references, the Board agrees that it will place a note in Petitioner's personnel file identifying his dates of employment, positions held, final salary, and that he retired in good standing from his employment with the Board. This note will instruct Board employees to provide only this information to prospective employers.

5. Petitioner shall not apply in the future for employment with the Paramus Board of Education or its subsidiaries, affiliates, or related entities operated or controlled by the Board and agrees that this Agreement shall be a complete bar to any such application. Petitioner further agrees that neither Paramus nor its subsidiaries, affiliates, or related entities have any obligation, contractual or otherwise, to hire or employ him in the future.

6. Both parties agree not to disclose or cause to be disclosed to, directly or indirectly, any person including, but not limited to, members of the general public and current

and former employees of the Paramus Board of Education, the existence of or terms of this Agreement except as required by applicable law. If anyone with prior knowledge of the pursuit of legal claims in this matter asks about the status of Petitioner's claims against Respondent, Petitioner and Respondent agree to state solely "The matter has been resolved." As an exception to this provision, it is understood that either party may disclose the terms of this Agreement to his counsel and tax preparer, provided that those persons are instructed to comply with the non-disclosure terms of this Agreement. Additionally, should either party be required by law, legal process or subpoena to provide information related either to his or to anyone else's employment or application for employment with Paramus, the parties shall, to the extent reasonably practicable, in advance of providing any response to such law, legal process or subpoena, and, provide written notice of such law, legal process or subpoena by facsimile, delivery service or other reasonable means to the other party's counsel; Steven M. Fleischer, Esq. of Sills Cummis Epstein & Gross P.C., One Riverfront Plaza, Newark, New Jersey 07102-5400, for Respondent, Alfred F. Maurice, Esq., of Springstead & Maurice, 39 Hudson Street Hackensack, New Jersey 07601 for Petitioner so that either party may seek to assert its rights and interests in connection therewith.

7. Petitioner agrees and understands that he will fully assume all tax obligations, if any, on the Sum provided to him as set forth in paragraph 1 of this Agreement, and that he shall be exclusively liable for the payment of all federal, state and local taxes which may be determined to be due as a result of any consideration or payment received by him pursuant to this Agreement. Petitioner agrees to fully indemnify and hold harmless Respondent and Releasees from payment of any and all taxes, interest or penalties that may be required of him by any government agency at any time as a result of any consideration provided pursuant to this

Agreement, except, however, that Respondent agrees to withhold and pay to all relevant taxing authorities all sums required to be so withheld and paid on behalf of all other employees in the district. Petitioner further acknowledges that neither Respondent nor any representatives of Respondent have made any promise, representation or warranty, express or implied, regarding the tax consequences of any consideration provided pursuant to this Agreement.

8. Neither party's breach of any of the paragraphs of this Agreement, nor either party's pursuit of any remedies for such breach, shall release either party from any other obligations under this Agreement.

9. Petitioner understands and acknowledges that, the consideration is accorded in exchange for his agreement to the terms and conditions set forth in this Agreement and is in full and final settlement of any and all claims, known or unknown, suspected or unsuspected, that Petitioner may have against Respondent and Releasees; and that Respondent's obligations under this Agreement are in lieu of any and all other amounts to which Petitioner might be or is now entitled to receive from Respondent and Releasees upon any claim whatsoever.

10. If either party should bring any action arising out of the subject matter of this Agreement, the prevailing party shall pay the other party's costs and expenses of the defense of such issues authorized by law. This paragraph is not intended to preclude Petitioner from: (1) enforcing the terms of this Agreement; (2) challenging the knowing and voluntary nature of the Agreement; or (3) participating in any investigation or proceeding conducted by the EEOC with respect to any claims under the Age Discrimination in Employment Act.

11. Petitioner agrees and acknowledges that he has the right to reflect upon this Agreement for a period of twenty-one (21) days before executing it, and will have an additional

period of seven (7) days after executing the Agreement to revoke it under the terms of the Older Workers Benefit Protection Act. Petitioner has seven (7) days after he signs this Agreement to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: Steven M. Fleischer, Esq. of Sills Cummis Epstein & Gross P.C., One Riverfront Plaza, Newark, New Jersey 07102. Petitioner understands and acknowledges that if he signs this Agreement prior to the expiration of the twenty-one day review period, he is voluntarily and knowingly waiving his twenty-one (21) day review period. This Agreement shall not be effective nor shall the Board take any actions hereunder until after the expiration of the seven (7) day revocation period set forth in the Older Workers Benefit Protection Act.

12. Petitioner and Respondent further agree that this Agreement will be governed by the laws of the State of New Jersey and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

13. Petitioner and Respondent further agree that if any of the provisions, terms, clauses, waivers or releases of claims and rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers or releases of claims and rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect, except that Petitioner's restoration and payment of his withheld 2003-2004 increment, the payment of the stated salary for the 2004-2005 school year, and Petitioner's agreement to retire June 30, 2005 are of the

essence of this agreement. In the event these provisions are determined to be void or of no effect than this agreement shall be void in its entirety.

14. Petitioner and Respondent 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.

15. This Agreement sets forth the entire agreement between Petitioner and Respondent, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

16. By signing this Agreement, Petitioner and Respondent acknowledge:

i. THEY HAVE READ THIS AGREEMENT COMPLETELY.

ii. THEY HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT.

iii. THEY HAVE CONSULTED WITH AN ATTORNEY OF THEIR CHOOSING, INCLUDING, BUT NOT LIMITED TO, ALFRED MAURICE, FOR PETITIONER AND STEVEN FLEISCHER FOR RESPONDENT, PRIOR TO EXECUTING THIS AGREEMENT TO EXPLAIN THIS AGREEMENT AND ITS CONSEQUENCES.

iv. THEY KNOW THAT THEY ARE GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT.

v. THEY UNDERSTAND EVERYTHING THAT IS STATED IN THIS AGREEMENT, AND THEY UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. THEY HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT.

vii. THEY HAVE SIGNED THIS AGREEMENT VOLUNTARILY AND ENTIRELY OF THEIR OWN FREE WILL.

To signify their agreement to the terms of this Agreement, the parties have executed this Agreement on the dates set forth below.

Robert C Natiello

ROBERT NATIELLO

Sworn and subscribe to before me on this ~~day of~~ ~~2004~~ 8/12/04

PARAMUS BOARD OF EDUCATION

Dated: Aug. 31, 2004

By: A Emmes
Board President

Joanne Schmidt
Sch. Bus. Adm/Bd Secy

10-05

OAL DKT. NO. EDU 7593-04
AGENCY DKT. NO. 241-7/04

S.A., on behalf of minor child, C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, but rather by the President of the Chathams Board of Education. In that neither the file nor the agreement itself incorporates any resolution of the Board approving the settlement and designating the Board President to sign on its behalf, the Commissioner cannot approve the settlement agreement.[1]

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the aforementioned concerns. If the parties cannot reach accord on a modified agreement, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/11/05

Date of Mailing: 1/11/05

[1] Indeed, Term No. 7 suggests that the Board had not yet approved the agreement when it was signed and submitted to the OAL.

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

State of New Jersey

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

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

January 11, 2005

John G. Geppert, Jr., Esq.
Wiley, Malehorn and Sirota
250 Madison Avenue
Morristown, NJ 07960

Nicholas Celso, III, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
Ten James Street
Florham Park, NJ 07932

Dear Parties:

S.A., on behalf of minor child, C.M. V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY, AGENCY DKT. NO. 241-7/04, OAL DKT. NO. EDU 7593-04

We are enclosing a copy of the decision of the Commissioner of Education dated January 11, 2005 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer preparing a synopsis or summary of the Commissioner's decision or providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/SAandCM
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7593-04

AGENCY DKT. NO. 241-7/04

S.A., o/b/o MINOR CHILD, C.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY,

Respondent.

John Geppert, Esq., for petitioner
(Wiley, Malehorn & Sirota, attorneys)

Nicholas Celso, III, Esq., for respondent
(Schwartz, Simon, Edelstein & Celso & Kessler, attorneys)

Record Closed: November 18, 2004 Decided: November 22, 2004

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 4, 2004, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for October 26, 2004, at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

November 22, 2004
DATE

BARRY M. FRANK, ALJ

Receipt Acknowledged:

11-30-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties

DEC 2 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 NOV 18 P 2:21

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between S.A. and C.M. ("Petitioners"), and the School District of the Chathams ("District"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, on or about July 16, 2004, Petitioners filed a Petition of Appeal ("Petition") with the Commissioner of Education against the District captioned, S.A. o/b/o C.M. vs. School District of the Chathams, which Petition was transmitted by the Commissioner to the Office of Administrative Law and docketed as EDUOS 07593-2004N; and

WHEREAS, the parties have worked cooperatively in an effort to reach an amicable resolution of the subject matter of said Petition; and

WHEREAS, the resolution reached by the parties was entered into the record during a hearing conducted by Administrative Law Judge Barry Frank on October 26, 2004; and

WHEREAS, the parties wish to memorialize the terms of their resolution in a formal writing to be signed by both parties;

NOW, THEREFORE, IT IS on this 26th day of October 2004, agreed that:

1. The final grade received by C.M. on the Honors English 11 assignment at issue herein, which was calculated by averaging the zero received on the initial assignment with the grade received on the substitute assignment, shall remain on his record unchanged.

2. The grade of zero received by C.M. for the A.P. U.S. History test which he missed due to cutting the class shall remain on his record unchanged.

3. C.M. shall not be permitted to complete any make up work of any kind to improve his final grades in either Honors English 11 or A.P. U.S. History, and the final grades for those respective courses shall remain on his record unchanged.

4. Except as explicitly set forth herein, no records pertaining to C.M. shall be expunged or modified in any way.

5. C.M. shall be permitted to submit a new application to the National Honor Society Committee of Chatham High School. C.M. shall not be required to check the box under the portion of the application (ART. VI (a)) pertaining to involvement in cheating incidents. Rather, in lieu of checking the box, C.M. shall write the words "See Below". On the lines available for further comment under that section of the application, C.M. shall write, "I failed to follow a teacher's directions not to consult an outside source during the completion of an assignment."

6. Petitioners understand and accept the fact that there are no guarantees that the new application to the National Honor Society Committee of Chatham High School submitted by C.M. will be recommended by the Committee for admission into the National Honor Society. Petitioners agree to be bound by the determination of the National Honor Society Committee of Chatham High School and hereby waive their right to appeal that determination and file any action of any kind against Respondent and its employees in any forum for any reason whatsoever associated with said decision. The National Honor Society Committee is to be comprised of the same members who consider all other applications to the National Honor Society and are to have no input outside the Committee or the application.

7. Petitioners agree that within five days following the Board's formal approval of this Agreement, C.M. shall submit a letter of apology to teaching staff member Howard Glatt.

The letter of apology shall state that C.M. expresses his remorse for "failing to follow Mr. Glatt's directions not to consult an outside source during the completion of an assignment."

8. By signing a separate Release, Petitioners shall release the Board, its trustees, officers, employees, agents, servants, representatives, attorneys, successors and assigns from liability for any action relating in any way to the subject matter of the within matter and shall abandon, waive, and remise all claims they may have against the foregoing, including but not limited to withdrawal with prejudice of the instant Petition of Appeal. Additionally, Petitioners shall immediately withdraw their Notice of Tort Claim dated August 25, 2004, with prejudice.

9. Petitioners acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement and the associated Release, and that they sign the said Agreement and Release as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein; and

10. The terms and conditions set forth herein constitute the entire understanding of the parties.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the date and year aforesaid.

WITNESS:

John Gerrett

John Gerrett

S.A. 11/5/04
(date)

C.M. 11/5/04
(date)

WITNESS:

Vincent D. Yaniro, Board Secretary

School District of the Chathams

Gerald Helfrich, Board President (date)

#19-05

19-05

OAL DKT. NO. EDU 10215-00
AGENCY DKT. NO. 363-9/00

JAY M. LIPPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the petition in this matter is dismissed, with prejudice, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/05

Date of Mailing: 1/12/05

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10215-00

AGENCY DKT. NO. 363-9/00

JAY M. LIPPER,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT,

Respondent.

Kathleen A. Naprstek Cerisano, Esq., for petitioner

(Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

John G. Geppert, Jr., Esq., for respondent

(Wiley, Malehorn & Sirota, attorneys)

Record Closed: November 17, 2004 Decided: December 6, 2004

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner filed a petition with the State Department of Education (DOE) on or about September 12, 2000, pertinent to claimed tenure and seniority rights, *vis-à-vis* respondent. Respondent filed an answer on or about November 29, 2000, and the DOE transmitted the matter to the Office of Administrative Law on December 21, 2000 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to-13.

Throughout the proceedings, telephone conferences were conducted and scheduled hearing dates were adjourned at the requests of the parties for various reasons. Additionally, this Judge issued two orders on motions for summary decision filed on behalf of respondent. The parties conducted settlement negotiations throughout the proceedings and ultimately reached a resolution of the matter. An in-person conference was conducted on September 15, 2004, at which time the terms of the settlement agreement were stated on the record. An executed Stipulation of Settlement and a certified copy of minutes of a meeting of respondent, at which respondent approved the settlement, were filed on November 17, 2004. Attached herewith are copies of the Stipulation and the minutes.

Having reviewed the terms of the Stipulation of Settlement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

December 6 2004
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12-10-04
DATE

M. Kathleen Duncan/cs
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 13 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ers

RECEIVED
OFFICE OF ADMIN. LAW
NOV 17 3 17 PM '04

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioner

JAY M. LIPPER, Petitioner, v. BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOR 10215-00N Agency Ref. No. 363-9/00 **STIPULATION OF SETTLEMENT**

The above-captioned matter having been brought before the Commissioner of Education upon the Petition of Appeal filed by Jay M. Lipper (the Petitioner) against the Board of Education of the Morris School District, Morris County (the Board), and the parties having agreed to resolve the dispute between them now pending before the court, subject to the terms and conditions set forth below:

1. Petitioner is the holder of an instructional certificate with endorsements as a secondary school teacher of math and secondary school teacher of science, and an administrative certificate with endorsements as a Supervisor and Principal/Supervisor.

2. Petitioner has been employed by the Board from on or about September 1, 1968 to the present in a number of full-time positions, as follows: teacher of mathematics (the 1968-69 school year through the 1994-95 school year), Mathematics Department Chairperson (the 1986-87 school year through the 1994-95 school year

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

when the position was abolished), Supervisor of Applied Sciences (K-12) (the 1995-96 school year through the 1998-99 school year when the position was abolished), and full-time teacher of mathematics (the 1999-2000 school year to the present).

3. Before the start of the 2000-01 school year, the Board created the 12-month position of Supervisor of Curriculum (and thereafter Director of Curriculum) to which Petitioner asserted tenure and seniority rights. When the Board appointed someone other than Petitioner to the position for the 2000-01 school year and thereafter, he filed the within Petition of Appeal, alleging a violation of his tenure and seniority rights and seeking assignment to the position of Supervisor of Curriculum (and thereafter Director of Curriculum) along with the additional compensation, pension credit, and any other emoluments attendant to that position. The Board filed an answer denying the allegations of the Petition of Appeal and the dispute was transmitted to the Office of Administrative Law for a hearing.

4. Inasmuch as the Petitioner and the Board are desirous to spare each other and the public the cost and uncertainties of continued litigation, and without admitting any liability or wrongdoing on behalf of either party but solely to bring this matter to a prompt and amicable resolution, the parties have agreed that this matter shall be resolved by adjusting Petitioner's salary for the past several years to reflect additional monies he would have earned in the position(s) of Supervisor of Curriculum and/or Director of Curriculum based upon comparable salary paid by the Board to another individual with a comparable history of employment serving in a similar Supervisor of Curriculum and/or Director of Curriculum position, and to award him the difference in these sums as full back pay, as follows:

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

School Year	Salary Was Paid	Salary To Be Paid
2001-02	$89,471.00	$ 94,471.00
2002-03	$90,771.00	$100,771.00
2003-04	$92,071.00	$102,071.00

5. The award of back pay, less standard and ordinary salary deductions, shall be made to the Petitioner within forty-five (45) days following the execution of this agreement and approval of its terms by action of the Board and approval by the Commissioner of Education.

6. The parties agree that Petitioner shall pay the employee's share of any additional pension contributions to the Teachers' Pension & Annuity Fund for this period of time based upon the Petitioner's adjusted gross annual salary for the 2001-02, 2002-03 and 2003-04 school years as set forth in paragraph 4 above, that the employer shall not be liable for the employee's share thereof, that the employee shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions. The District makes no representations about how the Teachers' Pension and Annuity Fund will address or handle this Settlement.

7. In addition, Petitioner shall submit his irrevocable resignation from his position as Teacher in the Morris School District as a condition of this Stipulation of Settlement, by executing the letter attached hereto as Exhibit A. The Petitioner's resignation shall be effective January 1, 2005, and the Board will act to accept the resignation of Petitioner at the time that the Board approves this settlement. It is further

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

agreed that Petitioner's resignation is expressly contingent upon the Commissioner of Education's approval of the terms and conditions of this Stipulation of Settlement and, that if the Commissioner of Education does not approve this Stipulation of Settlement, then Petitioner's resignation shall be null and void and of no force and effect.

8. The parties agree that this Stipulation of Settlement is contingent upon the approval of the Commissioner of Education, and that, upon the approval of the Commissioner of Education, the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education shall be deemed to be dismissed with prejudice.

9. The parties agree that neither party is responsible for the payment of the other party's attorney fees in connection with this matter.

10. Through this Settlement Agreement, Jay M. Lipper releases and waives any and all claims, including but not limited to these claims related to the positions of Supervisor of Curriculum and Director of Curriculum that Petitioner has or may have against the Morris School District accrued to date.

11. This Settlement Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing. In the event, however, that this Agreement requires some modification to facilitate its acceptance by the Teachers' Pension and Annuity Fund and its approval by the Commissioner of Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as to this agreement.

12. Each party acknowledges that he/it has consulted with an attorney or representative of his/its own choosing prior to signing this Settlement Agreement, and

that each party signs this Agreement as his/its own voluntary act and deed, and that each Party fully understands the duties and obligations enumerated herein.

13. Nothing in this Settlement Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Mr. Lipper.

Jay M. Lipper — Dated: 10-30-04

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: _____ — Dated: 11/1/04
Kathleen Naprstek Cerisano, Esq.

BOARD OF EDUCATION OF MORRIS
SCHOOL DISTRICT

By: _____ — Dated: 11/10/04
Dr. Angela Rieck, President

WILEY, MALEHORN AND SIROTA
Attorneys for Respondent

By: _____ — Dated: 11/15/04
John G. Gepper, Esq.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Jay & Jacqueline Lipper

5 Lopatcong Avenue
Landing, New Jersey 07850
973.398.7153 (H) 973.398.6755 (FAX)

October 9, 2004

Morris School District Board of Education
31 Hazel Street
Morristown, NJ 07960

Ladies & Gentlemen of the Morris School District Board of Education:

It is with both trepidation and optimism for many new opportunities and new challenges, that I resign from the Morris School District faculty, in order to enter retirement. This will be effective January 1, 2005.

As a life-long employee of the District, I have fully enjoyed teaching many students and their children over a long career. I have had the opportunity to revamp the mathematics program several times. I have also had many opportunities to innovate by designing, implementing and operating our K-12 Computer Education Program for a number of years. My administrative roles were equally challenging and rewarding.

I wish to thank the Board for all of the opportunities you have provided . I would like to think that I have given as much as I received. In particular, I wish to thank you providing an outstanding education for my two children, Elliott and Allison. I don't believe they could have received a better education anywhere in New Jersey. Both are proud alumni of MHS.

Sincerely,

Jay M. Lipper

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

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, November 1, 2004 at 6:30 p.m.** in the Auditorium of Lafayette Learning Center 31 Hazel Street, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Mr. William Fainglas, Mrs. Marie Fornaro, Dr. Peter Gallerstein, Ms. Lisa Pollak, Mrs. Ann Rhines, Dr. Angela Rieck, Mr. John Schafer**

The following members of the Board of Education were absent: **Mrs. Phyllis Grant; Mr. Leonard Posey**

The following Resolution was offered by **Mr. Schafer** seconded by **Dr. Rieck** and adopted by the Board of Education by the following roll call vote:

Roll Call:	***AYES:***	Mrs. Bangiola, Mr. Fainglas, Mrs. Fornaro, Ms. Pollak, Mrs. Rhines, Dr. Rieck, Mr. Schafer
	NOES:	None
	ABSENT:	Dr. Gallerstein who left before vote; Mrs. Grant, Mr. Posey

RESOLVED:

Motion #29 that upon the recommendation of the Superintendent and after review by the Board Human Resources Committee, the Board of Education approve the following settlement involving employee #0346:

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Susan Young, Business Administrator/Board Secretary of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, November 1, 2004**, compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **2nd day of November 2004.**

(Seal)

Business Administrator/Board Secretary

20-05

OAL DKT. NO. EDU 5988-04
AGENCY DKT. NO. 104-3/04

S.S., on behalf of minor children, J.A.S., C.M.S.: and D.J.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/05

Date of Mailing: 1/12/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5988-04
AGENCY DKT. NO. 104-3/04

SONIA SMITH O/B/O J.A.S., C.M.S. & D.J.S.,

Petitioners,
v.

BOARD OF EDUCATION OF THE TWP. OF IRVINGTON, ESSEX COUNTY,
Respondent.

John J. Russo, Esq. for petitioners
(DiFrancesco, Bateman, Coley, Yospin, Kunzman Davis & Lehrer, P.C., attorneys)

Ronald C. Hunt, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: November 19, 2004 Decided: November 29, 2004

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 24, 2004, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Agreement to Settle and Withdraw. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

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

November 29, 2004
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

12-3-04
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 NOV 19 P 3:50

DONALD T. DIFRANCESCO
CHRISTOPHER "KIP" BATEMAN
HARRY A. YOSPIN□
STEVEN A. KUNZMAN□
STEPHEN O. DAVIS◇*
JEFFREY B. LEHRER□
RICHARD P. FLAUM△▽
JOHN J. BELARDO□†
JOHN V. BIVONA■■
SIDNEY COHEN■■
MARTY ALLEN
JAMES L. HAY◇
DAVID J. WADYKA■
ALBERT E. CRUZ□
TIMOTHY P. BECK◇*
MICHELE E. D'ONOFRIO
RICHARD J. GUSS
PAUL F. RIZZO*
V. ANTHONY DIGIROLAMO□◆
LISA M. FITTIPALDI†
RICHARD R. AHSLER

SANDRA BELLI
SANTINA M. BOMBACI
PAMELA T. BAIN
RAYMOND J. STINE
WILLIAM J. WILLARD□
KATHLEEN Y. AGNO□
MICHAEL V. CRESITELLO, JR.◇
JOHN J. RUSSO*
ANTHONY J. VINHAL□
MARK R. PECK
MARCI DIFRANCESCO□

OF COUNSEL
EDWIN D. KUNZMAN
JOHN E. COLEY, JR.□
JEFFREY W. POMPEO■
JAMES J. MOLOUGHNEY✓

DIFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS & LEHRER, P.C.

ATTORNEYS AT LAW
15 MOUNTAIN BOULEVARD
WARREN, NEW JERSEY 07059-5686
SOMERSET COUNTY

(908) 757-7800
FAX: (908) 757-8039
E-MAIL: DBC@NEWJERSEYLAW.NET

AFFILIATED WITH BIVONA & COHEN, P.C.
NEW YORK, NEW YORK

AFFILIATED OFFICES

LOS ANGELES PHILADELPHIA LONDON BOCA RATON

MEMBERS OF THE NEW JERSEY BAR
□ also NY ◇ also PA △ also DC
† also TX ■ also MO ◆ LLM-Taxation
▽ also MD
■ Director of Finance and Administration
* Certified by the Supreme Court of NJ as a Civil Trial Attorney
✓ Certified by the Supreme Court of NJ as a Matrimonial Law Attorney

via facsimile

November 18, 2004

Writer's Ext: 172

Honorable Sandra Ann Robinson
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

AGREEMENT TO SETTLE AND WITHDRAW

Re: Sonia Smith on behalf of minor children, J.A.S., C.M.S. & D.J.S.
OAL Docket No. EDUDS 05988-2004N
Our File No. C15327

Dear Judge Robinson:

In accordance with the agreement made during the September 16, 2004 hearing before Your Honor and during the November 18, 2004 telephone conference, the above captioned matter has been resolved between the parties. The Board of Education of the Township of Irvington, Essex County, has agreed that Sonia Smith and her children currently reside in Irvington and that her children are permitted to attend Irvington Township public schools. In addition to the documents that were presented during the September 16, 2004 conference, Sonia Smith has provided proof of residence through her motor vehicle registration and motor vehicle insurance card and through her Blue Cross & Blue Shield bills. Petitioner Sonia Smith agrees to fill out an Affidavit of Residence when same is provided by counsel for the Township of Irvington. The parties agree that this matter is now resolved and petitioner is withdrawing her claim. The parties agree that this matter is now settled pursuant to the above conditions.

John J. Russo, Esq.
On Behalf of Petitioner, Sonia Smith

Ronald C. Hunt, Esq.
On Behalf of Township of Irvington

2105

OAL DKT. NO. EDU 1270-04
AGENCY DKT. NO. 452-11/03

DOREEN TERLETSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/05

Date of Mailing: 1/12/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
SETTLEMENT
OAL DKT. NO. EDU 1270-04
AGENCY DKT. NO. 452-11/03

DOREEN TERLETSKY,
Petitioner,
v.
NORTH ARLINGTON
BOARD OF EDUCATION,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner
(Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorney)

Vittorio S. LaPira, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: December 6, 2004 Decided: December 6, 2004

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

This matter was transmitted to the Office of Administrative Law on January 21, 2004 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

Dec. 6, 2004
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12-10-04
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 13 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 DEC -6 A 10:21

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioner

DOREEN TERLETZKY, Petitioner, v. NORTH ARLINGTON BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOA-1270-2004N Agency Ref. No. 452-11/03 **SETTLEMENT AGREEMENT**

WHEREAS, Doreen Terletzky (hereinafter referred to as "Terletzky" or Petitioner) is currently employed by the North Arlington Board of Education (hereinafter referred to as "the Board" or Respondent) as a certified school nurse; and

WHEREAS, on or about November 25, 2003, Terletzky filed a Verified Petition with the Commissioner of Education, bearing Agency Reference No. 452-11/03, alleging, among other things, that the Board was violating N.J.S.A. 18A:40-3.2 et seq. and N.J.A.C. 6A:16-2.1 by improperly allowing non-certified school nurses to perform certain nursing services in the district, and that she was impermissibly assigned the title "Supervisor of Nurses"; and

WHEREAS, the Board filed an Answer to the above-referenced Verified Petition denying Terletzky's allegations; and

WHEREAS, the matter was transferred to the office of Administrative Law and was assigned Docket No. EDUOA-1270-2004N; and

WHEREAS, circumstances have changed since Terletzky filed the Verified Petition of Appeal such that for the 2004-05 school year the Board currently employs two (2) certified school nurses, including Terletzky, to provide nursing services to students in the district and has advertised to hire a third certified school nurse; and

WHEREAS, Terletzky is currently assigned for the 2004-05 school year to serve as the certified school nurse at the Board's three elementary schools with the assistance of Judy Kommer, an uncertified nurse employed by the Board on a part-time basis; and

WHEREAS, in light of the current assignment of certified school nurses and allocation of nursing duties, the parties find it to be in their best interest to reach an amicable resolution to avoid the time and expenses associates with litigation;

NOW, THEREFORE, in consideration of the promises and mutual covenants, understandings and agreements contained in this Settlement Agreement, it is hereby agreed by and between the parties as follows:

1. **SETTLEMENT TERMS.**

   A. Terletzky shall withdraw, with prejudice, all claims asserted in her Verified Petition of Appeal against the Board, which have accrued as of the date of this Settlement Agreement.

   B. The Board shall officially note in writing that the title "Supervisor of Nurses" has officially been removed from Terletzky, and further stipulates that she does not currently serve, and has not served, and will not in the future be required to serve, in such a capacity. Nothing in this Settlement Agreement shall limit Terletzky's right to

file a Petition of Appeal with the Commissioner of Education should the Board ever assign her in the future to serve in the capacity of "Supervisor of Nurses."

C. Notwithstanding the above, nothing in this Settlement Agreement shall limit the Board's ability to either (a) employ non-certified school nurses to assist certified school nurses as permitted under N.J.S.A. 18A:40-3.3; or (b) assign to Terletzky such duties as are permitted by law. However, nothing in this Settlement Agreement shall limit Terletzky's right to file a Petition of Appeal with the Commissioner of Education should the Board violate N.J.S.A. 18A:40-3.2 et seq. and N.J.A.C. 6A:16-2.1, in the future, by improperly employing and/or allowing non-certified school nurses to perform nursing services in the district which are restricted by law to certified school nurses.

2. **NO RELIANCE.** The parties hereto represent and acknowledge that, in executing this Settlement Agreement, they have not relied upon any representation or statement, written or oral, made by any of the parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Settlement Agreement or otherwise.

3. **PARTIAL INVALIDITY.** Should any part, term or provision of this Settlement Agreement be declared or determined by a Court of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability, of the remaining parts, terms or provisions shall

not be affected thereby.

4. **REPRESENTATION BY COUNSEL.** Each party is represented by competent counsel of its choosing and each party states that she/it has signed this Settlement Agreement as her/its own voluntary act and deed, and that she/it fully understands the duties and obligations enumerated herein.

5. **NO ADMISSION.** This Settlement Agreement and compliance with this Settlement Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

6. **GOVERNING LAW.** This Settlement Agreement and all provisions hereof shall be governed by and construed under the law of the state of New Jersey.

7. **ENTIRE AGREEMENT.** This Settlement Agreement sets forth the entire agreement between the Board and Terletzky, and fully supercedes any and all prior agreements or understandings, written or oral between the parties pertaining to the subject matter hereof.

8. **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.

9. **RATIFICATION.** This Settlement Agreement is subject to ratification by the Board and is also contingent upon the approval of the Commissioner of Education, and is without prejudice to any party if the terms are not agreed upon.

IN WITNESS WHEREOF, the parties hereto have duly executed this

Settlement Agreement as of the date written below.

WITNESS: Marie Del Colle

Marie Del Colle

Date: 11/29/04

DOREEN TERLETZKY

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: Kathleen Naprstek Cerisano
Kathleen Naprstek Cerisano, Esq.

Date: 12/1/04

WITNESS:

NORTH ARLINGTON
BOARD OF EDUCATION

By: _____
Kathleen Marano
Board Secretary/Business
Administrator

By: _____
Board President

Date:

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
Vittorio S. LaPira, Esq.

Date:

1756.doc

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: _____
Kathleen Naprstek Cerisano, Esq.

Date:

WITNESS:

NORTH ARLINGTON
BOARD OF EDUCATION

By: Kathleen Marano
Kathleen Marano
Board Secretary/Business
Administrator

By: Karen Balotella
Board President

Date: November 29, 2004

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
Vittorio S. LaPira, Esq.

Date: December 2, 2004

1756.doc

22-05

OAL DKT. NO. EDU 11055-03
AGENCY DKT. NO. 226-6/03

MARSHA B. WILKERSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Petition of Appeal is both untimely filed[1] and beyond the scope of the Commissioner's jurisdiction.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter and the Petition of Appeal dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/05

Date of Mailing: 1/12/05

[1] In reaching this conclusion, the Commissioner has disregarded the clearly erroneous statement at page 4 of the Initial Decision, which references a cause of action in 1969 and appears to have been replicated from a discussion of untimeliness in an unrelated matter.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11055-03
AGENCY DKT. NO. 226-6/03

MARSHA B. WILKERSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP,
Respondent.

J. Clifton Wilkerson, Esq., for Petitioner

Chandra Rainey Cole, Esq., for Respondent (Love & Randall, attorneys)

Record Closed: October 29, 2004 Decided: December 13, 2004

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner asserts the Board employee acknowledged her injury was sustained in the course of employment and she relied on this acknowledgement, thereby failing to file a claim at the Division of Workers' Compensation. Thereafter, the Board charged Petitioner her sick time, contrary to *N.J.S.A.* 18A:30-2.1. On November 7, 2003, the

Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

This matter was originally assigned to Honorable Margaret M. Hayden and was reassigned upon Judge Hayden's appointment to the Superior Court. Respondent Orange Township Board of Education moved for summary dismissal by way of application received in this office on July 13, 2004 prior to the case being transferred to the undersigned. Upon transfer, I requested the parties provide me with the schedule as determined by Judge Hayden and, after requests for extensions, the record closed on or about October 25, 2004. There are two threshold issues which must be determined. The first is whether the petition was filed timely. The second issue to be determined is whether the Commissioner has jurisdiction to make a determination in this case.

FINDINGS OF FACT

For purposes of this application, I **FIND** the following materials **FACTS** to be relevant and undisputed.

1. Petitioner is a tenured teaching staff member employed by Respondent

2. For the 1999-2000 school year, Petitioner, a librarian, was assigned to the District's Park Avenue School and Oakwood Avenue School.

3. Petitioner was absent from work for 38 days during the 1999-2000 school year. Sometime in or about April 2000, she was hospitalized for a severe asthma attack. She was in and out of the hospital until May 31, 2000.

4. Petitioner's primary care physician cleared her to return to work on September 1, 2000.

5. Petitioner was notified, during her hospitalization, she had 79 accumulated days of sick leave. Petitioner was advised by memo on or about May 2, 2002 that she had 41 sick days remaining for the 2000-2001 school year.

6. In April 2003, Petitioner was advised that her absences for the 1999-2000 school year would be assessed against her personal sick leave. The petition in this matter was filed on June 30, 2003. An amended petition was filed on September 25, 2003.

7. Petitioner did not file a Worker's Compensation claim.

ANALYSIS AND CONCLUSION

As noted above, there are two threshold issues to be determined before reaching the substantive issues presented by this application. Both threshold issues are determinative and dispositive of the matter if the determination is in favor of Respondent.

The first issue is whether Petitioner's claim is time barred because Petitioner failed to adhere to the 90-day statute of limitation pursuant to the regulations. *N.J.A.C.* 6A:3-1.3(d). The pertinent regulation provides that a party who is aggrieved by a determination of a district board of education shall file a petition no later than the 90th day from the date of receipt of notice of a final order, ruling or other action of the district board on the matter at issue. *N.J.A.C.* 6A:3-1.3(d). The New Jersey Supreme Court has affirmed the validity and forcibility of the 90-day limitation period. *Kaprow v. Board of Educ. of Berkley Twp.*, 131 *N.J.* 572 (1993).

The Court recognized that a statute of limitation serves two purposes; the first is to encourage litigants to pursue their rights within a reasonable time so that the opposing party has a fair opportunity to defend; the second is to penalize a Petitioner for unreasonable delay and to provide security and stability in human affairs. *Id.* Given

these considerations with regard to a statute of limitation, it would appear Petitioner voluntarily slept on her right to appeal the determination made in March 1969. She waited 34 years before filing a claim with the Commissioner. This lapse of time gives rise to a presumption that Petitioner had abandoned her right to file a petition.

A limitation period, however, requires Petitioner to have had adequate notice of the action. The case law regarding adequate notice under this regulation provides that such notice taken by the Board must be sufficient to inform an individual of some fact that he/she has a right to know and the communicating party has a duty to communicate. New Jersey Supreme Court has held when a Petitioner knows or has reason to know that she has a cause of action against an identifiable party and voluntarily sleeps on rights so long as to permit the customary period of limitation to expire, the considerations of individual justice and the broader consideration of repose coincide to bar the action. *Id.*

In this case, Petitioner had reason to know of the determination of the District in May 2002 when she was apprised of the fact that she had only 41 days of sick for the 2000-2001 school year. In her affidavit, at ¶ 20, Petitioner states that she was told during her hospitalization (in May 2000) that she had 79 sick days. Later, on or about May 2, 2002, she was advised she had 41 sick days for the 2000-2001 school year. Basic arithmetic shows that the difference between 79 and 41 is 38. Consequently, I **FIND** Petitioner had noticed on or about May 2, 2002, that her sick days had been charged for the 38 days. I further **FIND**, therefore, that her petition is not timely filed and therefore, is time barred.

Although it is not necessary to address the issue of the Commissioner's jurisdiction to hear this matter, I note that Petitioner is seeking, essentially, a determination that her illness was work related or work caused. Such a determination, with limited exceptions not applicable in this case, are the under the exclusive jurisdiction of Workers' Compensation. Petitioner does not dispute that she chose not to file a Worker's Compensation claim and, instead, she chooses to rely on

representations she asserts were made to her by District personnel that the illness was work related.

I note, however, the even the language in her affidavit is somewhat ambiguous in that she states that ¶ 29 "It was made clear to Mr. Chon that the condition was noted to be caused by the school environment as per discussion with my treating physicians. At ¶ 30 again Mr. Lee was clearly advised of the claim causal relationship of my illness and my library environment."

It is a well-established fundamental principle; ignorance of the law is no defense for failing to meet requirements. In this case, Petitioner relies on her perception that no one advised her to file a Workers' Compensation claim. Petitioner is a tenured librarian of at least 10 or more years experience in the District. It strains credulity to believe that she had no knowledge of how to go about preserving her rights. Be that as it may, based on the exclusive jurisdiction of Workers' Compensation Court to determine issues such as these, I **CONCLUDE** the Commissioner lacks jurisdiction in this matter.

I further **CONCLUDE** Respondent's application for summary decision should be granted.

ORDER

I hereby **ORDER** summary decision in favor of Respondent be and hereby is **GRANTED**; I further **ORDER** this petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

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

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

December 13, 2004
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

December 14, 2004
DATE

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

DEC 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

#23-05

23-05

OAL DKT. NOS. EDU 5344-03 AND EDU 7872-04 (CONSOLIDATED)
AGENCY DKT. NOS. 122-4/03 AND 256-7/04

JOHN T. LAMKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Deputy Commissioner to whom this matter has been delegated for decision, pursuant to *N.J.S.A.* 18A:4-33.

Upon a careful and independent review of the record in this matter, the Deputy Commissioner concurs with the Administrative Law Judge (ALJ) that the District acted in accordance with the Comprehensive Education Improvement and Financing Act, *N.J.S.A.* 18A:7F-1 *et seq.*, and Department of Education regulations in establishing its 2003-04 net T&E budget and in including items that were contained in the base 2002-03 budget as a separate proposal in the 2003-04 budget.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/13/05

Date of Mailing: 1/13/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

CONSOLIDATED

OAL DKT. NOS. EDU 5344-03 and
EDU 7872-04

AGENCY DKT. NOS. 122-4/03 and
256-7/04

JOHN T. LAMKIN,

Petitioner,

v.

SOUTH ORANGE-MAPLEWOOD BOARD OF EDUCATION SCHOOL DISTRICT,

Respondent.

John T. Lamkin, *pro se*

Sidney Sayovitz, Esq., for Respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: October 29, 2004 Decided: December 8, 2004

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, John T. Lamkin, filed a petition against Respondent, South Orange-Maplewood Board of Education, claiming the Board unjustly received a Spending

Growth Adjustments (SGLA) for enrollment and transportation in the 2002-03 school year. Petitioner further asserts these adjustments will affect all future District budgets. Moreover, Petitioner asserts the Board improperly included in the 2003-04 school budget separate proposals for items that which were included in the 2002-03 T&E Budget.

On May 30, 2003, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

A telephone prehearing conference was held in the matter on August 13, 2003, and the issues to be resolved were delineated in the prehearing order as:

1) Has the District correctly calculated the 2003-04 T&E Budget based on perceived errors in a prior budget?

2) Can an item appearing in a separate proposal in one budget be included in the next T&E Budget in the following years budget.

The matter was originally scheduled for hearing on March 2 & 3, 2004; however, those dates were subsequently adjourned. On February 13, 2004, Respondent Board filed an application for summary dismissal. A briefing schedule was established and Petitioner made his cross application. Petitioner filed answering papers on March 15, 2004, and filed a cross application for summary decision to which Respondent replied on March 25, 2004. Petitioner responded to the Board's opposition to the application for summary decision on May 17, 2004. Before a determination could be made, Petitioner filed a second petition in August 16, 2004 under OAL Dkt. No. EDU 7872-04 in which he asserts the same claim, *i.e.,* the District is impermissibly using the statutory SGLA process to increase the District's maximum net T&E Budget for 2004-05 school year.

The parties agreed that the two cases should be consolidated and an Order of Consolidation was entered on September 29, 2004. The parties were given until October 22, 2004 to supplement their submissions. Thereafter, the record closed on October 29, 2004, after the court had an opportunity to review the submissions to ensure they were complete.

FINDINGS OF FACT

The parties agree, although there is no stipulation in the record, the facts are not in dispute. The relevant facts, appearing in the record before me, including the affidavit of Karla Millanette and those documents submitted by both sides are incorporated herein as findings of fact in this matter as follows:

1) The school budget process begins, in New Jersey, with a filing of an Annual Application for State School Aid (ASSA) on or about October 15 each year.

2) Each public school district is required to utilize the Department of Education (DOE) computerized budget program when submitting budget documents. All documents are transmitted electronically to DOE and each district must also submit a copy of the budget documents to the County Superintendent of Education.

3) On or about October 15, 2001, the District submitted its 2002-03 ASSA to the DOE and to the county office in compliance with the mandates set forth above. As of October 15, 2001, the actual enrollment in the District was 6488.50.

4) The 2002-03 budget guidelines required each school district to provide DOE with projections for enrollment for future years. The District retained the services of a demographer to assist in development enrollment

projections and the demographer utilized a standard cohort analysis to project enrollment in future years.

5) The District entered the projected figures into the DOE budget program; the figures were reviewed and approved by DOE, which then calculated the projected enrollment figures. Although, at all times during the process, DOE is aware of discrepancies between projected and annual enrollment figures, DOE basis the projected enrollment figures in accordance with the district's submissions.

6) DOE's review process does not include a reconciliation of enrollment discrepancies from year-to-year.

7) DOE determined the Board was entitled to SGLA for enrollment for the 2002-03 school year in the amount of $535,282.

8) The District applied for the SGLA for enrollment.

9) The District also applied for a SGLA for transportation cost for non-remote students. This particular SGLA is based upon the cost of transporting non-remote students.

10) The District submitted a report to DOE containing the names and addresses of all transported non-remote students, the mileage to transport them to and from school, the route and the license plate of the bus transporting them.

11) A summary of this report was entered into the budget program which then generated the District report of transported resident students (DRTRS).

12) According to the calculation set forth in the generated DRTRS, the District was entitled to SGLA for transportation for the 2002-03 school year in the amount of $488,500.

13) DOE approved the SGLA for transportation cost for non-remote students.

14) In the 2003-04 budget year, the District submitted a separate proposal to raise additional general tax fund levies in the amount of $1,272,555 for items included in the prior year's budget. The Board approved the separate proposal to be used for the following items: salary and benefits for one K-8 social studies supervisor; five technology facilitators; three enrichment program teachers, two project head teachers; two middle schools assistant principals; 1.8 middle school social worker; and four elementary world language teachers. The budget statement additional certification for the separate proposal was reviewed and approved on April 24 by the County Superintendent.

15) The approved $535,282 SGLA, which became part of the 2002-03 net budget, was used in the creation of the 2003-04 and 2004-05 maximum net T&E Budget committed before adjustments.

ANALYSIS AND CONCLUSION

In this matter, there are two issues to be resolved:

1) Whether the District correctly calculated the 03-04 net T&E Budget based on perceived errors in prior budgets; and

2) Whether items appearing in a base budget in one year may be submitted as a separate proposal in a subsequent budget.

Respondent Board asserts summary disposition is appropriate because the undisputed facts demonstrate the Board applied for and received SGLAs for enrollment and transportation in accordance with the law. Moreover, the separate proposal in the 2003-04 school budget was also approved in accordance with the law. Thus, asserts

Respondent, the Board is entitled to a favorable determination of its application for summary disposition as a matter of law.

Petitioner, on the other hand, seeks summary disposition on his cross application, asserting the Board has misconstrued the applicable law and, further, under a proper construction of the law, summary disposition in favor of Petitioner is appropriate.

In this forum, an application for summary decision is initiated by the filing of initial papers by the moving party. The non-moving party, to prevail, must then demonstrate, by the filing of a response, including an affidavit setting forth specific facts showing there is a genuine issue, which can only be determined in an evidentiary hearing. *N.J.A.C.* 1:1-12.5(b).

In this case, the parties have agreed there is no genuine issue of material fact to be determined. Accordingly, one side or the other is entitled to summary disposition as a matter of law.

Petitioner relies on the undisputed fact that the Board submitted and relied on "hypothetical population" figures in calculating the 2003-04 Maximum Net T&E Budget before Adjustments. The Board, on the other hand, asserts the DOE 2002-03 budget guidelines required the Board to supply enrollment projection in the ASSA and, further, Respondent supplied all budgetary information in accordance with those guidelines. Moreover, DOE budget review process does not require the reconciliation of projected and actual enrollment figures. Petitioner fails to rebut this assertion by citing to any statute or regulation, which would require Respondent to reconcile the two figures.

Petitioner raises a similar objection with respect to the SGLA for transportation. In this case, however, Petitioner himself acknowledges the "New Jersey State Department of Education allows the district to increase the Maximum Net T&E Budget

through the use of a Transportation SGLA." (Petitioner's brief, The Ides of March 2004, Exhibit 5).

With respect to the first issue, whether the District correctly calculated the 03-04 net T&E Budget based on perceived errors in prior budgets, I **FIND** the District calculated its budget in accordance with the established requirements of the DOE.

Petitioner also raises an objection to the inclusion of items in a separate proposal for consideration by the Board of School Estimate in the 2003-04 budget review because those same items had been included in the 2002-03 base budget. Here, Petitioner ignores the statutory authority for a district to submit separate proposal for consideration by a Board of School Estimate in addition to the base budget except for three specific items, which may not be contained in separate proposals. *N.J.S.A.* 18A: 7F-5d. None of the three were included in the separate proposal submitted by Respondent in the 2003-04 school budget. Respondent submitted its separate proposal to DOE through the County Superintendent and obtained all necessary approvals. (Board's Exhibit N). Accordingly, I **FIND** the inclusions of items in the base 2002-03 budget as a separate proposal in the 2003-04 budget to be in conformity with the law.

I **CONCLUDE,** therefore, Respondent is entitled to summary disposition as a matter of law.

ORDER

I hereby **ORDER** summary disposition be and hereby is entered in favor of Respondent; I further **ORDER** this petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

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

December 8 2004
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

December 10, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 13 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

#24-05

24-05

OAL DKT. NO. EDU 5990-04
AGENCY DKT. NO. 125-4/04

K.K., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/05

Date of Mailing: 1/13/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05990-04

AGENCY DKT. NO. 125-4/04

K.K. ON BEHALF OF MINOR CHILD R.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

Respondent.

K.K. parent of **R.K.**, petitioner, *pro se*

Anthony N. Gallina, Esq., for respondent

Record Closed: December 9, 2004 Decided: December 14, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on June 24, 2004, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement and Resolution Authorizing Settlement of Litigation.

Having reviewed the contents of the attached Stipulation of Settlement and Resolution Authorizing Settlement of Litigation, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement and Resolution Authorizing Settlement of Litigation meet the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

December 14, 2004
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

12-17-04
DATE

DEPARTMENT OF EDUCATION

Mailed to

DEC 22 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

ANTHONY N. GALLINA, ESQ.
218 ROUTE 17 NORTH
ROCHELLE PARK, NJ 07662
201-845-3626
Attorney for Respondent

STATE OF NEW JERSEY
OFFICE OF ALJ/N.J. LAW

MAY 12 4 17 PM '04

K.K. ON BEHALF OF MINOR CHILD, R.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, *ET. ALS.*

Respondent,

BEFORE THE COMMISSIONER OF EDUCATION

OAL Docket No. EDUOS 05990-2004N
Agency Ref. No. 125-4/04

STIPULATION OF SETTLEMENT

This Stipulation is made between Petitioner, K.K. on behalf of Minor Child, R.K. (hereinafter referred to as "Petitioner") and Respondent, Township of Saddle Brook Board of Education, Bergen County (hereinafter referred to as "Respondent").

WHEREAS, Petitioner has asserted various claims against Respondent in a Verified Petition filed with the Commissioner of Education, bearing Agency Reference No. 125-04/04 (hereinafter referred to as "the Litigation");

WHEREAS, the Litigation was transferred by the Commissioner of Education to the Office of Administrative Law for hearing, bearing OAL Docket No. EDUOS 05990-2004N;

WHEREAS, the parties are entering into this Stipulation of Settlement to avoid further expense, inconvenience and delay, dispose of potentially burdensome and protracted litigation, and

forever resolve the claims that were asserted or could have been asserted in the Litigation;

WHEREAS, the execution of this Stipulation of Settlement is not an admission of any wrongdoing or liability by any party to this Stipulation Agreement;

NOW THEREFORE, in consideration of the terms, covenants, conditions and agreements contained herein, it is hereby agreed by and among the parties as follows:

1. The recitals included in the "Whereas" clauses are incorporated herein;

2. The parties' appearance before Respondent on March 8, 2004 shall be deemed to have satisfied any and all disciplinary action imposed upon R.K. relative to the wearing of a hat in school on or about February 9, 2004;

3. No record of this matter shall be made a part of R.K.'s permanent student record;

4. Upon approval of this Stipulation of Settlement by the Commissioner of Education, the parties agree to execute a Stipulation of Dismissal With Prejudice and without costs as to all claims in the Litigation within ten (10) days of receiving notice of the Commissioner of Education's action in this matter. Upon execution by all parties, counsel for Respondent shall file the Stipulation of Dismissal with Prejudice with the Office of Administrative Law;

5. This Stipulation of Settlement contains the entire agreement between the parties as to the settlement of their

dispute and no amendment, modification or addendum to this Stipulation of Settlement shall be effective unless in writing dated subsequent to the date hereof.

6. The parties hereto agree to execute any and all further documents which may be reasonably required to effectuate the terms of this Stipulation of Settlement;

7. Petitioner hereby acknowledges that she has a right to consult with an attorney prior to the execution of this Stipulation of Settlement;

IN WITNESS WHEREOF, this Stipulation of Settlement is executed on this 31st Day of October, 2004:

Karen Kopec

KAREN KOPEC, on Behalf of R.K.,
Petitioner

ANTHONY N. GALLINA, ESQ.
Attorney For Respondent,
Saddle Brook Board of Education

SADDLE BROOK BOARD OF EDUCATION
COUNTY OF BERGEN
STATE OF NEW JERSEY

RESOLUTION AUTHORIZING SETTLEMENT OF LITIGATION

WHEREAS, Petitioner in a certain matter entitled: *R.K. ON BEHALF OF MINOR CHILD, R.K. V. TWP. OF SADDLE BROOK, BOE, BERGEN COUNTY,* has asserted various claims against Respondent, Saddle Brook Board of Education in a Verified Petition filed with the Commissioner of Education, bearing Agency Reference No. 125-04/04 (hereinafter referred to as "the Litigation");

WHEREAS, the Litigation was transferred by the Commissioner of Education to the Office of Administrative Law for hearing, bearing OAL Docket No. EDUOS 05990-2004N;

WHEREAS, a Motion was made in closed caucus on September 20, 2004 (Ref. 9-67) to determine if the Board should settle this matter. Said motion was approved by a role call vote;

WHEREAS, at the regular meeting of the Board held on September 22, 2004, a motion was made to approve the decision reached in closed session during the September 20, 2004 caucus meeting concerning a disciplinary matter scheduled for plenary hearing before the Office of Administrative Law. Said Motion was approved by a roll call vote;

NOW THEREFORE, BE IT RESOLVED:

1. The Board Attorney is hereby authorized to enter into, on behalf of the Board, a Stipulation of Settlement incorporating the terms of the settlement approved by the Board in its meetings of September 20, 2004 and September 22, 2004;

2. The Board Attorney is hereby authorized, on behalf of the Board, to execute any and all further documents which may be reasonably required to effectuate the terms of the Stipulation of Settlement;

AS APPROVED this 9 Day of December, 2004:

ANTHONY D'ACHILLE
Business Administrator/Board Secretary
Saddle Brook Board of Education

25-05

OAL DKT. NO. EDU 9254-04
AGENCY DKT. NO. 290-8/04

E.M.C., III and P.A.C., on behalf of minor child, J.V.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioners have failed to sustain their burden of establishing that the Board's use of a lottery system to limit the number of percussion instrument participants was arbitrary, capricious, unreasonable or violative of law or that there were improprieties in the conduct of such lottery.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/05

Date of Mailing: 1/14/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 9254-04

AGENCY DKT. NO. 290-8/04

E.M.C., III and P.A.C. o/b/o
MINOR CHILD J.V.C.,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,
Respondent.

E.M.C. III and **P.A.C.**, parents of **J.V.C.**, petitioners, *pro se*[1]

Robert M. Jacobs., Esq., for respondent
(Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Record Closed: November 8, 2004 Decided: December 16, 2004

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF CASE

Petitioners are the parents of a fifth grade student attending the Hubbard School in the Ramsey School District. Hubbard offers an optional instrumental music program to their fifth grade students. Students choosing to participate are asked to select an

[1] E.M.C., III is licensed to practice law in N.Y. and N.J.

instrument that they would like to learn how to play. Instrumental lessons are offered 30 minutes each week on a rotating schedule. Ultimately, a fifth grade band will form composed of participants in the optional instrumental music program.

Petitioners' daughter, J.V.C., chose to participate in the optional program and selected drums/percussion as her instrument. The popularity of J.V.C.'s selection resulted in a lottery for percussion participants. J.V.C.'s name was not chosen in the lottery.

Petitioners' contends that the selection process was in violation of *N.J.A.C.* 6A:7-1.7 "Equality in School and Classroom Practices" and it should be abolished and that all those, including J.V.C., requesting percussionist instruction should receive it.

Respondent board contends that the instrumental music program is an elective band program which should be differentiated from their "general music program" which is designed to provide a thorough and efficient education to all students and satisfies the Core Curriculum Content Standards of *N.J.A.C.* 6A:8-1.1 *et seq.* The Board further contends that parents are advised that the popularity of certain instruments requires a limitation in the number of those students who can participate in the instruction of that instrument and alternative choices should be submitted to ensure participation in the event of unsuccessful participation in a lottery for the most popular choices.

PROCEDURAL HISTORY

On or about August 25, 2004, a Petition of Appeal with a Motion for Emergent Relief was filed with the Department of Education. On or about August 27, 2004, the Petition and request for Emergent Relief were forwarded to the Office of Administrative Law for hearing.

The matter was assigned to the Honorable Judge Elinor Reiner who on September 14, 2004 denied the application for Emergent Relief.

On October 7, 2004, the matter was forwarded to the undersigned for hearing which was conducted on November 8, 2004.

TESTIMONY AND FACTS

Rosemary Pilonaro, the Hubbard School Band Director, Frank Philips, Director of the Music Department for the Ramsey School District and Bruce DeYoung, the Chief School Administrator of the Ramsey School District testified along with J.V.C.'s mother, P.A.C.

The facts in this matter are not in serious dispute. The testimony of the witnesses and the Exhibits marked in evidence lead me to the following **FINDINGS OF FACT**:

1. Parents of fourth grade students are advised of the band program setting forth the parameters of the instrumental music lessons which will be offered in fifth grade. (See P-1 in Evidence).

2. On or about May 17th, P.A.C. e-mailed Rosemary Pilonaro acknowledging receipt of information about the band program for fifth grade and advised of her daughter's interest in drums/percussion.

   On May 18th, Pilonaro e-mailed P.A.C. advising her that since percussion was so popular a lottery was used to limit the number of participants to eight. She advised P.A.C. to have her daughter make a back-up choice. (See P-2 in Evidence).

3. P.A.C. advised Pilonaro that her daughter's only choice was drums/percussion and acknowledged the lottery. (P-3 in Evidence).

4. On or about June 13, 2004, P.A.C. sent an e-mail to Pilonaro questioning the selection process that resulted in her daughter's elimination from the percussion/drum category and sought further information. (P-4 in Evidence)

5. P.A.C. contacted Pilonaro and requested a list of those students who had selected percussion/drums as their instrument and those who had been selected.

6. Pilonaro conferred with Michael Gratale, Principal of Hubbard School and after some initial reluctance, the list requested by petitioners' was forwarded on or about June 24, 2004. (P-6 in Evidence).

7. After receiving the list, P.A.C. wrote a two page letter to Superintendent Bruce DeYoung questioning the validity of the selection process and contending that her daughter was being deprived of the opportunity to learn the instrument of her choice. (See P-7 in evidence)

8. After a meeting with Mr. DeYoung, he forwarded a letter dated July 8, 2004 to the petitioners indicating that after a meeting with Frank Philips, Director of the Music Department for the Ramsey School District, he concluded that the limitation on the number of percussionist was based on sound reasoning. (See P-8 in Evidence).

9. On or about July 28, 2004, E.M.C., III forwarded a letter to Mr. DeYoung which he copied to William Librera, Commissioner of New Jersey Department of Education, seeking documentation of the Ramsey Band Program policies along with the guidelines used by the Department to limit the number of participants for the percussion instrument. (See P-9 in Evidence).

10. By letter dated August 2, 2004, Superintendent DeYoung responded to E.M.C.'s request indicating that there was no specific document describing the Fifth Grade Band Program, the Federal "No child Left Behind" Act is not pertinent to the discussion, guidelines for instruments in various band sizes was attached and an explanation of the lottery conducted by Pilonaro and Cordoba was described. (See P-10 in Evidence).

11. Petitioners then contacted Doctor Aaron R. Graham, Bergen County Superintendent of Schools by letter on or about August 4, 2004. (See P-11).

12. Dr. Graham wrote a letter to Mr. DeYoung dated August 12, 2004 in which he advised Mr. DeYoung that he was providing a Petition of Appeal to the parents of J.V.C. (See P-12 in Evidence).

The testimony from the witnesses at the hearing confirmed all of the above facts all of which were corroborated by documentation.

By inference, petitioners contend that the results of the lottery were suspicious and conducted in such secrecy that they should not be countenanced. Petitioners point to the fact that three of the successful lottery participants were either related to teachers or sons or daughters of classroom mothers. In essence, they argue that the probability of all those with more than a casual relationship to the school system being chosen for the lottery is so remote as to be suspicious if it occurs.

Balanced against this mathematical improbability contention is the testimony of Pilonaro which, as a matter of fact, I **FIND** credible, indicating that slips of paper were randomly pulled from a pool of all those who chose drums/percussion. Petitioners' on the other hand, point to Pilonaro's hesitancy in providing the final list and the absence of any public posting or public observation of the drawing as indications that it may not have been conducted fairly or for that matter at all. These accusations did not become apparent however until after the lottery had been conducted and the results reported. Petitioners did not dispute the conducting of the lottery and in fact sought to circumvent it by indicating that their daughter sought only instruction in one instrument and would not choose an alternative. The negative inferences which petitioners seek this fact finder to acknowledge are thoroughly refuted by Pilonaro whose testimony was not only credible but unrebutted by anything other than conjecture offered by petitioners.

Petitioners contend that music instructions including instrumental instruction is an educational program and service that the Ramsey District Board of Education must provide fairly pursuant to the provisions of the Equal and Equitable Educational Opportunity Requirements Code, *N.J.A.C.* 6A:7.

Petitioners further contend that once the school district offers percussionist instruction, it must allow all those students that elect to learn the percussionist instruments the opportunity to do so. Petitioners contend that the "coincidence" of probability resulting in students whose mothers were teachers and/or class mothers being chosen amounted to "invisible biases" contravening *N.J.A.C.* 6A:7-1.7(a). Of the eight students successful in the lottery, only one had a mother who is presently a teacher, a second was the son of a substitute teacher and one was the son of a class mother.

There can be little doubt that a more public drawing of the lottery is preferable and a less secretive disclosure policy concerning when and how it would be conducted would also be wise. Nonetheless, there is simply no reason to conclude that Pilonaro's testimony was untrue or contrived.

N.J.A.C. 6A:7-1.7 Equality in School and Classroom Practices was put in place to avoid discrimination. Race, Creed, Color, National Origin, Ancestry, Age, Marital Status, Affectional or Sexual Orientation, Gender, Religion, Disability or social Economic Status, shall not be used in the selection process for any program. Petitioners in this matter alleged "bias" in the conduct of the lottery. Their allegation is unsubstantiated and unproven.

Petitioners then argue that even if the contention that the lottery was unfair in some manner is not accepted, the next contention is that there should be no lottery at all for once a program is offered, all those who chose it should be able to participate. Petitioners offer absolutely no support for this contention. The purpose of the Instrumental Music Program is to eventually result in a performing band. Although the School Board may want to consider the restrictions presently in place limiting the number of specific participants in the band program, none of the statutes or code provisions cited by the petitioners, lead to the conclusion that petitioners' daughter was discriminatorily prevented from playing the drums. Limiting the number of participants in an activity for practical reasons is not prohibited by code, regulation or statute. Ramsey contends that 8 percussionists will be necessary for the size of the band they ultimately contemplate. The wisdom of that number can be challenged and second guessed, but there has been no showing that the unsuccessful lottery participants were eliminated because of any invidious intentions, nor have petitioners offered any convincing contentions supported by law or evidence that Ramsey cannot limit the number of participants in the voluntary band program or limit the number of participants for a specific instrument.

ORDER

It is **ORDERED** that the petition in this matter be dismissed.

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

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

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

Dec 16/04
DATE

JEFFREY A. GERSON, ALJ

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

12/21/04
DATE

Mailed to Parties:

DEC 23 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

For Petitioners:

P.A.C., parent

For Respondent:

Rosemary Pilonaro, the Hubbard School Band Director

Frank Philips, Director of the Music Department for the Ramsey School District

Bruce DeYoung, the Chief School Administrator of the Ramsey School District

Exhibits:

P-1 Letter advising parents of Band Options

P-2 Letter from Rosemary Pilonaro to P.A.C. dated May 18, 2004

P-3 Letter from Rosemary Pilonero to P.A.C. dated May 19, 2004

P-4 Letter from P.A.C. to Rosemary Pilonero dated June 13, 2004

P-5 Letter from P.A.C. to Rosemary Pilonero and M. Gratale dated June 19, 2004

P-6 Names of Lottery winners for the Percussion 2004-2005

P-7 Letter to Bruce DeYoung from P.A.C. dated June 24, 2004

P-8 Letter from Ramsey Public Schools to Mr. and Mrs. Cuddy dated July 8, 2004

P-9 Letter from Edward Cuddy to Bruce DeYoung dated July 28, 2004

P-10 Letter from Ramsey Public Schools to Edward Cuddy dated August 2, 2004

P-11 Letter from Edward Cuddy to Aaron Graham dated August 4, 2004

P-12 Letter from Aaron Graham to Bruce DeYoung dated August 12, 2004

P-13 Letter from Joe Borowski to Rosemary Pilonero dated June 11, 2004

P-14 Letter from Rosemary Pilonero to Joe Borowski dated June 11, 2004

P-15 Band Schedule

P-16 List of students who did not win Percussion Lottery 2004

R-1 Letter from Rosemary Pilonero to all parents undated.

R-2 Letter from Pamela Daniels, Supervisor of World Languages to all parents dated November 12, 2004

AGENCY DKT NO. 445-12/04

IN THE MATTER OF	:	
CHRISTINA WENZEL, SADDLE BROOK	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
BERGEN COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding Saddle Brook Board of Education member Christina Wenzel violated the School Ethics Act, *N.J.S.A.* 18A:12-24(d), when, on several occasions, she was paid as a substitute school nurse by the District while serving as a member of the Board, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, Ms. Wenzel was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

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

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

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/05

Date of Mailing: 1/14/05

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CHRISTINA WENZEL	:	**Docket No. C46-04**
SADDLE BROOK	:	
BOARD OF EDUCATION	:	
BERGEN COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on July 9, 2004, by Sebastian P. Salierno, a member of the Saddle Brook Board of Education (Board), alleging that Christina Wenzel, also a member of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. when, on several occasions, she was paid as a substitute school nurse by the District while serving as a member of the Board. Specifically, he alleges that the above conduct was in violation of N.J.S.A. 18A:12-24(b) and (d).

Ms. Wenzel submitted a response by way of counsel, Deborah Gross-Quatrone, Esq., wherein she admitted that, due to an emergency situation in the District, she worked for the Saddle Brook School District (District) as a substitute school nurse on May 5, 2004.

The Commission invited the parties to attend its September 30, 2004 meeting to present witnesses and testimony to aid in the Commission's investigation, but did not require that they be present. Neither party attended the hearing. Ms. Wenzel submitted a statement from the superintendent on the day of the meeting, but it was not received until after the Commission meeting. The Commission was advised that counsel represented to the executive director that the statement would be forthcoming by the time of the meeting, but the Commission ultimately determined that such a statement would not affect its ruling on probable cause.

At its September 30, 2004 meeting, the Commission voted to find probable cause to credit the allegations that Ms. Wenzel violated N.J.S.A. 18A:12-24(d) of the Act. The Commission did not find probable cause to credit the allegations that Ms. Wenzel violated N.J.S.A. 18A:12-24(b).

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised respondent that it would decide the matter on the basis of written submissions. Ms. Gross-Quatrone was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision to set forth why the Commission should not find Ms. Wenzel in violation of N.J.S.A. 18A:12-24(d). Ms. Gross-Quatrone was also told that her written submission should include the

respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

Ms. Gross-Quatrone submitted a timely response on November 17, 2004, wherein she contends that since both allegations revolve around the same events that it is clear that the Commission did not believe that Ms. Wenzel acted with intent or probable cause would have been found on both counts of the complaint. She also contends that Ms. Wenzel did not undertake employment, which is defined as a working relationship over the course of time; but that, at best, she was a casual employee. To support her contention that Ms. Wenzel was not an employee, she points out that Ms. Wenzel did not qualify for employment in terms of Workers Compensation or New Jersey State disability benefits. She further contends that Ms. Wenzel's service as a substitute school nurse did not prejudice her independence of judgment in the exercise of her official Board duties. She submits that if the Commission believes that there is a violation of the Act, then Ms. Wenzel should receive a private reprimand.

FACTS

The Commission based its finding of probable cause on the following facts. At all times relevant to this complaint, Ms. Wenzel was a member of the Board having served since 1998. Ms. Wenzel has been a registered nurse since 1994. The Superintendent and Ms. Wenzel had an agreement that she would be available to work as a substitute school nurse in the Saddle Brook School District (District) on an emergent basis since the substitute school nurse list had declined drastically.

Ms. Wenzel admitted to working as a substitute school nurse for the district on May 5, 2004 because the high school nurse was out for one week and there was no other nurse available for that day. Ms. Wenzel was paid by the District for working as a substitute school nurse. She was also paid as a substitute school nurse during the second quarters of 2003 and 2004 and during the fourth quarter of 2004. She indicated that she stands by her decision to serve in the District as a substitute school nurse.

ANALYSIS

The Commission found probable cause that Ms. Wenzel violated N.J.S.A. 18A:12-24(d), which provides:

> No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

In order to find probable cause under N.J.S.A. 18A:12-24(d), the Commission must determine whether Ms. Wenzel's employment by the District as a substitute school nurse might reasonably be expected to prejudice her independence of judgment in the exercise of her official duties as a Board member. Ms. Gross-Quatrone maintains that Ms. Wenzel was, in fact, not employed by the District, but that, at best, she was a casual

employee that was not eligible for Workers' Compensation or disability benefits. Casual employment is defined as "employment at uncertain or irregular times." See Black's Law Dictionary Fifth Edition, West Publishing Company, 1983. The Commission notes that employment is inherent in the definition. Even if Ms. Wenzel was a casual employee, she was still employed by the District on those days that she worked as a substitute school nurse. Even if Ms. Wenzel was ineligible for Workers Compensation or disability benefits as she contends, she was still employed by the District.

The Commission notes that N.J.S.A. 18A:12-24(d) applies to service as well as employment. In this case, Ms. Wenzel provided services to the District for which she was paid.

As an employed substitute school nurse for the District, Ms. Wenzel had significant entanglements with students, staff, and the administration. In working with children who have medical conditions or accident related injuries, she may unwittingly find herself being called as a witness against the Board on which she serves, or worse, a named defendant. She was also paid by the District for her services. When a board member works for and is paid by the District in which she serves, she is, in effect, working for the board. Thus, the Commission finds that anytime a board member is on the payroll of the District for which the board member serves, it is reasonable to expect it will prejudice that board member's independence of judgment in the exercise of official board member duties. Therefore, the Commission finds probable cause to credit the allegations that Ms. Wenzel violated N.J.S.A. 18A:12-24(d) when she worked for the District as a substitute school nurse on May 5, 2004 and prior occasions.

The Commission previously found no probable cause that Ms. Wenzel violated N.J.S.A. 18A:12-24(b), which provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

Ms. Wenzel had an agreement with the Superintendent to be available to work as a substitute school nurse on an emergent basis since the substitute school nurse list had declined drastically. Ms. Wenzel was offering her services in an attempt to assist the District. There is no evidence to show that Ms. Wenzel used her official position to secure employment with the District. Furthermore, since Ms. Wenzel has been a registered nurse since 1994, her employment as a substitute school nurse was not unwarranted. Therefore, the Commission finds that there is no probable cause to credit the allegation that Ms. Wenzel violated N.J.S.A. 18A:12-24(b).

The Commission notes that Ms. Gross-Quatrone contends that since both allegations revolve around the same events that it is clear that the Commission did not believe that Ms. Wenzel acted with intent or the Commission would have found probable cause on both counts of the complaint. The Commission agrees that that both allegations concern the same event. However, the Commission notes that a different standard is

applied to each of the provisions of the Act that complainant alleges were violated. While intent is relevant to each of those standards, it is not dispositive of the issue raised under each standard. Thus, the same events can trigger a violation of one provision and not another. She may not have intended to use her position to secure the employment, but she intended to take the job.

DECISION

For the reasons discussed above, the Commission finds that Christina Wenzel violated N.J.S.A. 18A:12-24(d) when, on several occasions, she was paid as a substitute school nurse by the District while serving as a member of the Board. The Commission advises Ms. Wenzel that she cannot continue to serve as a Board member and a substitute school nurse for the District. The Commission recommends that the Commissioner of Education impose a penalty of reprimand because Ms. Wenzel was offering her services in an attempt to assist the District.

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

Mark J. Finkelstein
Acting Chairperson

Resolution Adopting Decision – C46-04

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

Whereas, at its meeting of September 30, 2004 the Commission found that Christina Wenzel violated N.J.S.A. 18A:12-24(d) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of December 21, 2004, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

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

Mark J. Finkelstein
Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on December 21, 2004. Note: Paul C. Garbarini abstained from this decision.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C46-04v

27-05

AGENCY DKT. NO. 446-12/04

IN THE MATTER OF DAVID HATCHETT, :
SCHOMBURG CHARTER SCHOOL : COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, HUDSON COUNTY. : DECISION
:

The record of this matter and the decision of the School Ethics Commission (Commission) finding that Schomburg Charter School Board of Trustees member David Hatchett violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act (Act), and recommending a penalty of reprimand, have been reviewed. Upon issuance of the Commission's decision, Mr. Hatchett was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration; however, no comments were filed.

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

With this standard in mind, the Commissioner accepts the Commission's recommendation that Mr. Hatchett be reprimanded as a member of the Board of Trustees, since the Commissioner is satisfied that, in recommending a penalty for the violation it

found, the Commission considered the nature of Mr. Hatchett's offense and weighed the mitigating factors it determined to be present in his case. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that David Hatchett be reprimanded as a member of the Schomburg Charter School Board of Trustees.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/05

Date of Mailing: 1/14/05

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DAVID HATCHETT	:	**Docket No. C35-04**
SCHOMBURG CHARTER SCHOOL	:	
BOARD OF TRUSTEES	:	
HUDSON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 25, 2004, by Yasche Glass, Rebecca Posey, Crencenthia Brown, and Sheila Wilson-Tamborra against David. Hatchett, a member of the Schomburg Charter School Board of Trustees (Board). Complainants allege that Mr. Hatchett failed to attend board member training as required by N.J.S.A. 18A:12-33, and that he violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(d) by appointing Mrs. Hatchett, his former wife, as the acting Chief School Administrator at an unpublicized emergency meeting on Monday May 24, 2004. Complainants also allege that Mr. Hatchett violated N.J.S.A. 18A:12-24(b), (c) and (k) when he voted on the hiring and salary approval of his son on October 21, 2003.

Mr. Hatchett submitted a timely response by way of counsel, Tonya A. Smith, Esq., wherein he certified that he attended board member training. Mr. Hatchett further certified that there was no emergency meeting on May 24, 2004, and that the Board President asked Mrs. Hatchett to serve as acting Chief School Administrator because Karen Jones, the Chief School Administrator, was absent due to a family emergency. Mr. Hatchett argued that Board counsel instructed him to abstain from voting on his son's hiring and salary, that he abstained as instructed, and that he was surprised to see that his abstention was not noted in the minutes for the October 21, 2003 Board meeting.

The Commission invited the parties to attend its August 24, 2004 meeting to present witnesses and testimony to aid in the Commission's investigation, but did not require that they be present. Mr. Hatchett and his attorney, Tonya M. Smith, Esq. attended the meeting and Mr. Hatchett testified before the Commission. Complainants advised the Commission that they were unable to attend the meeting. At its public meeting on August 24, 2004, the Commission dismissed the allegation that Mr. Hatchett did not attend training as required pursuant to N.J.S.A. 18A:12-33. The Commission also voted to find no probable cause to credit the allegations that Mr. Hatchett violated either the Act or the Code of Ethics for School Board Members regarding the appointment of Mrs. Hatchett. The Commission also found no probable cause to credit the allegations that Mr. Hatchett violated N.J.S.A. 18A:12-24(b) or (k) regarding the hiring of his son. However, the Commission voted to find probable cause that Mr. Hatchett violated N.J.S.A. 18A:12-24(c) regarding the hiring of his son at the October 21, 2003 Board meeting.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised respondent that it would decide the matter on the basis of written submissions. Ms. Smith was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision to set forth why the Commission should not find Mr. Hatchett in violation of N.J.S.A. 18A:12-24(c) in relation to the hiring of his son. Ms. Smith was also told that her written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

Ms. Smith submitted a timely response on October 20, 2004, averring that the vote on respondent's son was improperly recorded in the minutes. However, respondent admitted that the incorrect recording was further compounded by his failure to notice and correct same. Ms. Smith noted that respondent stood by his testimony at the Commission's August 24, 2004 meeting that he abstained from the vote on the hiring of his son. Ms. Smith submitted that due to these circumstances, the appropriate sanction would be at most a reprimand.

FACTS

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

Mr. Hatchett testified that, at the October 21, 2003 Board meeting, prior to the vote, Board counsel instructed him to abstain from voting on his son's appointment and salary. Mr. Hatchett also testified that he abstained from voting on his son's appointment and hiring. The minutes from the October 21, 2003 Board meeting show that Mr. Hatchett voted on his son's appointment and salary. In response to a question from the Commission, Mr. Hatchett testified that it is Board practice to approve the minutes of Board meetings and that he did not read the minutes before he voted to approve them. Mr. Hatchett further testified that he did not ask for the minutes to be corrected because he was unaware that they were incorrect.

ANALYSIS

The Commission found probable cause that Mr. Hatchett violated N.J.S.A. 18A:12-24(c) of the Act in relation to the hiring of his son at the October 21, 2003 Board meeting.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter

where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Mr. Hatchett has testified that he abstained from voting on his son's hiring and salary. However, the Board minutes of October 21, 2003, indicate that he voted on his son's hiring. Mr. Hatchett did not review the Board minutes nor request for them to be changed to reflect his abstention. While Mr. Hatchett asserts that he abstained from the vote, the minutes, which are the public record of the meeting, indicate otherwise. In making its probable cause determination, the Commission considered the Open Public Meetings Act (OPMA), which provides:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the action taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with N.J.S.A. 10:4-12. [N.J.S.A. 10:4-14].

The Commission has already noted in its probable cause determination in this matter that construction of any statute must necessarily begin with consideration of its plain language. Merin v. Maglaki, 126 N.J. 430, 434 (1992). The plain language of the above statute is clear that the minutes of a public body are to show the action taken and the vote of each member. If, after the minutes are approved and made available for dissemination to the public, a board member argues that he did not vote in the way that the minutes indicate, the OPMA is undermined. In such a case, the public would have received information that the board member has voted a certain way, while the board member argues to another agency in a closed proceeding that it should find that he did not vote in the way that the official minutes indicate. See I/M/O Mary Adams, C44-02 (May 1, 2003). It would not be acceptable to make such a finding. The purpose of the Open Public Meetings Act is to give full access to all public meetings of governmental bodies and to protect against secrecy in public affairs. Aronowitz v. Planning Bd. of Twp. of Lakewood, 257 N.J. Super. 347 (Law Div. 1992).

Ms. Smith argues that notwithstanding the OPMA, Mr. Hatchett testified honestly and credibly that he abstained from voting on his son and the minutes are in error, compounded by his failure to change them. While the Commission found Mr. Hatchet to be credible, it is faced with the competing interest of the public in being able to trust the minutes of a public meeting to accurately reflect the actions taken and votes made. Therefore, the Commission is constrained to find that because the minutes indicate that he voted for his son and he voted to approve the minutes, he violated the Act by his vote. His vote violates the Act because of his personal involvement related to the hiring of his son. This involvement is a benefit to him in that he receives personal satisfaction because his involvement ensures that his son obtains employment. The Commission therefore finds probable cause to credit the allegation that Mr. Hatchett voted to approve the hiring

and salary of his son at the October 21, 2003, Board meeting and that conduct violated N.J.S.A. 18A:12-24(c).

DECISION

For the reasons discussed above, the Commission finds that David Hatchett violated N.J.S.A. 18A:12-24(c) for his vote on the hiring of his son at the October 21, 2003 Board meeting. The Commission recommends that the Commissioner of Education impose a penalty of reprimand due to the circumstances regarding the minutes and the credible testimony of Mr. Hatchett.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C35-04

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

Whereas, at its meeting of October 26, 2004 the Commission found that David Hatchett violated N.J.S.A. 18A:12-24(c) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of November 23, 2004, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

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

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 21, 2004.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C35-04

29-05

#29-05

OAL DKT. NO. EDU 8659-98
AGENCY DKT. NO. 401-9/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the Lacey Township Board of Education (Board) filed timely exceptions, to which the Department of Education (Department) duly replied.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred in concluding that the Department did not engage in unlawful rulemaking. According to the Board, the ALJ focused on only one of the six criteria enumerated by the Court for determining whether an agency action must be rendered through rulemaking, while ignoring the other five, all of which weigh in the Board's favor for the reasons expressed in briefing before the ALJ. (Board's Exceptions at 3-5) The ALJ further erred, the Board avers, in relying on a conclusion that the Department's determinations were statutorily authorized, which the Board has never contested, without going on to examine the *manner* in which the Department exercised its discretion; such examination, according to the Board, clearly demonstrates that the determinations at issue

should have been promulgated by rule. (*Id.* at 5-7) Finally, the Board argues that the ALJ erred in considering factors irrelevant to an assessment of whether unlawful rulemaking occurred, specifically the lack of factual evidence that the calculations resulting from the Department's determinations were erroneous, and the fact that the Board could raise local property taxes in the event of an insufficient school budget. (*Id.* at 8-10)

In reply, the Department urges adoption of the Initial Decision. Contrary to the Board assertions, the Department states, the ALJ did indeed consider the full holding of, and the six-factor test set forth in, *Metromedia, supra:*

> ***ALJ Miller noted that this was not a case where an agency acted beyond its legislative authorization. Thus, as ALJ Miller found, the fourth factor of *Metromedia* was inapplicable since Treasury did not prescribe a legal standard or directive that is not otherwise expressly provided by or clearly inferable from the enabling statute. Rather, Treasury acted within the broad authority granted to it under CEIFA. ALJ Miller also held that neither the fifth [n]or sixth factors of *Metromedia* were present, since he concluded that Treasury "did not create policy nor did it deviate from existing policy." Additionally, although ALJ Miller may not have specifically mentioned it, Treasury's methodology in providing municipal income estimates was applicable at the time of the 1998-1999 CEIFA calculation, and thus did not violate the third *Metromedia* factor either, since it was not merely prospective. Therefore, contrary to Lacey's arguments, ALJ Miller properly considered *Metromedia* to reach his conclusion that neither Treasury nor the Department violated the APA.
>
> (Department's Reply at 3-4, citations omitted)

In response to the Board's contention that the ALJ erred by considering irrelevant factors, the Department counters that the ALJ properly encompassed in his decision the entire controversy concerning the Board's claim of entitlement to additional State aid, rather than limiting himself to the Board's legal argument based on *Metromedia*, and further, that the Board misunderstands its full burden in this matter:

> ***In its petition, Lacey claimed that the March 1998 Core Curriculum Content Standards Aid ("CCSA") and Debt Service Aid [DSA] awards were incorrect and that it should be awarded the State aid that was originally calculated in February 1998. However, as ALJ Miller stated, "[t]here is no dispute that an error occurred in the initial calculation of the funding amount." Thus, the evidence clearly established that the original numbers issued in February 1998 were in error, and that Lacey Township was not entitled to the original award. Lacey's assertion that it does not possess the burden to demonstrate that the State aid numbers provided to it in March 1998 were in error is meritless. It was Lacey's burden, as petitioner, to demonstrate that the subsequently corrected award was erroneous. It failed to do that. Contrary to Lacey's assertions, ALJ Miller's finding that "petitioner failed to put forth any evidence of its own that the aid calculations were skewed, unfair or unreasonable," is relevant, since Lacey utterly failed to meet its burden to demonstrate that the CCSA and [DSA] awards provided in March 1998 were in error, or that they were unreasonable. Also, ALJ Miller's consideration of the municipality's ability to raise tax levy is relevant to an inquiry of an improper State aid calculation since it could affect the assessment of harm, if any, to the district, and a determination of an appropriate remedy.***
>
> (Department's Reply at 4-5, citation omitted)

Upon review, the Commissioner concurs with the ALJ that, under the undisputed facts of this matter, no rulemaking occurred with respect to the determination of State Aid for the 1998-99 school year in violation of *Metromedia, supra,* or the Administrative Procedure Act. Indeed, under the circumstances here presented, where the responsible State agency devised a facially reasonable method for culling and analyzing the mass of raw data necessary for first-time calculation of State aid under the Legislature's post-1997-98 formula, and such method was found upon application to require adjustment because it clearly resulted in error, the Board cannot reasonably seek to invalidate the revised methodology developed immediately thereafter so as to provide, on a timely basis, more accurate State aid figures to school districts because such methodology was not promulgated by rule in accordance with the

Administrative Procedure Act.[1] Moreover, the Commissioner concurs that, while the factors the Board contends the ALJ should not have considered are not germane to legal analysis strictly based on *Metromedia, supra*, they are directly pertinent to the Board's claims overall and to assessment of the Board's entitlement to relief.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/05

Date of Mailing: 1/19/05

[1] It is interesting to note that the relief sought by the Board is the difference in aid between the State's first calculation and its second, notwithstanding that the method used for the first calculation was likewise newly developed and not promulgated by rule.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8659-98

(On Cross-Motions for Summary Decision)

AGENCY DKT. NO. 401-9/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Michael W. Hoffman, Esq., for petitioner (Stein, Supsie & Hoffman, attorney)

Allison Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: November 15, 2004 Decided: November 30, 2004

BEFORE **W. TODD MILLER**, ALJ

STATEMENT OF THE CASE

On September 3, 1998, the Commissioner of Education ("Commissioner") received a Verified Complaint filed by the Lacey Township Board of Education ("petitioner" or "Board"). The Verified Complaint asserts that the New Jersey Department of Education ("respondent" or

"DOE") failed to provide petitioner with the appropriate level or amount of funding pursuant to the Comprehensive Education Improvement and Financing Act, *N.J.S.A.* 18A:7F-1, *et seq.* ("CEIFA" or "Act"). The petitioner requested a fair hearing and the matter was received by the New Jersey Office of Administrative Law ("OAL") on October 6, 1998, to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and 14F-1 to 13. The matter was initially assigned to the Honorable Joseph Martone, ALJ. Telephone conferences were scheduled with Judge Martone and held on December 1, 1998, December 10, 1998, January 27, 1999, March 3, 1999, April 15, 1999, May 19, 1999, July 27, 1999, and September 9, 1999. At issue during these conferences were the nature, extent and scope of discovery. Since petitioner was challenging the CEIFA funding formula and it involved other State agencies, including the Department of Treasury (Treasury), various contested discovery issues arose. Petitioner sought to explore the components of the funding formula, which were developed either through the Department of Education and/or through information obtained from Treasury.

The case was subsequently reassigned to the Honorable Judge Kathleen Duncan, ALJ. From 1999 through 2001, the parties engaged in extensive discovery efforts and motion practice. Various motions and cross-motions to compel discovery and/or to engage in depositions were filed. The depositions of various State employees from the Department of Education and the Department of Treasury followed. Subsequent to discovery, the parties engaged in serious and meaningful settlement negotiations. Although a settlement seemed promising, the matter ultimately remained unresolved. Judge Duncan retired and, thereafter, the matter was assigned to this ALJ in or around August 2002 for final disposition.

Subsequent to the unsuccessful settlement negotiations, the parties engaged in additional discovery and depositions. Telephone conferences were held on September 9, 2002, April 2, 2003, February 17, 2004, March 1, 2004, and July 1, 2004. Hearings were scheduled for July 12, 2004, and July 13, 2004, at the OAL offices in Atlantic City, New Jersey. In lieu of an evidentiary presentation, the parties agreed and consented to cross-motions for summary disposition. Petitioner and respondent filed initial briefs on on September 17, 2004. Each party filed reply or opposition briefs on November 15, 2004. The briefs, exhibits and depositions transcripts sufficiently articulated the issues and defenses. No oral argument was necessary. The record closed on November 15, 2004.

SUMMARY OF RELEVANT FACTS

Lacey Township provides educational services for grades K-12. Lacey is not a special needs (Abbott) district. On February 11, 1998, State aid numbers were provided to school districts, including Lacey Township. The amount of Core Curriculum Standards Aid (CCSA) to be paid to Lacey Township for the 1998-1999 school year was $13,345,013 and the amount of debt service aid was $667,221. For the 1998-1999 school year, DOE was required to compute the CEIFA State aid numbers twice. This occurred because Treasury discovered an inadvertent error in the coding of 99 municipalities. (4T23:10-25; 4T24:1-10).[1] The second computation by DOE was based on a revised data received from Treasury. (4T24:4-5). On March 3, 1998, DOE released revised State aid numbers to all of the school districts in the State of New Jersey. Consequently, Lacey Township's State aid was reduced to $12,352,037 in CCSA and $611,297 in debt service aid. Based upon the revised aid numbers, Lacey Township challenges DOE's State aid calculation for CCSA and debt service aid for the 1998-1999 school year.

The Nature Of The Error

The State of New Jersey, Division of Taxation processes approximately 4 million income tax returns per year. According to Dr. Richard Kaluzny[2], Director of Office of Revenue and Economics Analysis for the New Jersey Department of Treasury, the tax returns filed by the citizens of New Jersey provide Treasury with a significant source of the information for purposes of calculating CEIFA aid. Treasury utilized two methods for retrieving the pertinent financial information. Treasury uses the county-municipality (Tax Return, Tax Reg. or TR) code or a geocode (Mail Address Verification Geocode or MAVGP) for purposes determining income information for the 567 municipalities. When a tax return is filed, it contains either a county/municipal code and/or it contains the taxpayer's street address. These tags are used to pull data from the source documents. As expected, neither the TR code nor the MAVGP code is 100% accurate. The TR code is about 80% accurate while the MAVGP code is about 90%

[1] Deposition transcripts were submitted with the motions for summary decision. They are in date order as follows: 1T-April 18, 2000; 2T-April 19, 2000; 3T-August 19, 2003; 4T-November 14, 2003.

[2] Based upon the extent and scope of Dr. Kaluzny's knowledge, petitioner's motion to take his deposition was granted. Kaluzny was deposed for three days. The deposition transcripts are included in the record. Additionally, Yut Se Thomas, Planning Associate for the Department of Education, was deposed.

accurate. There are various reasons for the inaccuracies. These include typographical errors, fields that are left blank, post office boxes in lieu of street addresses, as well as other reasons. Treasury initially used the TR method in acquiring the necessary financial information. In those instances where a TR code did not provide sufficient information, the MAVGP code was used as a secondary source. (1T67-75).

DOE clearly described the error and the corrective action in its brief. DOE discovered the error when it started receiving telephone calls from municipalities, especially in Ocean County, claiming that something was wrong with their information. 1T96:16-21; 3T162:7-25; 3T163:1-24). Municipalities complained that they were assigned too many people and that too much income was being attributed to their communities. (1T100:21-25; 1T101:1) As a result of these complaints Treasury examined its data and discovered that in 99 communities the municipal codes listed in the GIT return preparation booklet were different from the municipal codes that were used in the OTIS MAVGP procedure. (1T97:20-25; 1T98:1-7). Thus, in this case, the TR code for Lacey is 1513. (1T99:4-5; S031). However, the geocode program relied on the municipal code listing provided by the Department of Community Affairs ("DCA") which coded Lacey as 1512. (1T99-9-10; S051). The impact upon the District was that some of its information went into the Jackson Township calculation. (1T102:5-10).

Treasury selected for each municipality the source that provided a population estimate that was most reasonable when compared to the census estimate of population. 2T13:12-25; 2T14:1-25; 2T15:1-19). As Dr. Kaluzny explained, after the municipalities started complaining about errors in population and income, Treasury developed a correction for the initial mistake.[3] The TR code was corrected so that it matched the municipal code used in the MAVGP procedure for the 99 communities with the miscoding (2T79:13-24) – and also recognized that there were other situations where the two different sources gave different estimates of municipal income. (2T14:10-25; 15:1-6). That resulted in Treasury relying upon census population estimates for comparison as they are an objective source of information with which to compare Treasury's assignment of population and, hence, of municipal income. (2T15:7-19). This revised methodology was applied to all 567 municipalities. (2T17:10). All of the towns in Ocean

[3] All of the numbers of municipal income for Ocean County changed as a result of correcting the error. (2T10:18-19).

County were affected by this miscoding. (1T100:4-8). After discovering the error, Treasury immediately prepared another assignment of tax returns to all 567 municipalities to collate corrected municipal income estimates.

LEGAL DISCUSSION AND ANALYSIS

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples 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 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 Co. of America,* 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment. Therein, the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational fact finder to resolve the alleged disputed disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden*, 993 *F.Supp.* 255, 261 (*D.N.J.* 1998).

Based on the briefs and affidavits presented by the parties, I **FIND** that there is no genuine issue of material fact and the matter can be decided on summary decision.

CEIFA was adopted in 1996 to comply with New Jersey's constitutional mandate to provide a "thorough and efficient education" under *N.J. Const. art. VIII, Section 4. N.J.S.A.*

18A:7F-2; L. 1996, c. 138.; *Robinson v. Cahill*, 69 *N.J.* 449, 473 (1975). It established a "prototypical program that the Legislature believed would satisfy the thorough and efficient (hereinafter "T & E") constitutional requirements. *Stubaus v. Whitman*, 339 *N.J. Super.* 38, 45 (App. Div. 2001). In the matter at hand, Lacey Township's State CEIFA was reduced from $13,340,513 to $12,352,037 in CCSA and from $667,221 to $611,297 in debt service aid. Based upon the revised aid numbers, Lacey Township challenges DOE's State aid calculation for CCSA and debt service aid for the 1998-1999 school year.

Under CEIFA, core curriculum standards have been established which "provide a substantial framework detailing what children need to know in order to participate as workers and citizens in contemporary society, which is the goal of the T & E public education system. *Stubaus*, *supra.*, 339 *N.J.Super.* at 45. CEFIA sets forth a model of prototypical school district that efficiently provides the programs and services necessary for pupils to achieve the core curriculum standards and it is the program that the Legislature believed would satisfy the T & E constitutional requirements. *Ibid.* The basis for distributing State education aid is then derived from the per pupil cost to implement the prototypical model, combined with the local school district's ability to contribute to that cost. *Ibid.*

In *Stubaus*, the Appellate Court succinctly set forth the framework for deriving state aid under CEIFA as follows: In order to implement CEIFA, the Commissioner is required under the Act to establish what is called the T & E amount which is "based on the costs necessary to provide the programs and services that will enable an elementary school pupil to achieve the core curriculum standards. *N.J.S.A.* 18A:7F-3; *N.J.S.A.* 18A:7F-12. The T & E amount is then weighted for the additional cost of middle and high school pupils and a half-day kindergarten program. *Ibid.* The T & E weighted amount is then multiplied by the number of pupils in the district to arrive at the T & E budget. *N.J.S.A.* 18A:7F-3; *N.J.S.A.* 18A:7F-13." *Ibid.* In *Hammonton Board of Education v. New Jersey Department of Education, et al*, OAL DKT. NO. *EDU 4614-02*, (Decided September 12, 2003) Honorable Lillard Law, ALJ observed:

> The Legislature expressed legislative intent that CEIFA would be a permanent funding formula when it stated that CEIFA provides and establishes "a funding mechanism" to ensure a thorough and efficient education. *N.J.S.A.* 18A:7F-2b(4). It is through CEIFA that the Legislature answered its constitutional obligations,

> and it is CEIFA which directs how to answer the Legislature's constitutional obligations.

CEIFA calculations are derived from various sources of information. The New Jersey Department of Treasury plays a significant and critical role in this process. Treasury collects information from the New Jersey Department of Human Services (DHS), the New Jersey Gross Income Tax Returns, Federal Census, Division of Community Affairs (DCA), Office of Information and Technology Services (OTIS) and the U.S. Postal System. Treasury collects and assembles the necessary data. Thereafter, the information is sent to the DOE. The DOE determines the final CEIFA calculations.

There are two key components to the CEIFA calculations. They are: 1) real estate or property values; and 2) income values. *N.J.S.A.* 18A:7F-14. In the matter at issue, Lacey Township is not challenging the real estate or property wealth component. Rather, it contends that the municipal income component, as determined by the Department of Treasury, violates the Administrative Procedure Act (APA). Petitioner contends the Department of Treasury's calculations, particularly as it pertained to the correction of the error, constitutes administrative rule-making in violation of *N.J.S.A.* 52:14B-2e and *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984).

In *Metromedia, Inc., supra.* the Court outlined six factors necessary to determine if an agency engaged in rule-making. The Court held that:

> [A]n 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. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (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. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.

The CEIFA legislation was promulgated in December 1996. The 1997-1998 school year was the first year it was implemented. As noted above, the formula requires an analysis of the *property wealth* and *income wealth* for the various municipalities and the population at large. The focus of this matter is on the *income wealth* calculations. A substantial portion of the components for the aid calculation is derived and assembled by the Treasury employees.

Petitioner relies upon the CEIFA definitions contained in *N.J.S.A.* 18A:7F-3 in asserting that Treasury and DOE engaged in improper rule-making. This statute provides, in part:

> "District income" for the 1997-98 school year means the aggregate income of the residents of the taxing district or taxing districts, based upon data provided by the Bureau of the Census in the United States Department of Commerce for 1989. Beginning with the 1998-99 school year and thereafter, district income means the aggregate income of the residents of the taxing district or taxing districts, **based upon data provided by the Division of Taxation** in the New Jersey Department of the Treasury **and contained on the New Jersey State Income Tax forms** for the calendar year ending prior to the prebudget year. The **commissioner may supplement data contained on the State Income Tax forms with data available from other State or federal agencies in order to better correlate the data to that collected on the federal census**.
>
> [Emphasis added]

Petitioner contends that Treasury and DOE violate *Metromedia* as well as the *APA*. Petitioner particularized the violations as follows:

> 3. Dr. Kaluzny, as an employee of the Department of Treasury, on his own, provided Respondent with district income figures for entry into the CEIFA aid formula. (T1:15-18)
>
> 4. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined that solely income

information from tax returns (as opposed to correlating that information with census data regarding income) should be used to determine the income to be assigned to a particular municipality. (T3:123, 150)

5. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined to use one coding method (referred to as the TR Code) verses using another coding method (referred to as the MAVGP Code) or a combination thereof to assign tax returns to a specific municipality. (T1:66-78; T2:41-42, 47-48, 57; T3:11-157)

6. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined to use the MAVGP Code as the primary coding method and the TR Code as the secondary source for assigning tax returns to municipalities. (T1:66-78, 87-88; T2:13-14, 18-20, 73-83, 126, 141; T3:52).

7. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined to operate under the premise/rule that, when using tax returns to achieve a population count for a certain municipality, the tax return population count should be lower in comparison than the census population count for that same municipality. T2:15-17, 71-72, 87).

8. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined to operate under the premise/rule that, when the tax return population was greater than 15% of and/or more than 100 people compared to the census population for a particular municipality, further analysis should be undertaken to determine the proper population and, then, district income for that municipality. (T2:67-72)

9. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined not to concern himself with district income situations where the tax return population was lower than the 1996 census population for a particular municipality and, therefore, district income was presumptively lower than it should be. (T3:69-71)

10. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined that unassignable tax returns should simply be discarded from the calculation of district income for municipalities. (T2:31-35, 81, 103-104; T3:48)

11. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined that social security income, which is not reported on tax returns but is reported on census information and thereby may be correlated with tax return income data, should be disregarded from the calculation of district income for municipalities. T2:29-31, 63-68, 72)

12. Dr. Kaluzny, as an employee of the Department of Treasury, on his own and without consulting the Respondent, determined to use a certain database (called the MOD-4 property tax records database) as a substitute for the coding procedures noted above in order to determine district income figures for a select/certain 40 some odd municipalities that were remarkable "anomalies" in terms of taxpayer population count compared to census population count. (T2:54, 108-109, 133; T3:87-103)

13. Respondent did not actively or competently engage in the process or analysis resulting in the determinations set forth above reached by Dr. Kaluzny at the time those determinations were initially in fact made. (t2:59-60, 68-70, 95-96, 99-100; T4:16-22; T5:17-18, 21-23)

[Petitioner's brief at 2-4.]

As required by law, Treasury provided the aggregate income of the residents of the taxing district for the CEIFA calculation. *N.J.S.A.* 18A:7F-3, *supra.* Much of the financial data is collected in a raw form and assembled by Treasury. Petitioner suggests that Dr. Kaluzny engaged in rule-making by failing to correlate tax data with census data and by using the MAVGP for primary coding in lieu of the TR code, without consulting DOE. It's also asserted that Kalunzy failed to properly resolve issues involving social security income and unassignable tax returns. These failures allegedly resulted in skewed data derived from tax returns rather than from census data, according to petitioner.

The depositions of Kaluzny and Thomas, a Planning Associate for DOE, do not support petitioner's assertions that respondent engaged rule-making as outlined in *Metromedia.* Notably, petitioner did not provide its own expert report or affidavit, in opposition to the depositions of Kaluzny and Thomas. Rather, petitioner attempted to establish deviations or defects through examination of respondent's witnesses. It is clear from the deposition transcripts and briefs that the aid formula is complex. It incorporates a panoply of information from a variety of sources. There are numerous sources of raw data that are not initially compatible with each other. The data must be culled and analyzed before it becomes useful. Therefore, no rigid formula could possibly be dictated by the Legislature regarding the financial data and methodology used in determining CEIFA. In fact, the legislation broadly defines "District income" as "data provided by the Division of Taxation" *N.J.S.A.* 18A:7F-3. It appears that the Legislature left Treasury with sufficient discretion for compiling the data in order to competently complete the task. The

ultimate goal is to have a funding formula that is reasonably fair, uniform and in keeping with the legislation. The final measure is not perfection, but rather is reasonable reliability and fairness. Finally, if it school budget is deficient, each municipality may also change its property tax levy. *N.J.S.A.* 18A:7F-5. It is against this backdrop that respondent's actions must be measured and weighed against the constraints of *Metromedia.*

The actions of Treasury and DOE are generally authorized by the CEIFA funding legislation. *N.J.S.A.* 18A:7F-2. Thus, as a threshold matter, both agencies are authorized and required to generate CEIFA calculations. The calculations must be prepared consistent with the Legislative mandate. This is not matter where the agency acted without or beyond such authorization. *Metromedia*; *N.J.S.A.* 18A:7F-1, *et seq.* The CEIFA implications are broad. Uniformity and fairness throughout the State are necessary components. Here, Treasury did not create policy or nor did it deviate from existing policy. It engaged in a statutorily mandated process of developing a funding formula. The process involves complex decision-making regarding an enormous amount of data from a variety of sources. Petitioner portrays the process as necessitating a fixed or rigid methodology. But it can't be developed under such conditions. Petitioner suggests that Treasury unilaterally ignored critical census data. Consequently, population and income figures may be under reported, according to petitioner. (Petitioner's brief at 12). The facts offered by petitioner do not support such a finding. Petitioner's argument is mere speculation. Petitioner offered no direct proof substantiating under reporting of population or income data in the revised calculations. Rather, petitioner posed an accusation but never backed it up.

There is no dispute that an error occurred in the initial calculation of the funding amount. In correcting the error, Treasury decided to utilize the method that minimized the difference between the census estimate and the estimate generated by either the TR primary source code methodology or MAVGP methodology. (2T57:4-25; 2T58:1-25; 2T59:1-4). Although Dr. Kaluzny conceded that Treasury knew that census data is not 100% accurate, he stated that because census population data was generated by the United States Census Bureau, and was not a number that Treasury generated and there would be no bias in the Census population count and the Census data was the best standard available to Treasury to measure the reasonableness of the assignment of GIT returns. (2T62:14-25; 2T63:1-11).

Based upon the foregoing, I **FIND** neither Treasury nor DOE violated the spirit of *Metromedia.* Both agencies acted within the Legislative mandate. *N.J.S.A.* 18A:7F-1, *et seq.* They developed a formula that was fair and reasonable. During the process, Treasury identified an error in the coding that ultimately affected aid for numerous municipalities. Treasury reviewed the methodology further. Coding errors were identified and fixed. The aid formula was improved by comparing the NJ-GIT information with Federal census information. The aid calculations were painstakingly revised and new aid calculations were generated. Ultimately, the aid calculations were re-computed. The coding error was identified in February 1998 and in March 1998; CCSA and debt service aid for 610 school districts was corrected. Both Treasury and DOE proceeded appropriately and did not engage in rule-making. There was no violation of *Metromedia* or the *APA*, *N.J.S.A.* 52:14B-1 *et. seq.* when the error was corrected by Treasury and DOE. **I SO FIND**. Petitioner failed to put forth any evidence of its own that the aid calculations were skewed, unfair, or unreasonable.

The District's initial aid calculation unfortunately contained an error. The revised aid amounts were significantly lower. This raised a red flag. However, the error was an inadvertent mistake that was corrected. The District challenged the correction of the error as inappropriate rule-making. *Metromedia.* The District did not establish a nexus between the correction and a violation of *Metromedia.* In other words, the correction was a reasonable administrative response to a statutorily mandated obligation. I **FIND** and **CONCLUDE** that no rule-making occurred as a result of the correction process. DOE and Treasury had an affirmative obligation to correct the error in the funding and did so in a reasonable and sound manner. *N.J.S.A.* 18A:7F-1, *et seq.*.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the relief sought be petitioner, Township of Lacey, Board of Education is **DENIED**. It is further **ORDERED** that the action filed by petitioner 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, 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.

11-30-04
DATE

W. TODD MILLER, ALJ

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

11-30-04
DATE

Mailed to Parties:

DEC 6 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

sd

DOCUMENTS RELIED UPON

Petitioner's Brief in Support of Summary Decision Motion, September 16, 2004

Respondent's Brief in Opposition to the Motion for Summary Decision and Appendix, September 16, 2004

Deposition Transcripts:

Deposition Transcript of Richard L. Kaluzny, Ph.D., April 18, 2000, April 19, 2000, and August 19, 2003

Deposition Transcript of Yut-Se Thomas, November 14, 2003

Petitioner's Reply Brief, November 15, 2004

Respondent's Reply Brief, November 10, 2004

#30-05E

OAL DKT. NO. EDU 12159-04
AGENCY DKT. NO. 421-11/04

E.B. and B.J.B., on behalf of minor child, E.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The recommended Order of Administrative Law Judge (ALJ) Bruce M. Gorman, granting petitioners' application for emergent relief in this matter, has been reviewed.

Upon such review, the Commissioner adopts the recommended Order of the ALJ as he is persuaded, by the particular circumstances of this case, that such Order affords E.B. an appropriate education *during the pendency* of this matter.

Accordingly, the recommended decision on motion is adopted for the reasons stated therein. This matter shall proceed to hearing on its merits on January 26, 2005 as contemplated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/19/05
Date of Mailing: 1/19/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER – EMERGENT RELIEF

OAL DKT. NO. EDU 12159-04

AGENCY DKT. NO. 421-11/04

E.B. & B.J.B. O/B/O
MINOR CHILD, E.B.,

Petitioners,

v.

TOWNSHIP OF EGG HARBOR BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

Robert P. Merenich, Esq., for petitioner (Gemmel, Todd & Merenich, attorneys)

James Arsenault, Esq. and **Emily A. Buonadonna,** Esq., for respondent (Cooper Levenson, attorneys)

BEFORE **BRUCE M. GORMAN**, ALJ:

The New Jersey Department of Education, Bureau of Controversies and Disputes, received a petition for emergent relief on or about December 23, 2004. The matter was transmitted to the Office of Administrative Law (OAL) on December 30, 2004, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The matter was scheduled for hearing on January 11, 2005, at the OAL office in Atlantic City, New Jersey. The hearing proceeded on that date.

The facts of the case are substantially undisputed. Petitioner's son, E.B., was caught in respondent's school with marijuana on his person. He was subjected to school discipline and suspended for ten days.

The dispute concerns what followed. Respondent's policy, Exhibit A annexed to petitioner's moving papers, specifies:

> 8. DRUG/ALCOHOL POLICY and PROCEDURES (This includes Anabolic Steroids):
>
> Possession, use and distribution of alcoholic beverages, controlled dangerous substances, inhalants, over-the-counter medications or unauthorized prescription drugs are strictly prohibited.
>
> *A. The student will attend Eagle Academy Alternative School for one full semester (90) days if he/she:*
>
> 1. *Is found to be in possession of controlled dangerous substances* and/or alcohol (and/or)
>
> 2. Is found in possession of drug paraphernalia (and/or)
>
> 3. Tests positive for drugs or alcohol as a result of a **second administrative referral** (and/or)
>
> 4. Refuses to have a mandatory drug screening in addition to a previous refusal or a previous positive drug screening result.
>
> (Emphasis added)

Because E.B. was found with drugs in his possession, he has been transferred to Eagle Academy. Eagle Academy is an alternative school operated by respondent school district. Petitioner appeals, asserting variously that the placement is educationally inappropriate, the procedure followed violates E.B.'s due process rights, and respondent's policy is arbitrary and capricious. Petitioner seeks E.B.'s immediate return to Egg Harbor Township High School.

Petitioner carries the burden in seeking emergent relief. The standard necessary for the awarding of this relief is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 *N.J.* 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. *Id.* at 132-34.

For the reasons set forth below, I **GRANT** petitioner's application for emergent relief.

IRREPARABLE HARM

Respondent's policy requires petitioner's placement at Eagle Academy without consideration for the placement's impact on his education. Eagle Academy is an Alternative School. According to respondent's Application for Approval to Operate an Alternative Education Program (Exhibit B), Eagle Academy was set up to handle the following population (Exhibit B):

> Fifty junior high and secondary students are referred to our alternative school setting for the following reasons: at risk and/or dropping out of school, in need of a non-traditional educational schedule, poor school attendance, chemical dependence, involvement in the juvenile justice system, and inability to follow traditional methods of instruction.

Further, the State Board of Education's Guide and Application for the Operation and Approval of Alternative Education Programs promulgated in September of 2004 (Exhibit C), states as follows:

> Generally, the target population for alternative education programs are those students who are disruptive, disaffected or at-risk of dropping out. These students may experience educational and behavioral problems in school, become disengaged in the regular academic setting, and are at-risk of dropping out. These adolescent are normally students between the ages of 11 and 18 who have had a history of negative school experiences and patterns of behavior that have been disruptive to their own education, as well as to that of their classmates. The causes of their problems are often complex and generally are difficult to overcome. They stem partially from personal and family problems and from a school climate that may be ill-suited to address their educational and social needs. These adolescents oftenexhibit chronic problems such as:
>
> - Persistent and consistent disciplinary issues;
> - Truancy;
> - Absenteeism; or
> - Continued academic failure.
>
> These issues are evident through basic skills deficiencies and a sense of frustration, alienation and/or negative self-concept by the student. School environments that provide insufficient encouragement for these students are also contributing factors. These at-risk students may benefit from alternative education programs.

It is undisputed that E.B. is a college-bound student who has functioned well in the standard high school setting. Prior to this incident, E.B.'s disciplinary record contained only one minor infraction. Nothing before me indicates, nor does respondent assert, that E.B. is "disruptive, disaffected or at-risk of dropping out." At this juncture, I can only preliminarily conclude that E.B. is exactly the type of student for whom the alternative school was not intended.

Petitioner's certification raises the question of whether the program at Eagle Academy is appropriate for E.B.. According to petitioner, with the exception of Math class, none of the teachers at the Alternative School has a program for E.B. E.B. has already completed the class work being studied by the other students. He is left to work on his own, primarily outlining chapters in the textbook. While I make no factual finding on that issue at this juncture, there is little before me now to indicate E.B.'s educational needs are being met. It is instructive to note that the State Board Guide, *supra*, specifies that,

> The scope of alternative education programs should be tailored to fit the ages and grade levels of the students served. Ideally, middle school alternative education programs should focus on reintegrating students back into a traditional academic environment. These programs should focus on helping students reconnect with the learning experience and with their learning environments. Middle school programs should not only educate students, but also nurture students and acknowledge the intellectual and social development that students are experiencing as young adolescents. High school programs should also pay attention to the individual social and developmental needs of the students, while assisting students in their efforts to complete their education, successfully transition into independent adulthood and obtain and maintain employment.

Nothing before me indicates that any sort of alternative education program has been developed and tailored to meet E.B.'s educational needs.

Further, E.B. does not fit any of the criteria for placement at Eagle Academy as set forth in respondent's population description, supra. He is not and does not meet any of these categories: at risk and/or dropping out of school, in need of a non-traditional educational schedule, poor school attendance, chemical dependence, involvement in the juvenile justice system, and inability to follow traditional methods of instruction.

Based upon the record before me, the only possible category into which E.B. could fall is "chemical dependence." He was found to have marijuana in his possession. However, in his moving papers, petitioner avers that E.B. has been subjected to a drug screen at respondent's insistence and found not to be chemically dependent. Respondent's counsel denied knowledge of the school's participation in such a screening, but could offer nothing to refute petitioner's contention that the screening had been conducted, and that E.B. had been found not to be chemically dependent.

Accordingly, there is nothing in the record which places E.B. in any of the categories delineated by respondent in its policy for placement at Eagle Academy. While subsequent evidence may prove to the contrary, at this juncture his placement there appears to be the exclusive result of respondent's "zero tolerance" policy, and bears no relationship to any educational or remedial purpose.

Therefore, I am forced to **FIND and CONCLUDE** that the placement of E.B. at Eagle Academy is likely to prove inappropriate, and, in consequence, E.B. may suffer irreparable harm to his educational program.

LEGAL RIGHT AND REASONABLE PROBABILITY OF SUCCESS

Respondent's defense turns on the validity of its policy, and the procedure followed in effectuating E.B.'s placement at Eagle Academy. It is undisputed that E.B. was afforded none of the due process protections normally required when punitive action is taken against a student. Respondent omitted those protections based upon the so-called "ten day rule" set forth in *Goss v. Lopez*, 419 *U.S.* 565 (1975), wherein the Supreme Court mandated due process protection for suspensions in excess of ten days.

Petitioner argues that E.B.'s punishment has been fashioned to circumvent *Goss*. He was given a ten-day suspension, which did not require those protections. Respondent urges that the subsequent 90-day transfer to Eagle Academy was "not punitive," and therefore requires no due process protection. Respondent states that the situation is analogous to someone charged with vehicular homicide who subsequently has his license suspended by the Motor Vehicle Commission. The suspension is a non-punitive result of the offense committed, opines respondent.

The problem with that analogy is that such a person whose driving privileges are suspended is entitled to due process in New Jersey. Such cases are heard here at the Office of Administrative Law.

The unilateral transfer of E.B. to Eagle Academy without any form of due process is troubling. While I make no final determination regarding this issue, I **FIND and CONCLUDE** there exists a reasonable probability petitioner will prevail on the issue of E.B.'s entitlement to due process protection before he can be consigned to Eagle Academy.

Further, for the reasons outlined under Irreparable Harm, *supra*, there appears to be reasonable probability that petitioner will prevail on the issue of the educational appropriateness of the Eagle Academy placement.

Therefore, I **FIND and CONCLUDE** that petitioner has established a reasonable likelihood he will prevail on the legal issues before me.

RELATIVE HARDSHIP

Respondent will suffer no demonstrable irreparable harm if E.B. is reinstated at Egg Harbor Township High School. If I subsequently find for respondent in the case in chief, E.B. can be returned to Eagle Academy to serve out the balance of his placement there. Conversely, if I allow E.B. to remain at Eagle Academy, the duration of this litigation may be such that he will have completed his time there, and the issue will be moot. In such event, E.B. will have been deprived of a semester of high school, a semester which cannot be restored to him.

Accordingly, I **FIND and CONCLUDE** that the balancing of relative hardship weighs in favor of petitioner.

In balance, I **FIND** that petitioner has met the standards imposed by *Crowe v. DeGoia*, *supra*. The deciding factor is the absence of anything in the record tending to show that there exists any educational purpose to the placement of E.B. at Eagle Academy. The New Jersey State Constitution requires that E.B. be provided with a thorough and efficient education. If E.B. is compelled to remain at Eagle Academy for the duration of this case, his education may suffer irreparable harm. Absent countervailing, non-punitive reasons for the placement, it would be inappropriate to risk such harm until this matter has been fully adjudicated.

Accordingly, I **FIND** and **CONCLUDE** that emergent relief should be granted.

OAL DKT. NO. EDU 12159-04

ORDER

I **ORDER** that E.B. be immediately returned to Egg Harbor Township High School until this matter can be fully adjudicated. **A plenary hearing is scheduled for January 26, 2005, at 9:30 a.m.** at the OAL office located at 1601 Atlantic Avenue, Atlantic City, New Jersey.

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

1/12/05
DATE

BRUCE M. GORMAN, ALJ

/sd

DOCUMENTS CONSIDERED

Petition

Amended Petition

Certification of Edwin Bennett, II

Certification of Edwin Gary Bennett, III

Respondent's Answer to Petition

Certifications of Robert Zentmyer and Pat Larkin

Exhibit A – Egg Harbor Township School Policy

Exhibit B – Eagle Academy Application for Operation

Exhibit C – A Guide and Application for the Operation and Approval of Alternative Education Programs

Exhibit D – Resource Manuel for Intervention and Referral Services

AGENCY DKT. NO. 443-12/04

RECORD SEALED

SHAHRYAR SHROFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION ON MOTIONS
RESPONDENT.	:	

This matter was opened by way of a Petition of Appeal and Motion for Emergent Relief, filed on December 21, 2004, wherein petitioner seeks both interim relief and a summary decision vacating the Board's decision to continue his suspension from school as the result of allegations and charges that he assaulted another student on November 4, 2004. (Petition of Appeal at 1 and Motion for Emergent Relief at 1)

Petitioner, an 18-year-old senior at the District's Colonia High School, claims that the Board acted arbitrarily and capriciously in considering allegations against him of criminal restraint and assault of another student, and in determining to suspend him indefinitely. Petitioner argues that: 1) the Board's decision to credit the allegations against him was based solely and exclusively on hearsay; 2) the Board failed to present the testimony of petitioner's accusers, thus depriving petitioner of his rights; 3) the Board drew an improper inference from petitioner's exercise of his Fifth Amendment rights; 4) the Board failed to conduct any study or to present any professional evaluation in considering the punishment to be imposed; and 5) the Board violated its own rules and regulations by holding petitioner's hearing on December 6, 2004, 24 days from the date of petitioner's suspension on November 12, 2004,

rather than within 21 days, as required. (Petition of Appeal at 1-3, Brief in Support of Motion for Emergent Relief at 1-3)

In support thereof, petitioner points out that, at the hearing on December 6, 2004, the Board heard testimony from a single witness in deciding whether to credit the charges, the investigating officer, who testified that he was not present at the scene when the alleged crime occurred, and there was no video or audio tape of the incident. (Brief in Support of Motion for Emergent Relief at 1, 3) Moreover, petitioner was not given the investigating officer's reports in order to cross examine him on what occurred that day. (*Id.* at 5) Notwithstanding that the investigating officer's testimony was based entirely on hearsay, petitioner asserts, the Board decided that petitioner had restrained the boy in question at the high school on November 4, 2004. (*Ibid.*) Additionally, citing from the hearing transcript, petitioner argues that the Board inferred corroboration of its finding that the charges were substantiated from his decision to exercise his Fifth Amendment rights by declining to testify at the hearing due to the pending criminal charges based on this same conduct and his failure to offer evidence on his own behalf. (*Id.* at 5-6)

With respect to the penalty imposed, which petitioner claims is "the education system's functional equivalent of the death penalty—expulsion,"[1] petitioner argues that the principal's recommendation to continue his removal because of major disruptions in the school, was reached without consideration of any study of the impact petitioner would have on the school if he returned, the Board's policies dealing with disciplinary issues, the victim's own situation and the extent of punishment for similar offenses. (*Id.* at 6-7)

[1] It is noted that the principal did not recommend, nor did the Board approve expulsion as a penalty. Instead, the Board determined that "the student will remain on home instruction for the remainder of his senior year, that's (sic) the 2004-2005 school year, will have the opportunity to complete his course work and receive his diploma upon earning the appropriate number of credits." (Petitioner's Exhibit A, Tr. at 98) The Board also stated that "[i]f the parents indicate that there will be no appeal in this matter and that they accept the board's decision, the board will permit S. to walk in the graduation ceremony; that is, participate in the graduation ceremony from Colonia High School in June 2005." (*Id.* at 99)

In its response, filed January 4, 2005, the Board requests that the record in this matter be sealed to protect the identities of student victims, that petitioner's requests for emergent relief and summary decision be denied and that the Commissioner remand this matter to the Board for further hearing or transmit the matter to the Office of Administrative Law (OAL) for a *de novo* hearing on an expedited basis. (Board's Response to Petitioner's Motion for Emergent Relief at 13) The Board avers that, based on information currently available, it appears that, on November 4, 2004, petitioner, in concert with four other student members of the boys' soccer team, participated in attacks that resulted in the forcible restraint and assault of two younger members of their soccer team and the placing of a banana between the buttocks of each victim. (*Id.* at 4) As a result of this incident, petitioner was arrested and incarcerated and was suspended from school effective November 15, 2004. (*Id.* at 3)

The Board further notes that it subsequently scheduled disciplinary hearings for all the students charged by the police for this incident on December 6, 2004, but, because the matter was still being investigated by the Prosecutor's Office and discovery was not yet available, offered to adjourn the hearings. (*Ibid.*) The four charged juvenile students agreed to postpone their hearings, but petitioner "insisted that his hearing go forward, apparently to force the Board to conduct the hearing without the benefit of the aforementioned discovery and the testimony of the minor victims." (*Ibid.*) It is disingenuous, therefore, the Board avers, for petitioner to complain that the testimony offered against him at the hearing on December 6, 2004 consisted of hearsay. (*Id.* at 4) In this regard, the Board contends that it had been advised by the Prosecutor's Office that "the student victims would not be available to testify due to the pendency of juvenile proceedings arising from the incident***." (*Id.* at 4) Thus, the Board asserts, it acted reasonably in cooperating with the Prosecutor's Office by not seeking to require the student victims to testify at petitioner's disciplinary hearing on December 6, 2004. (*Id.* at 3) The Board also explains that it acted on December 6, 2004 with respect to the charge against

petitioner for assaulting only one of the students because information regarding petitioner's participation in the attack on the other student was not available and the investigation was ongoing. (*Id.* at 4) The Board contends that it now has copies of discovery from the Prosecutor's Office that includes, among other things, statements from witnesses, the victims, petitioner and two other students charged in the incidents,[2] and that the victims will be available to testify upon the disposition of the pending juvenile delinquency matters, which is expected to occur January 7, 2005. (*Ibid.*) The Board also asserts that the discovery indicates that petitioner was an active participant in the assault on the other student, an allegation that the Board claims it did not have the opportunity to consider on December 6, 2004. (*Id.* at 7) Accordingly, the Board asks that petitioner's request for emergent relief and summary judgment be denied and that the matter be remanded to the Board for further hearing or transmitted to the OAL for a *de novo* hearing. (*Ibid.*)

With respect to whether petitioner's hearing was conducted in a timely manner, the Board maintains that petitioner's hearing was held within 21 days of his suspension, noting that petitioner did not attend school on November 12, 2004, and that any delay over the weekend between Friday, November 12, when he was notified of the suspension, until Monday, November 15, is *de minimus*. (*Id.* at 12) The Board further asserts that there is a good argument that the hearing could have been held as late as December 9, 2004, the date of the second Board meeting after petitioner's suspension. (*Ibid.*)

On January 5, 2005, petitioner responded to the Board's submission, claiming that the Board "based its response on further 'hearsay' evidence that: 1) was not part of the record below; 2) was never disclosed to Petitioner at any stage of this matter; and 3) was not considered by Respondent when violating petitioner's rights and inflicting the excessive punishment upon

[2] The Board attached Exhibits B-G containing excerpts of statements made to the Middlesex County Prosecutor's Office by student witnesses, the alleged victims, two of the charged juveniles and petitioner. These exhibits and the references thereto in the brief have not been considered in making this determination.

him." (Petitioner's Letter Brief of January 5, 2005 at 1) Petitioner also takes issue with what he claims is the Board's attempt to infer that some type of sexual assault occurred, averring that "[p]etitioner has never been charged by any authority with sexual assault (or any variation of a sex crime) nor have any of the juveniles been fully prosecuted under such laws. (*Id.* at 2) Moreover, petitioner claims that the juvenile cases are nearing conclusion with pleas to *de minimus* offenses and "the only logical inference to be drawn is that the Prosecutor's Office could not sustain more serious charges and saw the incident for what it was, 'kids fooling around in the locker room that allegedly crossed the line, albeit just barely.'" (*Ibid.*) With respect to the Board's assertion that it did not have information with respect to petitioner's alleged participation in the assault on the other student victim at the time of petitioner's hearing, petitioner avers that, at the December 6 hearing the investigating officer testified that he had information linking petitioner to the other student victim which did not rise to such a level to lead him to file a complaint against petitioner with respect to the second victim. (*Id.* at 3) Petitioner further notes that he has not been charged with an assault on the other victim. (*Ibid)*

Additionally, petitioner contends, *inter alia*, that proof problems were never discussed with respect to the hearing date and that the timetable for the hearing was open ended, leaving him to sit on his rights until at least January. (*Ibid.*) Just because he exercised his right to go forward to hearing, petitioner argues, does not mean that he is entitled to less due process. (*Ibid.*) With respect to the Board's claim that the victims will now be free to testify, petitioner points out that the criminal proceedings against him have not yet begun and it is likely that the same reasons that kept the victims from testifying in the juvenile cases will undoubtedly resurface with the adult prosecutor. (*Id.* at 4) Finally, petitioner avers that the Board failed to address the issue raised by him that the unreasonable punishment imposed was not supported by the facts. (*Id.* at 6)

The Board responded by letter brief, dated January 7, 2005, denying petitioner's allegations of impropriety and stating that, despite petitioner's statements to the contrary, the Board did not "attempt to poison the well" in this matter. (Board's Letter Brief of January 7, 2005 at 2) The Board argues that it acted properly in attaching to its brief new information that has since become available from the Prosecutor's Office with respect to the incident that occurred on November 4, 2004, and claims that this new information compels the Board to conduct both further hearings on the initial charges against petitioner and to institute new charges. (*Ibid.*) Moreover, the Board reasons, the Commissioner should have this information in making his determination as to how to proceed in this matter. (*Ibid.*)

With respect to petitioner's assertions that the juvenile cases are being handled lightly by the prosecutor, the Board avers that whether or not this is true is irrelevant to the instant matter and that "[t]he Board has legitimate concerns beyond punishment alone, *e.g.*, the provision of a safe school environment for all of its students." (*Ibid.*) Petitioner further points out that the fact that law enforcement charged petitioner with an assault against only one of the students is of no consequence in this matter as petitioner has been charged with misconduct against one student and new information indicates misconduct toward another. (*Id.* at 3) Finally, the Board takes issue with petitioner's assertion that there is a veiled undercurrent throughout the Board's papers that some type of sexual assault occurred with a banana, averring that the Board has never accused the students of being sexual offenders, but that it disputes petitioner's characterization of this matter as "kids fooling around in a locker room" as "[t]he perpetrators in this matter did, in fact, capture, restrain and commit undignified assaults on their younger schoolmates." (*Ibid.*)

Turning initially to the Board's request that the record be sealed to protect the identity of the minor victims and to prevent access by members of the public to additional facts that would cause these students further embarrassment and deprivations of privacy (Board's

Response to Petitioner's Motion for Emergent Relief at 8), the Commissioner determines, in the absence of objection by petitioner and given the sensitive nature of the incident underlying this dispute, to grant the Board's request to seal the record in this case. Accordingly, the record of this matter is hereby sealed as of the date of this decision.

Secondly, with respect to petitioner's application for emergent relief, as set forth in the State Board regulations found at *N.J.A.C.* 6A:3-1.6, the standard for granting emergent relief is established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Emergent relief is considered an extraordinary remedy and may be granted only where necessary to prevent irreparable harm; where the legal right underlying petitioner'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. *Crowe* at 132-134.

In addressing irreparable harm, petitioner asserts that he has already been harmed because he has missed over thirty days of school and that each day that passes makes it worse. (Petitioner's Brief in Support of Motion for Emergent Relief at 15) Petitioner also claims that he has been unduly punished for an infraction the school has failed to prove, and that, if it occurred at all, it should have been punished by a five-day suspension, if it was petitioner's third offense, and that "[s]uch a grave injustice comes at a time when Petitioner is applying to colleges, seeking scholarships and charting a course for his future." (*Id.* at 16) The petitioner, therefore, claims that he has been, and continues to be, damaged by the arbitrary and capricious decision issued against him. (*Ibid.*)

In response, the Board sets forth its position that petitioner will not suffer irreparable harm if emergent relief is not granted, in that petitioner has been receiving home instruction services since November 19, 2004, and that, at the conclusion of the marking period on January 31, 2005, petitioner will have attained all of the academic credits he needs to graduate in June 2005, with the exception of health, which he can easily complete on home instruction.

(Board's Response to Petitioner's Motion for Emergent Relief at 9) The Board further points out that the social activities petitioner is missing are privileges and that loss of these privileges on a temporary basis does not warrant emergent relief. (*Ibid.*)

Upon a thorough review of the parties' arguments as set forth above, the Commissioner finds that petitioner cannot establish that he will suffer irreparable harm absent the grant of emergent relief. Petitioner is receiving all the educational services to which he is entitled and petitioner's loss of any social activities are privileges to which petitioner has no entitlement. Moreover, the Commissioner cannot conclude that the Board acted arbitrarily and capriciously in continuing petitioner's suspension, given petitioner's decision to go forward with his hearing before discovery was complete and in light of the serious criminal charges filed against him of holding a younger student in a condition of involuntary servitude, specifically by restraining him, in violation of *N.J.S.* 2C:13-2b, and committing assault by attempting to cause bodily injury on that same student by restraining him in violation of *N.J.S.* 2C:12-1a. (Board's Exhibit A, Criminal Complaint, dated November 10, 2004) Notwithstanding petitioner's implication that this incident was "kids fooling around in the locker room that allegedly crossed the line, albeit just barely," and his speculation that "the juvenile cases are nearing conclusion with pleas to *de minimus* offenses" and 'the only logical inference to be drawn is that the Prosecutor's Office could not sustain more serious charges," the Commissioner observes that the serious charges against petitioner in adult court have not yet been resolved.

The Commissioner, therefore, concludes that petitioner has not met his burden of establishing irreparable harm. In that petitioner is required to satisfy all four prongs of *Crowe, supra*, for the grant of emergent relief, and given the conclusion that petitioner has failed to establish irreparable harm, it is not necessary to reach a conclusion as to whether petitioner satisfies the other three prongs of *Crowe* in determining that petitioner's application does not

meet the criteria for the grant of the requested relief. Accordingly, petitioner's application for emergent relief is hereby denied.

Turning to petitioner's request for summary decision, the Commissioner concludes that this matter is not amenable to summary decision at this juncture, given the factual disputes raised and the additional information now available with respect to the incident at issue. Accordingly, petitioner's request for summary decision is denied. Moreover, in light of the additional information that is now available to the parties, the Commissioner has determined to grant the Board's request that the matter be remanded to it for further hearing. The Board is, therefore, directed to conduct further disciplinary hearing(s) with respect to the allegations against petitioner and the penalty, if any, to be imposed, commencing within 15 days of the date of this decision.

The Commissioner does not retain jurisdiction.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/19/05

Date of Mailing: 1/19/05

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

31-05

OAL DKT. NO. EDU 2631-04
AGENCY DKT. NO. 141-4/04

D.B., on behalf of minor child, A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	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.

Upon a careful and independent review of the record in this matter, the Commissioner concurs that the Special Education Settlement attached to the Initial Decision, dated September 29, 2004, fully disposes of this matter as one within the jurisdiction of the Office of Special Education Programs.[1]

Accordingly, the Initial Decision, which finds that this matter does not involve a contested case or controversy within the Commissioner's jurisdiction, is adopted for the reasons expressed therein. The petition in this matter is, therefore, dismissed, with prejudice.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/20/05

Date of Mailing: 1/20/05

[1] The Commissioner notes that the Administrative Law Judge issued a separate decision on December 7, 2004 in the special education matter (Docket No. EDS 2630-04) which had been consolidated with this case at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 2631-04
AGENCY DKT. NO. 141-4/04

DB O/B/O AB,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY.
Respondent

David Rubin, Esq., appearing for petitioner

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

Record Closed: September 29, 2004 Decided: December 7, 2004

BEFORE **ISRAEL D. DUBIN,** ALJ:

STATEMENT OF CASE

This matter seeking reinstatement of certain academic credits denied to a student deemed eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.A.* § 794, was filed with both the Office of Special Education Programs and the Bureau of Controversies and Disputes within the Department of Education. On April 23, 2004, the Commissioner of Education transmitted both filings to the Office of Administrative Law, where

the Special Education matter was assigned OAL Docket No. EDS 2630-04 and the regular education matter was assigned OAL Docket No. EDU 2631-04.

In accordance with 20 *U.S.C.A.* § 1415 and 34 *C.F.R.* §§ 300.500 – 300.587, the Commissioner requested that this matter be assigned to an Administrative Law Judge for hearing as a Special Education petition for emergent relief and request for due process. In so doing, the Commissioner expressly directed that the matter proceed as a regular education matter only if the Administrative Law Judge concluded that the Office of Special Education Programs did not have jurisdiction.

The Director of the Office of Administrative Law assigned this case to me for hearing. *N.J.S.A.* 52:14F-5(o) and oral argument on the petition for emergent relief was scheduled for June 28, 2004. However, oral argument was adjourned at the request of both parties, who indicated that they had reached a tentative settlement based upon the accommodations the student was to have received pursuant to Section 504. They also asked that the matter be held in abeyance while they negotiated the final terms of that settlement.

The parties subsequently finalized the settlement agreement, the terms of which were reduced to writing in the Settlement Agreement and General Release appended to the Decision – Special Education Settlement dated September 29, 2004, a copy of which is attached hereto. The Decision fully disposed of this matter as one within the jurisdiction of the Office of Special Education Programs. Therefore, consistent with the Commissioner's instructions, I **CONCLUDE** that the matter bearing an OAL Docket No. of EDU 2631-04 and Agency Reference No. of 141-4/04 should be dismissed with prejudice as not involving a contested case or controversy within the jurisdiction of the Department of Education. It is so **ORDERED**.

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

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

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

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

December 9, 2004
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

12-16-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

ALJ - 1	Decision – Special Education Settlement with attached Settlement Agreement and General Release

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Release") dated this 12th day of July ~~April~~, 2004 is between

The Petitioner, **D. B. on behalf of her minor child, A.B.**, and

The Respondent, MOORESTOWN TOWNSHIP BOARD OF EDUCATION, **together referred to as the "Parties."**

RECEIVED
2004 JUL 14 A 11: 15
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BACKGROUND

D.B., on behalf of her minor child, A.B. filed two petitions, one for due process seeking relief under §504, as well as a petition of appeal before the Commissioner of Education requesting emergency relief based on the alleged improper actions of Respondent in denying A.B. academic credit. Respondent has denied any improper actions.

A.B. has moved to, and enrolled in, the Haddonfield Public School District, and has expressed her intention not to return to Respondent's district. As a result of her academic ineligibility, A.B. has been unable to play softball for the Haddonfield Public School District. In the interest of avoiding the expense and inconvenience of continued litigation, the parties have determined to amicably resolve their differences as follows:

1. Release: A) Petitioners give up any and all claims and/or rights which Petitioners have or may have against Respondent, which claims were raised or could have been raised in connection with two Petitions entitled D.B. on behalf of her minor child, A.B., Petitioners, v. MOORESTOWN TOWNSHIP BOARD OF EDUCATION, Respondent, one filed in the Office of Special Education, New Jersey, and another, with the identical caption, filed before the Bureau of Controversies and Disputes, ("Petitions").

This Release applies to claims resulting from anything which has happened up to now, as same relate to the claims in the Petitions, and specifically, any and all claims of any kind, whether contractual, common law or statutory, including but not limited to all claims for injunctive relief for alleged discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§794(a), as well as recovery for damages, costs and attorneys fees under the Family Education Rights and Privacy Act, 20 U.S.C. §1232g, et seq., 29 U.S.C. §794(a), 42 U.S.C. §1983, 42 U.S.C. §1988, 29 U.S.C. §705(20), N.J.A.C. 6A:14-3.5, the Individuals with Disabilities In Education Act ("IDEA"), 20 U.S.C. §1400, et seq., and N.J.A.C. 6A:14-3.5 and/or N.J.A.C. 6A:14-3.6, Section 504 of the Rehabilitation Act, 29 U.S.C. §705(8), the Americans

with Disabilities Act, 42 U.S.C. §12132, et seq., the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, et seq., N.J.A.C. 6A:14-1.1, et seq., N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, et seq., the Americans with Disabilities Act, 42 U.S.C. §621, et seq., all as amended, any statutes of New Jersey, including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., or any other claims which have been or could have been asserted by Petitioners or on the behalf of Petitioners in any forum arising out of or connected with A.B.'s education with the Respondent, and from all liability whatsoever with respect thereto, whether known or unknown, and to the extent permitted by applicable law, as of now.

Petitioners specifically, but not by way of limitation, release the following claims: any and all claims for counsel fees and costs arising from or in the course of Petitioners' education by the Respondent as of now.

It is specifically understood that Respondent, by agreeing to this compromise and settlement, in no way admits liability of any kind to Petitioners. Petitioners understand that Respondent has not agreed or promised to do or omit to do any act or thing not contained in this Release.

Petitioners represent that they have not filed, and promise that they will not file, any other Petition, administrative charge or any other claim or complaint relating to Petitioners' education by the Respondent and the claims and/or rights referred to above, and Petitioners agree that any such Petition, charge, claim or complaint, if filed, shall be dismissed immediately with prejudice.

Petitioners represent and acknowledge that in executing this Release, Petitioners do not rely and have not relied upon any representation or statement not set forth herein made by the Respondent or its attorneys with regard to the subject matter, basis or effect of this Release or otherwise.

B) Respondent shall immediately excuse the appropriate absences based on the medical documentation provided to Respondent, and shall restore A..B.'s academic credit for the two courses previously denied credit. A revised transcript restoring the academic credits in question, with raised seal, has been, or promptly will be, issued to Petitioners.

Respondent represents and acknowledges that in executing this Release, Respondent does not rely and has not relied upon any representation or statement not set forth herein made by the

Petitioners or her attorneys with regard to the subject matter, basis or effect of this Release or otherwise.

2. Consideration: Petitioners agree to dismiss the Petitions referred to above with prejudice in return for the restoration of academic credits in accordance with the agreements contained herein. Petitioners agree that they will not seek anything further, including any payment from or on behalf of Respondent, specifically any payment of attorney's fees and costs.

Since A.B. has moved to the Haddonfield Public School District, and in lieu of continuing her education at Respondent, the Moorestown Township School District, and accepting the services and accommodations provided, D.B. and A.B. have withdrawn A.B. from Respondent, the Moorestown Township School District.

D.B., PARENT OF A.B., AND A.B. UNDERSTAND AND ACKNOWLEDGE THAT A.B. IS ENTITLED TO A THOROUGH AND EFFICIENT EDUCATION TO BE PROVIDED BY THE RESPONDENT, PURSUANT TO THE NEW JERSEY CONSTITUTION AND N.J.S.A. 18A:38-1. D.B. AND A.B. ALSO UNDERSTAND AND ACKNOWLEDGE THAT A.B. IS ENTITLED TO SUCH AN EDUCATION BY THE RESPONDENT UNTIL A.B. GRADUATES FROM HIGH SCHOOL OR UNTIL A.B.'S TWENTY FIRST BIRTHDAY, WHICHEVER EVENT COMES FIRST.

Notwithstanding these rights, D.B. and A.B., with full knowledge of these rights, and with a deliberate intent to relinquish and/or surrender these rights, **HEREBY WAIVE SUCH RIGHTS.**

D.B., parent of A.B., and A.B., from and after the date of this Release, agree that A.B. shall no longer be carried on the rolls as a student of the Moorestown Township School District, and shall not be entitled to any further services or accommodations from the Moorestown Township School District; and, D.B. and A.B. hereby release and discharge Respondent from any further responsibility or obligations under previous, temporary §504 plans, agreements, the IDEA or otherwise.

Respondent agrees that A.B.'s student records shall be maintained in accordance with the law, including N.J.A.C. 6:3-6.1 through N.J.A.C. 6:3-6.8, 34 C.F.R. § 99, and 20 U.S.C. § 1232g (Family Educational Rights and Privacy Act of 1974).

3. In the Event of Breach: In the event that Petitioners breach this Agreement, or otherwise seek to bring a claim that is waived and released herein, Respondent will be entitled, without releasing any of its rights hereunder, to obtain all other relief provided by law or equity in addition to the Respondent's attorneys' fees and costs.

In the event the Respondent breaches this Agreement, or otherwise seeks to bring a claim that is waived and released herein, Petitioners will be entitled, without releasing any of their rights hereunder, to obtain any and all relief provided by law or equity, in addition to Petitioners' attorneys' fees and costs.

4. Partial Invalidity/Severability: If any section of this Release should be held invalid by operation of law or by a tribunal of competent jurisdiction, or if compliance with or enforcement of any section is restrained by such tribunal, the application of any and all other sections, other than those which have been held invalid, shall not be affected.

5. Miscellaneous: All executed copies of this Release, and photocopies thereof, shall have the same force and effect and shall be as legally binding and enforceable as the original.

6. Entire Release; Amendments: This is the complete and final Release between the Parties with respect to any subject matter of this Release. No representations, warranties or promises have been made by or to any party to this Release with respect to the subject matter of the Release other than as expressly set forth herein. In deciding whether to enter into this Release, Petitioners are not relying on any promises, statements or representations other than those that are expressly set forth herein. This Release shall not be modified or amended except by a further written Release signed by the Parties.

This Release shall be construed as having been entered into and made in the State of New Jersey and shall be governed by and construed in accordance with the laws of the State of New Jersey.

7. Settlement of Action: In consideration for the promises made by the Parties as set forth in this Release, the Petitioners hereby release and give up any and all claims and rights, known and unknown, as of now, which are related in any way to the subject matter referenced in this Release and in the Petitions filed on behalf of Petitioners, D.B. on behalf of her minor child, A.B., as referenced in paragraph 1 of this Release.

8. Signatures: PETITIONERS, BY SIGNING THIS RELEASE, UNDERSTAND AND INTEND THAT PETITIONERS HAVE WAIVED ALL CLAIMS AGAINST RESPONDENT,

INCLUDING ALL CLAIMS FOR PAYMENT OF ATTORNEYS FEES AND COSTS AND CERTIFY THAT PETITIONERS ENTER INTO THIS RELEASE KNOWINGLY, VOLUNTARILY AND AFTER HAVING CONSULTED WITH AND HAVING THE OPPORTUNITY TO CONSULT WITH PETITIONERS' ATTORNEY AND REVIEW THIS DOCUMENT IN ITS ENTIRETY.

RESPONDENT, BY SIGNING THIS RELEASE, CERTIFIES THAT RESPONDENT ENTERS INTO THIS RELEASE KNOWINGLY, VOLUNTARILY AND AFTER HAVING CONSULTED WITH AND HAVING THE OPPORTUNITY TO CONSULT WITH RESPONDENT'S ATTORNEYS AND REVIEW THIS DOCUMENT IN ITS ENTIRETY.

Witnessed or Attested by:

DEBORAH BEIDEMAN

ASHLEY BEIDEMAN

Witnessed or Attested by:

DAVID B. RUBIN, ESQUIRE

Witnessed or Attested by:

MOORESTOWN TOWNSHIP BOARD OF EDUCATION

By:

Witnessed or Attested by:

ARCHER & GREINER
A Professional Corporation

By:
SUSAN S. HODGES, ESQUIRE

1332159v1

34-05

#34-05

OAL DKT. NO. EDU 5965-04
AGENCY DKT. NO. 143-4/04

ANNE MARIE ABERCROMBIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4. The Board did not file reply exceptions.

Petitioner's exceptions reiterate her argument advanced below, *i.e.*, the letter she received from the district on June 7, 1999 only denied her workers compensation benefits and did not address or operate to deny sick leave benefits, pursuant to *N.J.S.A.* 18A:30-2.1, which she, at that point in time, had never requested. Petitioner, therefore, urges reversal of the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that, pursuant to *Verneret v. BOE Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134, petitioner's claim for benefits under *N.J.S.A.* 18A:30-2.1 is untimely since it was not filed within the 90 days prescribed by *N.J.A.C.* 6A:3-1.3(d)(1). The Commissioner further finds that the record before him reveals no unusual or compelling circumstance which would warrant the relaxation of the 90-day rule, and, therefore, as concluded by the ALJ, the instant petition of appeal must be dismissed.

It is noted that in *Verneret* the State Board was clear in its holding that, even if an alleged work-related injury is also the subject of a workers' compensation action, an individual

seeking to claim benefits under *N.J.S.A.* 18A:30-2.1 must file a petition before the Commissioner of Education within 90 days of the district board's action that has the effect of denying benefits to petitioner. It further held that strict adherence to this regulatory timeline was required even if the Commissioner chose to defer exercise of his jurisdiction to hear the school law claim until the conclusion of the workers' compensation case. Here, the action of respondent which operated to trigger the running of the 90-day timeline of *N.J.A.C.* 6A:3-1.3(d)(1) was when petitioner received notice, in June 1999, that her absences on the dates at issue would be treated as ones due to personal illness, rather than work-related illness, and these days were deducted from petitioner's accumulated sick leave bank. Contrary to the position espoused by petitioner, the fact that she did not specifically apply to the Board for benefits pursuant to *N.J.S.A.* 18A:30-2.1 in 1999 is of no moment. The very nature of the Board's determination and action at this time served to advise her unequivocally that *any* claim she might have based on an allegation of a work-related injury was being denied. Consequently, there can be no question that the instant petition, filed in April 2004, some five years after petitioner's receipt of the June 7, 1999 notice from the Board, was time-barred pursuant to *N.J.A.C.* 6A:3-1.3(d)(1).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein, as clarified above, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/20/05

Date of Mailing: 1/20/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5965-04
AGENCY DKT. NO. 143-4/04

ANNE MARIE ABERCROMBIE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

David Conti, Jr., Esq., for petitioner
(Butler & Gonzalez, attorneys)

Vincent Jesuele, Esq., for respondent
(Kessler, DiGiovanni & Jesuele, attorneys)

Record Closed: November 22, 2004 Decided: December 15, 2004

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education, Bureau of Controversies and Disputes, on June 23, 2004, following the filing of a Verified Petition by Anne Marie Abercrombie on April 4, 2004, challenging respondent's determination to charge her sick days for a work related injury. According to Abercrombie, this action constituted a violation of *N.J.S.A.* 18A:30-2.1.

Following receipt of the Answer, the Director, Bureau of Controversies and Disputes, wrote to counsel to request that petitioner submit a letter indicating why the matter should not be dismissed as "untimely" under the State Board's decision in *Verneret v. BOE Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134. Respondent was provided ten days to file a response.

Thereafter, memoranda were submitted by both sides and were included in the file transmitted to the OAL. Thus, the issue to be determined, preliminarily, is whether under the "90 Day Rule" (*N.J.A.C.* 6A:3-1.3(d)(1)) the Petition was untimely filed and should be dismissed.

In late July 2004, I wrote to counsel noting the pendency of the motion and advising them to let me know whether they intended to submit any additional or supplemental legal memoranda. In reply, counsel for petitioner resubmitted the memorandum he had sent to Director Duncan concerning the *Verneret* decision. No further submission was received from counsel for the Board.

Finally, by letter dated November 22, 2004, counsel for the Board wrote to advise me that he had provided counsel for petitioner with additional documentation concerning the events surrounding the notice given to petitioner with respect to denial of her claims for benefits, and reiterating the Board's position that her claims were time-barred. Counsel also provided a follow-up letter to the undersigned informing me that since the New Jersey Superior Court, Appellate Division, recently had affirmed a worker's compensation judgment on behalf of the petitioner, there was no issue before me related to whether petitioner's condition was work-related. However, he reiterated that with regard to sick leave injury benefits claimed in the Petition, as was previously argued they were time-barred. The recent decision to which counsel referred, Superior Court, Appellate Division, Docket No. 39-2-8387 (decided November 16, 2004) affirmed that Abercrombie was entitled to the award of partial total pulmonary disability, temporary disability benefits and that a penalty should be assessed against the Board for its delay in paying temporary benefits to her.

DISCUSSION

In the Verified Petition filed by Abercrombie in April 2004, she alleged that after approximately fourteen years of employment by the Board as a teacher, she began to develop disturbing pulmonary symptoms, including difficulty in breathing, a rash, swelling, chest pains and sinus problems, all of which she attributed to the presence of mold. On January 12, 1999, she had been diagnosed with allergic rhinitis and sinusitis and requested a transfer to another school building. That transfer request was denied and she was also advised by the Board's Worker's Compensation Administrator that her claim for worker's compensation benefits also were denied. Thereafter, according to the petition, petitioner was treated by her own doctor, retained an attorney and brought the action which culminated in a decision in the Division of Worker's Compensation in January 2004 determining that her illness arose out of and in the course of her employment with respondent. Thus, she was awarded temporary disability and partial total disability payments, as well as the penalty which the Appellate Division very recently affirmed.

Previously, in a letter dated January 21, 2004, Abercrombie's attorney submitted a claim to respondent on her behalf for sick leave injury benefits under N.J.S.A. 18A:30-2.1 based upon the Worker's Compensation finding that her illness was work-related and stating that she was forced to use 59 and 1/2 sick days during the time of her absence. By letter dated March 31, 2004, her request was denied. Thus, in the Petition filed in April 2004, she asks the Commissioner to order payment of sick leave injury benefits for a period of one year pursuant to *N.J.S.A.* 18A:30-2.1, and to order restoration of her 59 and 1/2 sick days, together with attorney fees.

In its Answer, the Board admitted most of the underlying background circumstances, but pointed out that in a letter sent to Abercrombie dated June 7, 1999 (which was attached to the Petition), there had been a final action denying her claim. That June 7, 1999 letter was sent to Abercrombie by David W. Russo, Claims Adjuster, and advised that her claim was denied under *N.J.S.A.* 34:15-7 and no further benefits of any kind would be paid to her. According to the Board, the Russo letter clearly constituted final notice to petitioner by the Board of a denial of <u>any sick leave related claim</u> and immediately triggered the 90 Day Rule for a petition of appeal to be filed. Thus,

the Board argues that any petition filed after September 7, 1999, was out of time. For the following reasons, I agree.

In the *Verneret,* case, *supra*, the Commissioner held, and the State Board affirmed, that the filing of a worker's compensation claim does not "toll" the obligation of a teaching staff member seeking sick leave benefits under Title 18A to file a petition with the agency within the regulatory timeline of 90 days. As noted, Abercrombie was made aware in June 1999 that her benefits request had been denied, yet it was not until nearly five years later (April 2004) that she filed the instant petition. Thus, Board counsel points out that if Abercrombie's position is sustained, all an employee has to do to avoid the impact of *Verneret* and other cases is simply to refrain from making a claim for benefits for as long as he or she wants to, so long as it is not so untimely delayed as to raise the possibility of a "laches" defense. Thus, when she was advised in June 1999 of the benefits' denial, Abercrombie clearly was put on notice that the Board's action was final and from that point she had an obligation to file with the Commissioner within 90 days.

In the memorandum to Director Duncan, counsel for Abercrombie argued that *Verneret* should not apply since petitioner did not specifically mention "sick leave injury benefits" in her request in January 1999, nor did Russo's denial letter specifically refer to that subject, as such. I disagree with this interpretation. Realistically, there is no doubt that Abercrombie requested the statutory benefits which she now seeks and she was notified in plain and unmistakable terms that they were denied. *Verneret* is not distinguishable simply because the board there had begun to pay sick leave injury benefits and only later determined they should be stopped. The fact that no benefits were paid to Abercrombie is irrelevant - the critical factor is the adequacy of the notification she received that they would not be paid. That denial, contrary to counsel's assertion in his memorandum, was not "vague" and contrary to counsel's claim, the Board's reliance upon *Verneret* and other cases does not constitute "legal gymnastics". In 1999 petitioner requested that she receive benefits to which she believed she was entitled, including sick leave injury benefits. In June 1999 her request was denied and she never pursued the issue until 2004. To allow Abercrombie to wait nearly five years before filing a petition raising a claim for sick leave injury benefits under Title 18A is not tolerable.

Indeed, what Abercrombie is attempting to do is precisely what I determined was no longer appropriate in an initial decision which I issued in 1996 in *Mederios v. State-Operated School District of Jersey City, Hudson County*, 97 *N.J.A.R.* 2d (EDU) 276. In that case I noted that the *Verneret* decision clarified some arguably existing confusion by holding that even if an alleged work-related injury also is the subject of a worker's compensation petition, any school law claim under *N.J.S.A.* 18A:30-2.1 must still be filed within ninety days of the Board's denial under the predecessor 90-Day Rule (*N.J.A.C.* 6:24-1.2(c)). I also went on to note in *Mederios* that although previous school law decisions apparently had been construed by some to mean that a companion Title 18A claim need not be filed until after the Worker's Compensation case was decided,* *Verneret* put that notion firmly to rest.

Clearly then, under the circumstances in this case, the exchange of correspondence between Abercrombie and Russo in 1999 constituted adequate final notice to her of the denial of any claim she might have for sick leave injury benefits and absent compelling reasons to relax the "90 Day Rule", under the decisions in *Verneret*, *Mederios* and other cases cited by counsel, her Verified Petition must be **DISMISSED** as untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(d)(1).

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

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

---

*Also involved in *Mederios*, supra, was the issue of prospective vs. retroactive application of the State Board decision in *Verneret*. That issue, of course, does not exist here. Nor has petitioner raised any issue of "relaxation" in the event the regulatory limitations period applies.

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

December 15, 2004 — Stephen Weiss

DATE — **STEPHEN G. WEISS**, ALJ

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

December 15, 2004

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 16 2004

DATE — OFFICE OF ADMINISTRATIVE LAW

/mvh

37-05

37-05

OAL DKT. NO. EDU 6452-04
(ON REMAND EDU 6437-02)
AGENCY DKT. NO. 246-8/02

BRENDA STITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter, the proposed settlement agreement ("Separation Agreement/Release") as revised on remand, and the Initial Decision on Remand issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/05

Date of Mailing: 1/26/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT -
ON REMAND
OAL DKT. NO. EDU 6452-04
AGENCY DKT. NO. 246-8/02

BRENDA STITH,
Petitioner,
v.
CITY OF PERTH AMBOY
BOARD OF EDUCATION,
Respondent.

Emanuel S. Fish, Esq., appearing for petitioner

Philip E. Stern, Esq., appearing for respondent, (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: December 3, 2004 Decided: December 15, 2004

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 12, 2002 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Upon receipt, the matter was assigned OAL Docket No. 6437-02. The hearing was scheduled for and commenced on May 16, 2003. However, the parties subsequently met and negotiated a "SEPARATION AGREEMENT/RELEASE" that obviated the necessity of completing the hearing.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

By Initial Decision – Settlement dated July 1, 2004, I found that the parties had voluntarily agreed to the settlement as had been evidenced by their signatures and/or representatives' signatures and that the settlement fully disposed of all issues in controversy and was consistent with the law. Consequently, I concluded that the agreement met the requirements of *N.J.A.C.* 1:1-19.1, approved the settlement, ordered the parties to comply with the terms of the settlement, and closed the file in this matter.

By Decision dated August 5, 2004, the Commissioner of Education found that the President of the City of Perth Amboy Board of Education had signed the "Separation Agreement/Release." However, he also found that neither the file nor the settlement agreement contained a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf. Since the agreement had not been signed by the Board attorney either, the Commissioner concluded that he could not approve it and ordered the matter remanded to the OAL for revision of the agreement.

Under cover letter of December 1, 2004, the Board's attorney submitted a copy of the Minutes for the March 31, 2004 Board of Education meeting in which the Board accepted petitioner's resignation effective July 1, 2004, "for the purpose of retirement," as well as a revised copy of the "SEPARATION AGREEMENT/RELEASE" signed by him. Since the agreement has now been signed by Philip E. Stern, Esq., the Board's counsel and duly authorized representative in this litigation, I **CONCLUDE** that it fully conforms with the requirements of *N.J.A.C.* 1:1-19.1 and should be approved.

Accordingly, it is **ORDERED** that the parties comply with the terms of the "SEPARATION AGREEMENT/RELEASE" and that these proceedings be and are hereby concluded.

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

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

December 16, 2004
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

Dec 23 2004
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 "SEPARATION AGREEMENT/RELEASE," as revised

J-2 Minutes, Board of Education Meeting, March 31, 2004

13. **Recommendations of the Superintendent of Schools** (continued)

C. **Buildings and Grounds Committee – Mr. Steve Jobin, Chairperson**

9). Approval for the Raritan Bay Area Y.M.C.A. to conduct an After-School Childcare Program at the E.J. Patten School from September, 2004 through June, 2005, subject to compliance with Board requirements.

Jobin Motion | Pabon Seconded | CARRIED UNANIMOUSLY

13. **Recommendations of the Superintendent of Schools**

D. **Personnel Committee – Mr. Raymond Geneske, Chairperson**

Note: All appointments of district staff are contingent upon satisfying the requirements of the New Jersey Criminal History Background Check Status.

1). Acceptance of the following resignations:

a). Claire Tauber, Office Manager, Board of Education Office, effective July 1, 2004, for the purpose of retirement.

b). Wanda Mastropietro, Reading Specialist, Flynn School, effective July 1, 2004, for the purpose of retirement.

c). Brenda Stith, Science Teacher, Perth Amboy High School, effective July 1, 2004, for the purpose of retirement. Contingent upon execution of Separation Agreement.

d). Shirley Totin, Teacher, Flynn School, effective July 1, 2004.

e). Theresa Triolo, Guidance Counselor, Flynn School, effective July 1, 2004, for the purpose of retirement.

f). Antoinette Ward, Teacher, Shull School, effective July 1, 2004, for the purpose of retirement.

g). Haydee Bermudez, Para-professional, St. Mary's Early Childhood Center, effective July 1, 2004, for the purpose of retirement.

h). Marie Bruckman, Lunch Aide, R.N. Wilentz School, effective July 1, 2004, for the purpose of retirement.

Geneske Motion | Gonzalez Seconded | CARRIED UNANIMOUSLY

2). Termination of the employment of Barbara Still, Lunch Aide, A.V. Ceres School, effective March 15, 2004.

Geneske Motion | Gonzalez Seconded | CARRIED UNANIMOUSLY

3). Approval of a request from Debra A. Guarrera, Teacher, R.N. Wilentz

SEPARATION AGREEMENT/RELEASE

RECEIVED
2004 JUN 18 P 12: 08
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Separation Agreement and Release ("Separation Agreement") is made this day of March, 2004 by and between Brenda Stith ("Ms. Stith"), and the Board of Education of the City of Perth Amboy ("Board").

RECITALS

WHEREAS, Ms. Stith is an employee of the Board, serving as a tenured teaching staff member; and

WHEREAS, the Board and Ms. Stith have concluded that, effective at the close of business on June 30, 2004, Ms. Stith shall retire and/or resign from employment with the Board; and

WHEREAS, the Board and Ms. Stith desire to resolve amicably and in good faith all matters and issues arising out of Ms. Stith's employment relationship with the Board;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Stith and the Board agree as follows:

ARTICLE I
Retirement and/or Resignation and Release

1. Retirement and/or Resignation From Employment – Ms. Stith and the Board hereby agree that, effective at the close of business on June 30, 2004, Ms. Stith shall retire and/or resign from her employment with the Board.

2. Mutual Releases – In return for their obligations pursuant to this Separation Agreement, Ms. Stith and the Board hereby release and discharge each other as well as any and all of their former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which they may have had, now as or may hereafter have for any reason whatsoever on account or arising out of or in consequence of their employment relationship, including, but not limited to:

A. Any pending litigation, including, but not limited to Brenda Stith v. Perth Amboy Board of Education, Office of Administrative Law Docket Number EDUOR 06437-02s, Agency Reference Number 246-8/02, which the parties agree

will be withdrawn and dismissed, with prejudice upon execution of this Agreement..

B. Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Public Employee Relations Act the Employee Retirement Income Security Act, the Older Worker's Benefit Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977; the Education Laws and Regulations;

C. Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

D. Any claims arising out the terms and conditions of Ms. Stith's employment with the Board, Ms. Stith's retirement and/or resignation from such employment, and/or any of the events relating directly or indirectly to or surrounding that retirement and/or resignation;

E. Any and all claims related to compensation of any kind, except as set forth in this Separation Agreement;

F. Any and all claims for damages of any kind;

G. Any and all claims arising out of the execution of this Separation Agreement;

H. Any and all claims for attorney's fees, costs, disbursements or the like

which they ever had, or have or hereafter can, shall or may have against each other for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Separation Agreement.

Ms. Stith does not waive or release her right to seek indemnity pursuant to NJSA 18A:16-6 and/or NJSA 18A:16-6.1 in the event of a claim or accusation by a third party. Nothing in this release shall be construed as waiving or releasing the Board's right to assert any defenses it may have to such a claim or indemnity.

ARTICLE II
Terms of Settlement

2.1 Retirement and/or Resignation - Simultaneously upon the execution of this Separation Agreement, Ms. Stith shall submit an irrevocable letter of retirement and/or resignation, effective at the close of business on June 30, 2004.

2.2 Consideration - As consideration for Ms. Stith's retirement and/or resignation and Release as set forth herein, the Board agrees to the following:

a.) Contemporaneously upon the signing of this Agreement, the Board shall reinstate Ms. Stith's salary increment which was withheld for the 2002-2003 school year. Within thirty (30) days of the signing of this Agreement, the Board shall pay Ms. Stith the sum of one thousand eight hundred fifty ($1,850.00), representing the amount lost as a result of the increment withholding set forth above.

b.) Upon Ms. Stith's retirement and/or resignation from the Board, Ms. Stith shall receive all benefits and emoluments due her pursuant to the Collective Bargaining Agreement between the Board and the Perth Amboy Federation/AFT Local 857, AFT, NJSFT, AFL-CIO.

c.) The Board will expunge and remove from Ms. Stith's personnel file and its records any alleged incidents where she has been accused or charged with improper distribution of student grades.

d.) The Board will expunge and remove from Ms. Stith's personnel file and its records any references to the disciplinary charge and decision to withhold her increment raise for the 2002-2003 school year.

e.) As consideration for the above, the Board shall pay Mr. Stith the additional sum of twenty thousand ($20,000.00) dollars within thirty

(30) days following her retirement and/or resignation from the Board on June 30, 2004.

f.) The Board shall furnish Ms. Stith with a letter of recommendation.

Ms. Stith expressly acknowledges and represents that she will neither seek nor be entitled to any further consideration from the Board in connection with this Separation Agreement other than the consideration as detailed in this subsection.

ARTICLE III
Miscellaneous

3.1. Entire Agreement – This Separation Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Separation Agreement. No condition or provision of this Separation Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Separation Agreement.

3.2. No Admissions – Nothing contained in this Separation Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.3 Binding Effect – This Separation Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 Governing Law and Choice of Forum – This Separation Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 Captions – The captions set forth in this Separation Agreement are intended solely for the parties' convenience and ease of reference and are not intended to

modify, limit, describe or affect in any way the scope, content or intent or this Separation Agreement.

3.6 Signature in Counterpart – This Separation Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.7 Authorization – The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Separation Agreement on the Board's behalf.

3.8 Acknowledgments – The parties to this Separation Agreement acknowledge and agree that they have entered into this Separation Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Separation Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Separation Agreement.

2.9 Construction and Enforcement – The terms of this Separation Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Separation Agreement to be drafted.

3.10 Confidentiality -- The parties agree, with respect to the confidentiality of this Agreement, to the extent permitted by applicable law and regulation, not to disclose or cause to be disclosed to, directly or indirectly, any person the existence of or terms of this Agreement.

3.11 **BY SIGNING THIS SEPARATION AGREEMENT MS. STITH STATES THAT:**

A. SHE HAS READ IT;

B. SHE UNDERSTANDS IT AND KNOWS THAT SHE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT NOT LIMITED TO, RIGHTS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE TENURE LAWS SET FORTH IN TITLE 18A OF NEW JERSEY STATUTES, THE NEW JERSEY FAMILY LEAVE ACT, THE PUBLIC EMPLOYEE RELATIONS ACT, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE CIVIL RIGHTS ACT OF 1964, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AND ANY OTHER CONSTITUTIONAL STATUTORY OR COMMON LAW CLAIM AS MORE FULLY SET FORTH IN PARAGRAPHS 1 and 2 HEREIN ABOVE;

C. SHE AGREES WITH EVERYTHING IN IT;

D. SHE HAS HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL OF HER CHOOSING;

E. SHE HAS SIGNED THIS SEPARATION AGREEMENT KNOWINGLY AND VOLUNTARILY, AND WITHOUT COERCION;

F. **SHE HAS BEEN GIVEN AT LEAST 21 DAYS IN WHICH TO CONSIDER WHETHER TO SIGN THIS SEPARATION AGREEMENT, AND ACKNOWLEDGES THAT SHE HAS AN ADDITIONAL 7 DAYS FOLLOWING THE DATE ON WHICH SHE SIGNS THIS SEPARATION AGREEMENT TO RENUNCIATE IT, AND THAT THE SEPARATION AGREEMENT WILL NOT BE EFFECTIVE UNTIL AFTER THE 7 DAY PERIOD HAS LAPSED.**

IN WITNESS WHEREOF, the parties have executed this Separation Agreement on the date above written.

Brenda Stith 3/23/04
BRENDA STITH

Witnessed this 23d Day of March 2004 as to Brenda Stith
Emanuel S. Fish
An Attorney At Law of N.J.

CITY OF PERTH AMBOY BOARD OF EDUCATION

AUSTIN GUMBS, PRESIDENT

Philip E. Stern, Esq.
Board Attorney

SILLS CUMMIS EPSTEIN & GROSS
A PROFESSIONAL CORPORATION

The Legal Center
One Riverfront Plaza
Newark, New Jersey 07102-5400
Tel: 973-643-7000
Fax: 973-643-6500

RECEIVED
2004 DEC -3 A 11:52
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Philip Edward Stern
Of Counsel
Direct Dial: (973) 643-5688
E-mail: pstern@sillscummis.com

30 Rockefeller Plaza
New York, NY 10022
Tel: 212-643-7000
Fax: 212-643-6550

One Market
San Francisco, CA 94105
Tel: 415-643-7000
Fax: 415-643-6500

December 1, 2004

VIA TELEFAX and REGULAR MAIL
The Honorable Israel D. Dubin, A.L.J.
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza,
Quakerbridge Road
PO BOX 049
Mercerville, NJ 08625 0049

Re: Brenda Stith v. City of Perth Amboy Board of Education,
Middlesex County
OAL Docket No.: EDU-OR 06437-02S
Agency Ref. No.: 246-8/02

Dear Judge Dubin:

As you are aware, we are the attorneys for the Perth Amboy Board of Education ("Board") in the above-referenced matter. Pursuant to the August 5, 2004, Commissioner's Decision, please find enclosed the minutes of the March 31, 2004, meeting of the Board, in which the Board authorized execution of the settlement agreement in this case.

As Your Honor will see from the enclosed Board minutes, the Board unanimously passed the following:

"1). Acceptance of the following resignations:

c). Brenda Stith, Science Teacher, Perth Amboy High School, effective July 1, 2004, for the purpose of retirement. **Contingent upon execution of Separation Agreement.**

Geneske	Gonzalez	
Motion	Seconded	CARRIED UNANIMOUSLY

Board Minutes of March 31, 2004 (emphasis added).

On behalf of the Board, I trust that the attached minutes will satisfy the Commissioner's requirement for "a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf."

Moreover, the undersigned has also executed the settlement agreement, an original of which is attached hereto for Your Honor's reference.

Please let me know if I can be of any further assistance to Your Honor in finally resolving this matter. Best wishes for a healthy and happy holiday season.

Respectfully submitted,

PHILIP E. STERN

PES/vd
cc: Mr. Emmanuel Fish, Esq. (via facsimile & regular mail)
Mr. William Stratton (via facsimile & regular mail)

44-05

OAL DKT. NO. EDU 5907-04
AGENCY DKT. NO. 100-3/04

D.S., on behalf of minor child, T.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on January 4, 2005, providing petitioner ten (10) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/05

Date of Mailing: 1/31/05

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

45-05

OAL DKT. NO. EDU 6665-04
AGENCY DKT. NO. 253-7/04

STEPHEN J. BLEISTINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
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 is unable to approve settlement of this matter at the present time. Notwithstanding that the Stipulation was signed by counsel for both parties, one of its terms (Paragraph 18) expressly states that "[t]his Stipulation must be approved by the Board by resolution prior to being effective and final." Because the record contains no indication whatsoever that such approval actually occurred, and because acceptance by the Commissioner would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d), the Commissioner must ensure that the Board has, in fact, approved the settlement prior to his own acceptance of it.

Accordingly, this matter is remanded to the OAL for appropriate Board action, or supplementation of the record, as the case may be, in light of this decision. Should the parties be unable to reach agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/1/05
Date of Mailing: 2/1/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6665-04

AGENCY DKT. NO. 253-7/04

STEPHEN J. BLEISTINE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BLACKHORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

John D. Wade, Esq., for respondent

Record Closed: January 4, 2005 Decided: January 5, 2005

BEFORE **JAMES W. FAISON, III**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 20, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

1-5-05
DATE

JAMES W. FAISON, III, ALJ

Receipt Acknowledged:

Jan 7, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
2005 JAN -4 P 4:54
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, STEPHEN J. BLEISTINE

STEPHEN J. BLEISTINE, Petitioner, v. BLACKHORSE PIKE REGIONAL SCHOOL DISTRICT Respondent.	BEFORE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDU-06665-2004S Agency Ref. No.: 253-7/04 CIVIL ACTION STIPULATION OF SETTLEMENT

The Blackhorse Pike Regional School District, hereinafter referred to as "Board," with offices located at 580 Erial Road, Blackwood, New Jersey 08012, represented by John D. Wade Esq., at 1250 Chews Landing Road, Laurel Springs, New Jersey 08021 and Stephen J. Bleistine, hereinafter referred to as Mr. Bleistine, whose residence is located at 4 Greenbriar Road, Mullica Hill, New Jersey 08062, represented by Robert M. Schwartz, Esq. with offices located at 12 Centre Drive, Monroe Township, New Jersey 08831, by way of this Stipulation of Agreement say:

WHEREAS, on or about July 23, 2004 Mr. Bleistine initiated a contested case in the Office of Administrative Law with the filing of a Petition of Appeal challenging the Board's withholding of increment for the 2004-2005 school term, which took affect on July 1, 2004, and

WHEREAS, the outcome of this matter is uncertain, and

WHEREAS, both parties are expected to incur further extensive litigation, and

WHEREAS, both parties believe that an amicable settlement is in their respective best interests,

NOW, THEREFORE, in consideration of the agreements and covenants and conditions contained herein, the adequacy and sufficiency of which is hereby expressed and acknowledged by the parties hereto, the parties agree as follows:

1. Mr. Bleistine shall withdraw his petition of appeal contesting the Board's increment withholding for the 2004-2005 school term.

2. Mr. Bleistine shall forward to the Board a letter of resignation to be made effective at the end of the day on June 30, 2005.

3. In consideration therefore, the Board agrees to immediately reinstate Mr. Bleistine's employment and adjustment increment, consisting of $4,500.00, retroactive to July 1, 2004.

4. Commencing on September 7, 2004 Mr. Bleistine shall begin a medical leave of absence. In this regard, Mr. Bleistine shall provide to the Board a physician's note explaining the need for the medical leave of absence, and by execution of this Agreement, upon receipt of a physician's note requesting same, the Board agrees to provide Mr. Bleistine the requested medical leave of absence.

5. For the balance of the 2004-2005 school term, commencing on or about September 7th, 2004 through June 30, 2005, Mr. Bleistine shall remain on a medical leave of absence during which time he shall receive his full

compensation, inclusive of the increment withheld by the Board for the 2004-2005 school term, together with all benefits and emoluments he is entitled to in accordance with his contract and collective bargaining agreement, with the exception of vacation days, sick days and personal days,

6. In the event that Mr. Bleistine obtains other employment with another school district requiring his release of employment with the Board, the Board agrees to provide such release of employment, which shall result in a commensurate modificat n of his termination date of June 30 with any balance of his salary compensation to be paid by the Board in no more than two installments, the last installment of which to be paid no later than August 1, 2005.

7. The Board further agrees that if any prospective employee requests a reference from the Board, or from any agent of the Board, it will provide a reference for and on behalf of Mr. Bleistine, in accordance with the central office policy which is to provide the date(s) of employment, position held, certificate required and the salary paid. In no event shall the Board, or any of its agents, transmit or communicate in any way whatsoever a negative reference of Mr. Bleistine, the commission of which shall be a material breach of this Agreement. Agents of the Board shall mean the/a person acting in an official capacity sanctioned by the Board to give references to prospective employers.

8. In consideration of the benefits and payments made pursuant to this Agreement, Mr. Bleistine, personally and for his estate and/or his heirs, and the Board, on behalf of its collective officials, agents, administrators, employees and representatives, each waive, release and give up any and all claims, demands,

obligations, damages, liabilities, causes of action and rights in law or in equity, known or unknown, each may have against the, based upon any act, event or omission occurring before the execution of this stipulation, including, but not limited to any events related to, arising from or in connection with Mr. Bleistine's employment and/or association with any of the parties subject to this release. Specifically, as to the release to the Board by Mr. Bleistine it shall include the Board's agents, employees, and officers, in their official capacity and in their individual capacity.

9. It is expressly understood that neither the execution of this stipulation, nor any other action taken in connection with the release provided by both parties and this settlement agreement constitutes an admission.

10. This stipulation contains the sole and entire agreement among the parties hereto, and fully supercedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding, unless in writing, signed by the parties hereto and expressly stated to represent an amendment to this stipulation.

11. This stipulation shall be governed by and be construed in accordance with the laws of the State of New Jersey.

12. This stipulation may be executed in counter parts. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey, venued in Camden County.

13. Mr. Bleistine and the Board acknowledge that they have been represented by and have consulted with counsel throughout the negotiations of the terms of this Stipulation and that they have each have reviewed the Stipulation in detail with their respective counsel and that they each fully understand its requirements and limitations.

14. Mr. Bleistine hereby states that he is signing this Stipulation voluntarily, of his own free will, and not under duress or coercion of any kind. Mr. Bleistine also states that he is satisfied with the representation provided by his counsel.

15. This Stipulation shall be construed fairly and according to the plain language of its terms.

16. If its determined that a specific clause(s) of this Stipulation is/are illegal under Federal or State Law, then the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

17. This Stipulation and each of its provision binds the parties to this Stipulation. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns also are bound. This Stipulation is made for the benefit of all parties hereto and all who may succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

18. This Stipulation must be approved by the Board by resolution prior to being effective and final.

IN WITNESS WHEREOF, the parties hereto set their hands to the Stipulation as follows:

October 1, 2004 — Stephen J. Bleistine
WITNESS DATE STEPHEN J. BLEISTINE

October 18, 2004 — [signature]
WITNESS DATE BOARD OF EDUCATION

The below signed attorneys of record hereby Stipulate and Agree to the Settlement of the above matter without attorney's fees or costs.

[signature]
ROBERT M. SCHWARTZ

[signature]
JOHN D. WADE, ESQ.

OAL DKT. NOS. EDU 1354-03 AND EDU 5753-04 (ON REMAND)
AGENCY DKT. NO. 385-11/02

CAROL GOTTLIEB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/1/05

Date of Mailing: 2/1/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1354-03
AGENCY DKT. NO.: 385-11/02
(REMAND)

OAL DKT. NO. EDU 5753-04
AGENCY DKT. NO.: 385-11/04

CAROL GOTTLIEB,

Petitioner,

v.

WOOD-RIDGE BOARD OF EDUCATION,

Respondent.

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

Mark T. Janeczko, Esq., for respondent
(Mark T. Janeczko, attorney)

Record Closed: December 29, 2004 Decided: December 30, 2004

BEFORE **MUMTAZ BARI BROWN**, ALJ:

On June 17, 2004, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*

52:14F1 to -13. The matter was scheduled for hearing on February 1, 2005. Prior to hearing, the parties agreed to settle the matter. A Stipulation of Settlement indicating the terms of settlement was signed by the parties and a copy is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 30, 2004
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

Jan 7, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cdr

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 DEC 29 A 11:29

MARK T. JANECZKO, ESQ.
109 HACKENSACK STREET, WOOD-RIDGE, NEW JERSEY, 07075
(201)939-8800
COUNSEL FOR RESPONDENT

CAROL GOTTLIEB,	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF
Petitioner,	ADMINISTRATIVE LAW
vs.	AGENCY REF. NO. 385-11/02
	OAL DKT. NO. EDU 1354-03N
WOOD-RIDGE BOARD OF EDUCATION,	
Respondent.	STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between the petitioner, Carol Gottlieb (hereinafter 'Ms. Gottlieb") residing at 245 Rock Avenue, Park Ridge, New Jersey 07656, and the Wood-Ridge Board of Education (hereinafter "the Board"), with its offices located at 89 Hackensack Street, Wood-Ridge, New Jersey 07075. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Gottlieb has been employed by the Board since September 1, 1996; and,

WHEREAS, Ms. Gottlieb gained tenure as the result of her employment with the Board; and

WHEREAS, Ms. Gottlieb filed a verified petition with the Commissioner of Education alleging that the Board's assignment of English as a Second Language ("E.S.L.") instructional classes to her for the 2002-2003 school year violated her tenure rights as a guidance counselor; and

WHEREAS, the Board filed an answer to the petition denying that it violated Ms. Gottlieb's tenure rights; and

WHEREAS, for the 2003-2004 school year, the Board has appointed Ms. Gottlieb as a full-time guidance counselor and she is not being required to teach any E.S.L. classes; and

WHEREAS, the parties have expressed a desire to reach an amicable resolution of this matter; and

NOW, THEREFORE, the parties hereby agree to the following terms on this _____ day of _____, 2004:

1. The Board intends to continue the appointment of Ms. Gottlieb as a full-time guidance counselor for the 2003-2004 school year.

2. Based on the current status of Ms. Gottlieb's assignment for the 2003-2004 school year, the parties acknowledge that the underlying dispute is now moot because Ms. Gottlieb is presently in the position requested in the petition and there is no claim for additional salary or benefits.

3. The parties agree that this action will be dismissed without prejudice.

4. The parties agree that, except as provided in this Agreement, the dismissal of this action shall not limit or restrict in any way, the ability of the petitioner to file and pursue any future actions before the Commissioner of Education based upon an alleged future violation of her tenure and/or seniority rights.

5. The parties agree that, except as provided by this Agreement, the dismissal of this action shall not prevent, limit or restrict the Board in any way in the presentation of its defenses against any future actions brought by Ms. Gottlieb before the Commissioner of Education alleging a violation of her tenure and/or seniority rights.

6. Ms. Gottlieb acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

7. The undersigned representatives of the Board hereby acknowledges that the terms and conditions of this Agreement was ratified by the Respondent, Board of Education at its April 28, 2004 meeting as indicated by the Board minutes attached hereto and made a part hereof as Exhibit A.

8. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

9. Both parties acknowledge that their agreement to dismiss the petition is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

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

Gregory T. Syrek, Esq.

WITNESS:

Carol Gottlieb Nov. 22, 2004
Carol Gottlieb

OF EDUCATION OF THE
BOROUGH OF WOOD-RIDGE,
BERGEN COUNTY

Mark T. Janeczko, Esq.

By: _____
ROBERT TACHINI, Board President

_____
MICHAEL LEADY, Board Secretary

Wood-Ridge
Board of Education

89 Hackensack Street
Wood-Ridge, New Jersey 07075
(201) 939-2566
Fax (201) 804-9204

Michael D. Leary
Business Administrator / Board Secretary

11.) Ratification of Settlement on Grievance

Be it resolved on motion of Mr. Valenti, seconded by Mrs. Peck, upon the recommendation of the Superintendent that the Board of Education hereby approves the Stipulation of Settlement reached with Carol Gottlieb in January 2004 and accepted by the Office of Administrative Law on February 27, 2004 to settle the grievance relating to her employment.

In Favor: 5
Opposed: 0

CERTIFIED TO BE A TRUE AND CORRECT EXTRACT FROM THE MINUTES OF THE APRIL 28, 2004 BUSINESS MEETING OF THE WOOD-RIDGE BOARD OF EDUCATION.

Michael Leary
Board Secretary

EXHIBIT A

OAL DKT. NO. EDU 5987-04
AGENCY DKT. NO. 159-5/04

F.E., on behalf of minor children, J.E., J.E. and J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/1/05

Date of Mailing: 2/1/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5987-04
AGENCY DKT. NO. 159-5/04

F.E. ON BEHALF OF MINOR CHILDREN,
J.E., J.E., and J.E.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF BELLEVILLE,
Respondent.

Rubin M. Sinins, Esq., for petitioner
(Sinins & Bross, attorneys)

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

Record Closed: December 16, 2004 Decided: January 3, 2005

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on June 24, 2004, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled for October 13, 2004, but was adjourned at the request of counsel for petitioner, with consent of counsel for respondent. Subsequent to October 13, 2004, the parties reached a resolution. A Settlement

Agreement prepared and executed by counsel was submitted to the undersigned Administrative Law Judge on December 16, 2004, on which date the record was closed.

Having reviewed the terms Settlement Agreement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

January 3, 2005
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

Jan 7 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 10 2005
DATE

OFFICE OF ADMINISTRATIVE L

\mvh

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

DEC 21 '04 11:31 AM

FRANCHETTE EPPS, Petitioner, v. BELLEVILLE BOARD OF EDUCATION AND BELLEVILLE PUBLIC SCHOOL DISTRICT, Respondents.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION Agency Reference No. 159-5/04 OAL Docket No.: EDUOS-05987-2004N **SETTLEMENT AGREEMENT**

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that her children, J.E., J.E., and J.E., were not domiciled in the Township of Belleville and were therefore ineligible to attend the Belleville Public Schools, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim, seeking tuition reimbursement in the amount of $16,037.82 for a total of 139 days of education received while not domiciled in the Township of Belleville, and the parties having reached a settlement to amicably adjust their differences; it is hereby agreed as follows:

1. F.E. shall deliver the sum of $8,000.00 ("Settlement Sum") as full and final payment of tuition to the Belleville Board of Education for the education of her

children, J.E., J.E., and J.E., by the Belleville Public Schools during the 2003-2004 school year, while they were not domiciled in the Township of Belleville.

2. The Settlement Sum referenced in paragraph 1 shall be delivered by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 on or before December 10, 2004.

3. In consideration of the above-mentioned payment, the parties consent to the dismissal of the claims asserted in this matter and hereby release each other from any claims which were or which could have been asserted in this action, except as set forth in this agreement.

4. This agreement is subject to Board approval.

Dated:

FRANCHETTE EPPS

BELLEVILLE BOARD OF EDUCATION

Dated:

BY:

JOSEPH KRAEMER
Acting Superintendent on behalf of
Belleville Board of Education

LAW OFFICES
GACCIONE, POMACO & MALANGA
A PROFESSIONAL CORPORATION
524 UNION AVENUE
P.O. BOX 96
BELLEVILLE, NEW JERSEY 07109
(973) 759-2807
TELEFAX: (973) 759-6968
TELEFAX: (973) 759-7717

ROBERT A. GACCIONE
FRANK POMACO
ANTHONY F. MALANGA, JR. ♦
DENNIS E. GAGLIONE
ALDO DiTROLIO

LESLIE W. FINCH
OF COUNSEL
(1972-2000)

MARK A.WENCZEL
JOSEPH A. DEFURIA ▲
ROBERT J. PANSULLA ▲
MICHAEL C. SULLIVAN
ANTHONY N. GAETA■

♦ CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
▲ MEMBER OF PENNSYLVANIA BAR
■ MEMBER OF NEW YORK BAR

December 16, 2004

Honorable Leslie Z. Celentano
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

DEC 21 '04 AM 11:31

Re: F.E. o/b/o J.E., J.E. and J.E. v. Township of Belleville Board of Ed
OAL Docket No.: EDUOS-05987-2004N

Dear Judge Celentano:

As Your Honor is aware, this firm represents the Respondent in the above-referenced matter. Enclosed please find an original Settlement Agreement executed by the parties. The settlement sum has already been delivered and the Board has approved the agreement.

Respectfully,
GACCIONE, POMACO & MALANGA

BY: _____
MARK A. WENCZEL, ESQ.

MAW:dk
Enc.
Cc: Rubin M. Sinins, Esq.

48-05

OAL DKT. NO. EDU 6012-04
AGENCY DKT. NO. 178-5/04

BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4,[1] and were considered by the Deputy Commissioner to whom this matter has been delegated for decision, pursuant to *N.J.S.A.* 18A:4-33, in reaching his decision to remand this matter to the OAL for revision of the Initial Decision, and/or further proceedings as necessary, for the reasons set forth below.[2]

Upon a thorough review of the Initial Decision, the Deputy Commissioner finds that the ALJ: 1) failed to set forth any explanation as to his reasoning in concluding that the

[1] Notwithstanding petitioner's assertion in its letter of January 12, 2005 that respondent's reply exceptions, filed on January 7, 2005, were not timely, as respondent correctly points out in its responsive letter of January 14, 2005, *N.J.A.C.* 1:1-1.4 specifies that "[i]n computing any period of time fixed by rule or judicial order, the day of the act or event from which the designated period begins to run is not to be included" and further provides that "[i]n computing a period of time of less than seven days, Saturday, Sunday and legal holidays shall be excluded." In that it is undisputed that respondent received petitioner's exceptions on December 30, 2004, and the next day (December 31) was a holiday, followed by a Saturday (January 1) and a Sunday (January 2), respondent's five days for reply did not commence until January 3, 2005. Accordingly, respondent's reply exceptions were timely filed on the fifth day, January 7, 2005, pursuant to *N.J.A.C.* 1:1-18.4(d).

[2] Given the deficiencies in the Initial Decision, the Deputy Commissioner was unable to conduct the necessary review of the Administrative Law Judge's (ALJ) findings of fact, legal conclusions and final determination. The Deputy Commissioner, therefore, considered only the arguments set forth by the parties with respect to whether the ALJ provided a reasonable articulation for his determinations and has not considered the parties' exception arguments on the merits in this matter.

grant of summary decision is appropriate in this instance;[3] 2) failed to set forth findings of fact and the basis for his legal conclusions, pursuant to the requirements at *N.J.A.C.* 1:1-18.3(c), in order for the Deputy Commissioner to determine whether the recommendations in the Initial Decision are sufficiently (and solidly) grounded in fact and law; and 3) failed to provide reasons for the rejection of petitioner's claim of a continuing violation of public rights. Additionally, the ALJ did not provide a full articulation of the relief requested by petitioner in the Initial Decision so as to enable the Deputy Commissioner to assess petitioner's assertion that the ALJ "erred in disregarding the nature of the relief sought." (Petitioner's Exceptions at 14)

Accordingly, in that the Initial Decision does not contain the essential elements for adequate agency review, the Deputy Commissioner hereby remands this matter to the OAL for revision of the Initial Decision and/or further proceedings as necessary, consistent with the concerns set forth above.

IT IS SO ORDERED.[4]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/31/05

Date of Mailing: 2/01/05

[3] Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. It is noted that the ALJ does not address petitioner's claims that it has alleged facts sufficient to sustain a judgment in its favor and that "discovery in this matter has not even begun, and is necessary to resolve material facts that are in dispute (Petitioner's Opposition to Motion to Dismiss at 14-15), nor is there any discussion by the ALJ with respect to how his determination comports with *N.J.A.C.* 1:1-12.5(b) and *Contini, supra.*

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6012-04

AGENCY DKT. NO. 178-5/04

BOARD OF EDUCATION OF
THE BOROUGH OF MILFORD,
HUNTERDON COUNTY,
Petitioner,

v.

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,
Respondent.

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Allison C. Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: November 15, 2004 Decided: December 15, 2004

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 13, 2004, Petitioner, the Milford Borough Board of Education, filed a Verified Petition of Appeal to recalculate State aid pursuant to *N.J.S.A.* 18A:7F-15. On June 4, 2004, Respondent, the State Department of Education, filed a motion to dismiss. The Bureau of

Controversies and Disputes in the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on July 14, 2004.

On October 7, 2004, the Petitioner filed a brief in opposition to Respondent's Motion to Dismiss. Respondent's reply brief was filed on November 15, 2004. This Initial Decision grants Respondent's Motion to Dismiss.

ANALYSIS

Petitioner challenges the calculation of the Core Curriculum Standards Aid component of its Comprehensive Education Improvement and Financing Act aid for the years 2002-2003, 2003-2004 and 2004-2005.

With respect to the challenge to the 2002-2003 and 2003-2004 calculation, the Department contends that the Petitioner's claim is time barred because the petition was not filed within ninety days of the date it received notice of its State aid awards. *N.J.A.C.* 6A:3-1.3(d). The Petitioner agrees that the 90-day limitation applies, but argues it should be enlarged in the interests of justice since the matter involves a continuing violation of public rights. Petitioner, however, provides no explanation justifying or explaining its prolonged delay in filing the appeal for 2002-2003 and 2003-2004 aid calculations. Furthermore, I find that the 90-day rule should not be relaxed since the Petition does not raise any issue of significant public interest.

With respect to the challenge to the 2004-2005 calculation, the Department contends that it properly calculated Petitioner's aid for that school year. The Department contends that the FY05 Appropriations Act suspended the statutory provisions of CEIFA. I agree with the Department that the Legislature has clearly suspended the CEIFA statute for FY05 (as well as for FY03 and FY04). The Legislative language at issue in the FY05 Appropriations Act provides that each district shall receive no less of a total State aid amount payable for the 2003-2004 school year in various State aid categories. The Legislature appropriated the same amount in FY05 that it did for FY04 and FY03. Thus, the appropriation language, when viewed together with the amount actually appropriated for FY05, evidences a clear Legislative intent to suspend CEIFA.

ORDER

For the foregoing reasons, I hereby **GRANT** Respondent's Motion to Dismiss and **ORDER** that Petitioner's Verified Petition of Appeal be **DISMISSED**.

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

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

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

12-15-04

DATE

DOUGLAS H. HURD, ALJ

12-15-04

DATE

Mailed to Parties:

DEC 21 2004

DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

#51-05

51-05

OAL DKT. NO. EDU 8380-04
AGENCY DKT. NO. 310-9/04

L.G., on behalf of minor children, K.W., B.S. and T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on January 12, 2005, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's children in its schools, this matter is hereby remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/2/05
Date of Mailing: 2/2/05

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

52-05

OAL DKT. NO. EDU 9526-04
AGENCY DKT. NO. 113-3/04

JOSEPH C. PARLAVECCHIO AND ALFONSE R. ROSSI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners sought and were granted two extensions of time within which to file exceptions to the Initial Decision and such exceptions were filed pursuant to the extended timeframe. These and the District's reply submission were fully considered by the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, in reaching his determination herein.

Upon careful and independent review of the record, the Deputy Commissioner concurs with the Administrative Law Judge (ALJ) that the instant Petition of Appeal was filed well outside the 90-day mandatory timeline prescribed by *N.J.A.C.* 6A:3-1.3(d)(1). The Deputy Commissioner further finds that the record before him reveals no unusual or compelling circumstance which would warrant the relaxation of the 90-day rule and, therefore, as concluded by the ALJ, the petition must be dismissed. In so determining, the Deputy Commissioner rejects, as wholly without merit, petitioners' suggestion that their claim in this matter was a statutory right and, therefore, not subject to any statute of limitations. It is noted that *N.J.S.A.* 18A:16-6.1 requires a board to reimburse its employees for counsel fees and expenses incurred in defending against certain criminal actions. If the requisite statutory standard is satisfied, such indemnification is mandatory. *N.J.S.A.* 18A:16-6.1, read in conjunction with the correlative provisions of the immediately preceding statutory section, *N.J.S.A.* 18A:16-6, sets forth a two-pronged test for

determining whether board employees are entitled to indemnification in this regard, *i.e.*, 1) the underlying criminal action must be dismissed or result in a final disposition in favor of the employee **and** 2) any act or omission upon which the criminal charge is based must arise out of and during the course of the employee's performance of the duties and responsibilities of his position.

Here, there is no dispute that the first prong of the requisite test was satisfied by petitioners' acquittal of the federal charges and dismissal, with prejudice, of the state charges against them. Thus, the remaining issue is whether the underlying criminal charges arose within the legitimate scope of the petitioners' employment with the District. The Deputy Commissioner concludes that it cannot be credibly argued that the specific conduct of petitioners which formed the basis of the criminal charges brought against them, *i.e.*, concealed ownership of a building which they were leasing to the District, *arose out of* the performance of the duties and responsibilities of their employment with the District. *See Scirrotto v. Warren Hills Board of Education*, 272 *N.J. Super.* 391 (App. Div. 1994). Consequently, petitioners have not satisfied the requisite legal standard which would serve to entitle them to indemnification of their legal fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein. Summary decision is hereby granted to the District and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 2/2/05

Date of Mailing: 2/2/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 9526-04

AGENCY DKT. NO. 113-3/04

JOSEPH C. PARLAVECCHIO and

ALFONSE R. ROSSI,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK,

Respondent.

Stephen J. Edelstein, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Vito A. Gagliardi, Jr., Esq., appearing for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed and Decided: December 21, 2004

BEFORE **BARRY N. FRANK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Joseph C. Parlavecchio and Alfonse R. Rossi, were both employees of the Newark Board of Education from 1972 to 1994. Newark became a State-

Operated School District in 1995. In addition, in 1995, petitioners were indicted by both Federal and State Grand Juries on a variety of charges stemming from their concealed ownership of a building, which they were leasing to the school district. Petitioners were acquitted of all federal charges on January 18, 1996, and the state charges that had been brought against petitioners were dismissed with prejudice on December 24, 1996.

Thereafter, William D. Sayers, Esq., then attorney for the petitioners, demanded indemnification from Newark pursuant to *N.J.A.C.* 18A:16-6.1 for reasonable attorney's fees regarding the federal and state indictments. The total amount due at that time was alleged to be in excess of $400,000. On April 29, 1997, Newark, through its Senior Associate Counsel, Hope R. Blackburn, Esq., denied petitioners' request for indemnification (See Respondent's Exhibits A & B). Ms. Blackburn cited relevant New Jersey case law and opined that in order to qualify for such reimbursement, the employee "must have been acting in a manner which the corporation has an interest, he must have been acting in the discharge of a duty imposed or authorized by law and he must have acted in good faith." (See Respondent's Exhibit B, citing *Scirrotto v. Warren Hills Board of Educ.*, 272 *N.J. Super.* 391, 396 (App. Div. 1994). p. 397 directly *Errington v. Mansfield Twp. Board of Educ.*, 81 *N.J. Super.* 414, 420 (App. Div. 1963)).

Five months after receipt of this letter from Ms. Blackburn, petitioners' attorney filed a complaint on September 15, 1997, in Superior Court Law Division, Essex County. This complaint sought indemnification for all counsel fees and costs, including both the state and federal actions and interest on all sums due (at this point, allegedly in excess of $500,000) and the cost of bringing the current complaint in Superior Court.

On appropriate motion, an order was entered by the Honorable F. Michael Caruso, J.S.C., on January 23, 1998, dismissing the complaint without prejudice and ordering the complaint be transferred to the Commissioner of Education, who had original jurisdiction in such matters involving schools.

Nothing further appeared to occur on the record until the filing of this matter was perfected on May 14, 2004, with the Department of Education. Shortly thereafter, on

September 16, 2004, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case and also to make a determination with regard to the motion for summary decision filed by respondent.

STANDARDS FOR SUMMARY DECISION

The standards to be applied in disposing of a case presenting no issue of material fact and not requiring a plenary hearing are set forth in both the New Jersey Administrative Code and New Jersey Court Rules. *N.J.A.C.* 1:1-12.5(b) states that:

> "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 material fact challenged and that the moving party is entitled to prevail as a matter of law." This section of the Administrative Code follows a similar rule as set forth in New Jersey Court Rule at *R.* 4:46-2(c) stating in part:
>
> "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." This rule further defines what constitutes a genuine issue of fact. The rule indicates that:
>
> "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on motion, together with all legitimate inferences therefore favoring the non-moving party, would require submission of the issue to the trier of fact." *Id.*

Judson v. People's Bank & Trust of Westfield, 17 *N.J.* 67 (1954) has been the standard by which all summary decision motions have been measured for a substantial period of time. In 1995, the standard set forth in *Judson* was supplemented by the decision in *Brill v. Guardian Life Insurance*, 142 *N.J.* 520 (1995). The result is that not only was the determination made as to whether or not a material issue of fact exists, but also *Brill* further requires that the evidence be viewed in the light most favorable to

the non-movant. The non-movant party must demonstrate that a dispute exists, and, if resolved in the non-movant's favor, will entitle said non-movant to a favorable judgment. This case goes on to state:

> The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial' . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46- 2 . . . . The import of our holding is 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. (See *Brill*,142 *N.J.* at 540).

The only way a non-movant party may prevail is if that party "by responding affidavit sets forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." See *N.J.A.C.* 1:1-12.5(b). It has further been noted that "if the adverse party does not respond, an absence of a material factual dispute may be presumed and the movant will prevail if the law supports the movant's position." See 37 New Jersey Practice, Administrative Law and Practice §5.18 (Steven L. LeFelt, Anthony Miragliotta and Patricia Prunty) (2d ed. 2000). Respondent in this case, makes its motion predicated on a purely procedural issue, alleging that petitioners failed to diligently pursue their claim for reimbursement of attorney's fees expended in the defense of criminal matters, and that the 90-day rule set forth in *N.J.A.C.* 6A:3-1.4(d), limiting the timeframe in which to initiate an action under the school laws, time bars petitioners' claim. Respondent makes the argument that the clock started ticking once the petitioners received the letter from Ms. Blackburn denying their demand for reimbursement. The argument goes on to allege that the petitioners failed to take any action within this 90-day timeframe and that it was not until the passage of approximately five months after receipt of Ms. Blackburn's letter that they then filed an appropriate complaint in Superior Court. In their Statement of Facts, the petitioners seem to confirm this timeframe as being totally accurate. However, petitioners argued that despite the timeframe to which they have agreed, indemnification is a statutory entitlement, and, as a result, the 90-day rule is inapplicable.

NINETY-DAY RULE

N.J.A.C. 6A:3-1.3(d) mandates when the filing of an action that arises under the school laws must take place and states in pertinent part:

> The petitioner shall file a petition no later that the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Kaprow v. Board of Educ. of Berkeley Twp., 131 *N.J.* 572 (1993) determined that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind this 90-day rule. In this decision, the Supreme Court held:

> The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration . . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days . . . . *N.J.A.C.* 6:24-1.2(c) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws. Kaprow at 582.

There is no question that the petitioner must be notified if the school board is taking a position or made an adverse decision to the petitioner's request. As a result, the public policy that favors providing school districts with a measure of finality with regard to claims must be balanced against the right of the petitioner to receive proper notification of an adverse decision.

In *Kaprow, supra*, petitioner was notified by a secretary of the respondent board of education that other employees have assumed positions for which the tenured petitioner asserted he was qualified. In this case, the petitioner had been terminated in a reduction of force. The court held that this type of informal notification satisfied the "notice of a final order, ruling or other action" by the respondent, as required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588. The court also stated:

> 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. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the 90-day limitations period . . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the petitioner has been alerted to the existence of facts that would be adverse to it. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956).
>
> [*Id.* at 587.]

In the case at bar, the letter forwarded to petitioners by Ms. Blackburn clearly constitutes the type of notification the court had in mind. Furthermore, respondent argues that petitioners' delay in pursuing this matter total approximately six years during which time petitioners' right apparently languished or was nearly forgotten. Other than a vague illusion of dismissal by the Superior Court and alleged failure of this court to transmit the case in question, petitioners, through counsel, offered no cogent reason for effectively sitting on their rights well beyond any reasonable statutory or regulatory timeframe.

Historically, a 90-day requirement has been strictly followed and applied almost without exception. In *Dreher v. Jersey City Board of Educ.*, 1987 *S.L.D.* 1706 *aff'd,* State Board, 1988 *S.L.D.* 2439, rev'd App. Div. A-6120-82 (Feb. 28, 1985) (reversed for further fact-finding to determine if Dreher was a 10 or 12 month employee, which did not affect the 90-day limitation holding) a petition filed just two days after the 90-day

period was dismissed. Other cases have also strictly applied this 90-day rule. See, *Eisenberg v. Board of Educ. of the Borough of Ft. Lee*, EDU 9451-01, Final Decision (Nov. 5, 2003) 2003 W.L. 2364-3569 (State Board of Educ.), http://www.newjersey.gov/njded/legal/sboe/index.html, see also, *Nissman v. Board of Educ. of the Twp. of Long Beach Island*, 272 *N.J. Super.* 373, 382 (App. Div. 1994), cert. denied, 137 *N.J.* 315 (1994).

I must reemphasize that in the case before this court, petitioners have absolutely failed to comply with the 90-day requirement for filing the original action in Superior Court. Petitioners received a letter from Newark on April 29, 1997, denying their indemnification request. No action was taken and petitioners failed to file any kind petition or action in any court until they filed the initial action in Superior Court on September 15, 1997, which is approximately five months after Newark denied their initial request for indemnification. Once this action was taken and the Superior Court dismissed without prejudice petitioners' application so that same might be pursued before the Department of Education, which has original jurisdiction in such matters, petitioners failed to pursue the matter and to see that it was transferred or filing perfected until March 2004, well over six years subsequent to when the matter was dismissed from Superior Court and certainly contrary to the mandatory timeframe set forth in the 90-day rule clearly defined in *N.J.A.C.* 6A:3-3(d).

Under certain circumstances, provisions have been made for relaxing of the rule in permitting a petitioner to file after 90 days has lapsed. *Kaprow,* 232 *N.J. supra*. at 590, states that the 90-day rule may be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. It is also indicated that certain types of cases are exempted from this rule, namely those which involve "(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." See, *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975). This case goes on to state "the authority to relax or waive the 90-day rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur." See also, *DeMaio v. New*

Providence Board of Educ., 96 *N.J.A.R.* 2d (EDU) 449, 453 (citing *Gordon v. Passaic Board of Educ.,* 1985 *S.L.D.* 1929, 1931, *aff'd.*, A-3294-84T7 (App. Div. May 27, 1986) (unreported), cert. denied, 105 *N.J.* 534 (1986).

Petitioners in defense to the motion for summary decision, raise no constitutional issues, cite no *ex parte* or legal determination by administrative officials informal or otherwise, and in addition, the interest to be served if the petitioners were successful are private and not public monetary issues. Petitioners are pursuing a private right. Therefore, petitioners' best interest should be to pursue private remedies in an expeditious manner within the timeframe set forth by the regulations. Petitioners were not merely slightly out of time, they were out of time by a number of years. Petitioners by any measurable standard, have sat on their rights for too long a timeframe for these rights to now be appropriately considered.

Petitioners did not diligently pursue their remedies in a timely manner; therefore, they should not now be permitted to complain they should be exempted from the well-established 90-day limitation period. After review of all the above case law and regulations and given there is no material issue of fact, I must **CONCLUDE** that the petitioners are time-barred from further pursuing their claims.

Is the claim a statutory entitlement. It is clear that petitioners throughout their brief do not dispute the fact that they first made their demand for indemnification on April 28, 1997; however, petitioners defend the late filing of their claim utilizing the argument that indemnification is a statutory entitlement. As a result, petitioners' claim that they should not be bound by the 90-day rule as set forth in the regulations.

N.J.S.A. 18A:16-6.1 states:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and

> expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as the result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

In stands to reason that in order for a so called statutory entitlement to take petitioners outside of the 90-day rule, that there has to be some connection to the services rendered by petitioners' employees for said statutory entitlement to be applicable. This being the case, it stands to reason that petitioner seek reimbursement for defending their indictments because their actions allegedly arose out of the course of their employment. This does not appear to be the case here because the indictments had nothing to do with the course of petitioners' employment but had to do with an alleged omission and hidden ownership actions taken by petitioners, which allegedly was improper due to their status as employees for the district. These complaints were dismissed, and reimbursement sought by petitioners constituted a private cause of action under the regulations in the 90-day rule. This being the case, it would have made sense for petitioners to expeditiously pursue their claims. Also, since the indictments had nothing to do with petitioners' employment, at least directly, I can find no factual basis for the indemnification to be a statutory entitlement. I must **CONCLUDE** that the 90-day rule as set forth in regulations time-bars petitioners' claim for failing to act within a reasonable timeframe. Notification to petitioners by Ms. Blackburn triggered the 90-day rule effective April 29, 1997. I will not get into the laches argument for summary decision as reaching that argument is not necessary under the circumstances.

ORDER

It is hereby **ORDERED** that the motion by respondent for summary decision predicated upon petitioners' failure to file for an appeal pursuant to the requirements of *N.J.A.C.* 6A:3-1.3(b) is hereby **GRANTED;** it is further **ORDERED** that petitioners' claims against Newark Public Schools be and hereby are **DISMISSED WITH PREJUDICE.**

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

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

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

December 21, 2004
DATE

BARRY N. FRANK, ALJ

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

December 23, 2004
DATE

Mailed to Parties:

DEC 29 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Petitioner's Brief in Opposition to Motion for Summary Decision

Respondent's Brief in Support of Motion for Summary Decision

5 3-05

53-05 R

OAL DKT. NO. EDU 9015-00
AGENCY DKT. NO. 247-7/00

CARLOS FERNANDEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the Westfield Board of Education signed the settlement agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Moreover, the Commissioner observes that the settlement included with the Initial Decision was signed in *June 2003*, and neither the Initial Decision nor the record provides any explanation for the extraordinary delay in reviewing the parties' agreement. Additionally, it is noted that the agreement appears to set forth terms that were to be effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The Administrative Law

Judge and the parties are cautioned against effectuating any term of a settlement agreement in a controverted matter that has been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

Finally, although Item Number 3 states that a letter of reference for Carlos Fernandez is attached to the agreement, the Initial Decision/Settlement provided by the OAL does not contain a copy of such letter.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement and Initial Decision 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: 2/3/05

Date of Mailing: 2/3/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9015-00

AGENCY DKT. NO.: 247-7/00

CARLOS FERNANDEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WESTFIELD, UNION COUNTY,

Respondent.

Edward C Bertucio, Jr., Esq., for petitioner
(Law Offices of Edward C. Bertucio, Jr., attorneys)

Lester Arons, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: December 10, 2004 Decided: December 20, 2004

BEFORE **MUMTAZ BARI BROWN**, ALJ:

On September 22, 2000 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. After several adjournments, the matter was scheduled for hearing on December 9, 2004. Prior to hearing, the parties agreed to settle the matter. A

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

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 29, 2004
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

12/27/04
DATE

DEPARTMENT OF EDUCATION

Mailed

DEC 29 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cdr

SILLS CUMMIS EPSTEIN & GROSS

A Professional Corporation

One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
FAX (973) 643-6500

Date: DECEMBER 10, 2004 **Time**

RECIPIENT	COMPANY	FAX NO.	PHONE NO.
Carene	Judge Bari-Brown	(973) 648-6124	(973) 648-6051

FROM: LESTER ARON, ESQ.

ATTORNEY NO.: 292

TELEPHONE DIRECT DIAL: (973) 643-5795

MESSAGE:

Call me upon receipt: Yes ☐ NO ☒

TOTAL # OF PAGES (including cover page): 10

CLIENT NAME:
CLIENT/MATTER #:

OFFICE SERVICES USE ONLY:

THE ATTACHED TELECOPY HAS BEEN SUCCESSFULLY TRANSMITTED BY:

OPERATOR: _____ DATE/TIME: ___/___/___ __:__AM/PM

****CONFIDENTIALITY NOTE****

The documents accompanying this telecopy transmission contain information from the law firm of Sills Cummis Epstein & Gross P.C. which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the comments of this telecopied information is strictly prohibited and that the documents should be returned to this firm immediately. In this regard, if you have received this telecopy in error, please notify us by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

SEPARATION AGREEMENT AND RELEASE

This separation and release by and between the Westfield Board of Education with principle offices located at 302 Elm Street, Westfield, New Jersey 07090and Mr. Carlos Fernandez residing at 54 3rd Avenue, Apt. D17, Garwood, New Jersey, mutually and voluntarily agree, upon advise of counsel, to the settlement of the case filed by Mr. Fernandez before the Commissioner of Education, OAL Docket No.: EDUOR 09015-00N, which contains the following provisions:

1. The Westfield Board of Education (hereinafter "Board") hereby rescinds and removes from his personnel file the three letters issued by Dr. William Foley to Mr. Carlos Fernandez dated May 11, 2000, June 6, 2000 and June 8, 2000 and also rescinds and removes from the personnel file the the letter from Mr. Robert Berman to Mr. Carlos Fernandez dated June 28, 2000.

2. Mr. Carlos Fernandez will submit and the Board will accept a non-revocable letter of resignation from the Board by Mr. Fernandez back dated to June 30, 2000.

3. Any inquiries presented to the District regarding Mr. Fernandez' separation from employment shall be directed to the Director of Human Resources who shall state that Mr. Fernandez resigned in good standing.

4. The Board hereby provides the attached letter of reference for Carlos Fernandez.

5. The Board shall vote to accept both Mr. Fernandez' letter of resignation and the terms of this Settlement.

6. Upon approval of this complete and final settlement by both the Board and Mr.

Fernandez, Mr. Fernandez shall promptly withdraw the above-referenced petition.

7. Release by Carlos Fernandez. Excluding the obligations of the Board contained herein, and for its obligations pursuant to this Separation Agreement, Carlos Fernandez hereby releases and discharges the Board, and any and all of its former and current trustees, directors, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which Carlos Fernandez may have had, now has or may hereafter have for any reason whatsoever on account or arising out of or in consequence of his employment relationship with the Board, including, but not limited to:

i. Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Protection Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977;

ii. Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

iii. Any claims arising out of the terms and conditions of Carlos Fernandez's employment with the Board, the termination of such employment, and/or any of the events relating directly or indirectly to or surrounding that termination;

iv. Any and all claims related to compensation of any kind, including but not limited to, bonuses, incentive payments, severance pay and vacation pay;

v. Any and all claims for damages of any kind;

vi. Any and all claims arising out of the execution of this Separation Agreement;

vii. Any and all claims for attorney's fees, costs, disbursements or the like which Carlos Fernandez ever had, or has or hereafter can, shall or may have against the Board for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Separation Agreement.

8. Release by the Board. For his obligations pursuant to this Separation Agreement, the Board hereby releases and discharges Carlos Fernandez, and any and all of his agents, contractors, representatives, predecessors, successors and assigns, as well as his heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which the Board may have had, now has or may hereafter have for any reason whatsoever on account or arising out of or in consequence of its employment relationship with Carlos Fernandez, including, but not limited to:

(i) Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Protection Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977;

(ii) Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

(iii) Any claims arising out of the terms and conditions of Carlos Fernandez's employment with the Board, the termination of such employment, and/or any of the events relating directly or indirectly to or surrounding that termination

(iv) Any and all claims related to compensation of any kind, including but not limited to, bonuses, incentive payments, severance pay and vacation pay;

(v) Any and all claims for damages of any kind;

(vi) Any and all claims arising out of the execution of this Separation Agreement;

(vii) Any and all claims for attorney's fees, costs, disbursements or the like which the Board ever had, or has or hereafter can, shall or may have against Carlos Fernandez for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Separation Agreement.

ALL OF THE TERMS OF THIS SEPARATION AGREEMENT are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by an instrument in writing executed by the parties.

The parties acknowledge that each has received independent legal advice of his/its own selection, that each fully understands this Separation Agreement, that each has been fully informed of his/its legal rights and obligations. Having such advice and knowledge, each is signing this Separation Agreement freely and voluntarily.

IN WITNESS WHEREOF, the parties have set their hands and seals as of this th day of June, 2003.

CARLOS FERNANDEZ

Date: June 12, 2003

WITNESS: Kristin Arnone

6-12-03
Date:

WESTFIELD BOARD OF EDUCATION

Irlene L Gardner
Board President

Date: June 24, 2003

WITNESS: Margaret Dolan

6/24/03
Date:

54-05

#55-05

OAL DKT. NO. EDU 920-04
AGENCY DKT. NO. 19-1/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FACILITIES AND TRANSPORTATION, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision to remand this matter to the OAL for revision of the Initial Decision, and/or further proceedings as necessary, for the reasons set forth below.[1]

Upon a thorough review of the Initial Decision, the Commissioner finds that the ALJ fails to set forth findings of fact and the basis for his legal conclusions, pursuant to the requirements set forth at *N.J.A.C.* 1:1-18.3(c), in order for the Commissioner to determine whether the recommendations in the Initial Decision are sufficiently (and solidly) grounded in fact and law. Moreover, the ALJ does not provide a summary of petitioner's arguments and the reasons for their rejection. In fact, there is no mention of petitioner's arguments at all in the

[1]Given the deficiencies in the Initial Decision, the Commissioner was unable to conduct the necessary review of the Administrative Law Judge's (ALJ) findings of fact, legal conclusions and final determination. The Commissioner, therefore, considered the parties' arguments only in the context of determining whether the ALJ provided a reasonable articulation for his determinations. The parties' exception arguments on the merits were not considered.

Initial Decision and the only references to petitioner's position in the entire Decision are the following two sentences:

> Petitioner, the City of Perth Amboy Board of Education, challenges the State Department of Education's decision denying retroactive funding for an early childhood education facility, pursuant to *N.J.S.A.* 18A:7G-1 (Initial Decision at 1)

and

> The Board challenges the Department's denial of its application for retroactive funding for the acquisition of the property. (*Id.* at 3)

Accordingly, in that the Initial Decision does not contain the essential elements for adequate agency review, the Commissioner hereby remands this matter to the OAL for revision of the Initial Decision and/or further proceedings as necessary, consistent with the concerns set forth above.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/2/05

Date of Mailing: 2/3/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 920-04

AGENCY DKT. NO. 19-1/04

PERTH AMBOY BOARD

OF EDUCATION,

Petitioner,

v.

NEW JERSEY DEPARTMENT

OF EDUCATION,

Respondent.

Francis X. Journick, Esq., for petitioner, (Wilentz, Goldman & Spitzer, attorneys)

Jason Michael Ross, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: November 18, 2004 Decided: December 20, 2004

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the City of Perth Amboy Board of Education, challenges the State Department of Education's decision denying retroactive funding for an early childhood education facility, pursuant to *N.J.S.A.* 18A:7G-1. Respondent contends that the funding was appropriate and

consistent with State law and implementing regulations. The matter was transmitted to the Office of Administrative Law, where it was filed on March 8, 2004.

Petitioner and Respondent filed motions for summary decision on September 29, 2004. Responses were simultaneously filed on November 18, 2004. This Initial Decision denies Petitioner's summary decision motion and grants Respondent's summary decision motion.

ANALYSIS

This matter is appropriate for summary decision because there are no material facts in dispute.

On April 28, 1999, the Middlesex County Superintendent of Schools recommended approval for the acquisition of property in Perth Amboy for the construction of a new early childhood education center. On June 14, 1999, the Office of School Facility Financing sent correspondence approving the land acquisition project pursuant to *N.J.A.C.* 6:22-2.1. On July 18, 2001, the Board submitted an application to amend the school district's 5-year Long Range Facility Plan to the Department requesting retroactive funding for the land acquisition. On August 21, 2001, the Department approved the school facilities project.

On September 20, 2001, the Department made the following determination: (1) the Board's application requesting retroactive funding for land acquisition was not received prior to the Department's June 30, 2001, deadline for such submissions, and that (ii) the submitted land acquisition alone does not meet the requirements of the law because the application is inconsistent with the definition of a school facilities project. On October 14, 2003, the Department again denied the Board's application for retroactive funding. Once again, the Department determined that it approved the school facilities project, including educational specifications, on August 21, 2001, which was over one-year beyond the July 18, 2000, deadline for funding eligibility under *N.J.S.A.* 18A:7G-9(c), and a land acquisition alone did not constitute a school facilities project.

The Board challenges the Department's denial of its application for retroactive funding for the acquisition of the property. However, I find and conclude that the Department's decision to deny the Board's application for retroactive funding for a school facilities project was not arbitrary, capricious or unreasonable. Simply put, the Department did not approve a school facilities project prior to the statutory deadline imposed for funding eligibility pursuant to *N.J.S.A.* 18A:7g-9(c). Indeed, the Board did not even amend its Long Range Facilities Plan to add such a project until July 18, 2001. The Department approved the school facilities project, including educational specifications, on August 21, 2001, which was over one-year beyond the statutory deadline. Furthermore, the Department's decision denying the Board's request was correct because under the regulations a land acquisition alone does not constitute a school facilities project that would be eligible for such funding. There is no question that prior to July 18, 2001, the Board had not received approval for the construction, rehabilitation or acquisition of a school facility on the site.

ORDER

In conclusion, the Department's denial of retroactive funding is consistent with Educational Facilities Construction and Financing Act and its implementing regulations, and does not violate the New Jersey Constitution or the Abbott cases. Accordingly, I hereby **DENY** the Board's motion for summary decision and **GRANT** the Department's motion for summary decision. The Board's Petition of Appeal is **DISMISSED**.

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

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

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

12-20-04

DATE

DOUGLAS H. HURD, ALJ

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

12-20-04

DATE

Mailed to Parties:

DEC 23 2004

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

54-05

OAL DKT. NO. EDU 6094-04
AGENCY DKT. NO. 222-6/04

L.E.C., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WESTAMPTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner agrees with the ALJ that petitioner has failed to sustain her burden of establishing that J.C. was a domiciliary of Westampton and, thus, entitled to a free public education in that District's schools.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed. The Commissioner directs that petitioner pay the Board tuition for the period of J.C.'s ineligible attendance in its schools, February 9, 2004, to December 2, 2004, at the per diem rate of $38.89.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/3/05
Date of Mailing: 2/3/05

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

59-05

#59-05

AGENCY DKT NO. 453-12/04

IN THE MATTER OF THE TENURE	:	
HEARING OF JENNIFER TURNER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
OCEAN CITY, CAPE MAY COUNTY.	:	
	:	

For the Board, Michael P. Stanton, Esq., Taht, Stanton & McCrosson

Jennifer Turner, *Pro Se*

This matter was opened before the Commissioner of Education on December 30, 2004, through the certification of tenure charges against Jennifer Turner, a tenured teacher with the Board of Education of the City of Ocean City, alleging insubordination, and incapacity, and seeking her removal.

By notice dated January 3, 2005, the Commissioner directed respondent, via both certified and regular mail, the certified copy having been returned as unclaimed, to file an Answer to the tenure charges against her. The communication from the Bureau of Controversies and Disputes, sent regular mail and presumed received, clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *shall have 15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, will result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent, or any attorney on

her behalf, in response to the District's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner has reviewed the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges, including memoranda, observations, anecdotal records, letters, inter-departmental correspondence and other documents, which specify that respondent has consistently refused to follow the directives and instructions of a supervisor; has demonstrated a lack of capacity to properly serve students by her actions and remarks; and, despite prior warnings, has demonstrated she is unfit to engage in the teaching of students in the District. (Certification of Donald E. Dearborn, Ed.D., Superintendent of Ocean City Public Schools)

Deeming the within charges to be admitted, and noting that respondent has chosen not to deny the allegations against her, the Commissioner finds that the Board has demonstrated that respondent is guilty of insubordination and incapacity.

IT IS ORDERED this 10th day of February 2005 that summary decision shall be granted to the District, and Jennifer Turner shall be dismissed from her tenured position as a teacher in the Board's employ as of the date of this order.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/10/05

Date of Mailing: 2/10/05

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

60-05

OAL DKT. NO. EDU 6404-02
AGENCY DKT. NO. 242-8/02

THOMAS F. GRIGGS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), including the November 10, 2003 Order of the Administrative Law Judge (ALJ) incorporated into the Initial Decision by reference, have been reviewed. The Commissioner has additionally considered petitioner's exceptions to both the Initial Decision and the incorporated Order, as well as the replies to these filed by respondent (the Board). [1]

On exception, petitioner urges adoption of the ALJ's conclusions that 1) the terms of petitioner's 1999 written employment contract were carried forward by operation of law to the 2001-02 school year; 2) contractual notice provisions must be honored in the event of an abolishment of position; and 3) petitioner lawfully accepted continued employment for the 2002-03 school year by virtue of his letter of acceptance

[1] The referenced Order was submitted to the Commissioner for immediate review, whereupon the parties duly filed exceptions and replies. However, by decision dated December 17, 2003, the Commissioner declined to review the Order on an immediate basis and elected instead to review it at the end of the contested case. See Initial Decision at 2.

faxed on May 28, 2002.[2] (Petitioner's Exceptions to Order at 3 and *passim*) Petitioner excepts, however, to the ALJ's conclusions as to the character and effect of the termination clause in petitioner's contract (*Id.* at 4-8), and as to whether the Board's action in abolishing petitioner's position was arbitrary, unreasonable or taken in bad faith (Petitioner's Exceptions to Initial Decision at 2-6).[3]

With respect to his contract's termination clause, petitioner contends that the ALJ erred in finding it "vague and unclear" (Order at 12), thus permitting termination of the contract "at will or after a reasonable time." (*Ibid.*) To the contrary, petitioner avers, the language in question is perfectly clear and its only reasonable interpretation is as a promise, in the event of termination by the Board, to reach a mutual agreement with petitioner as to length of notice to be provided. While the Board may no longer like this agreement, petitioner argues, it cannot avoid its obligation thereunder, and, while the ALJ or Commissioner might prefer a different arrangement, they may not use this proceeding to attempt to make a better contract or twist plain contractual language to create ambiguity where none exists. (Petitioner's Exceptions to Order at 4-7) Alternatively, if the Commissioner concurs with the ALJ that the contractual language is, in fact, vague and unclear, the Commissioner must not repeat the ALJ's error in failing to construe such ambiguity against the drafting party (the Board), and he must then award petitioner the requested one year's compensation (less mitigation), rather than accepting as sufficient the 60-day notice provided by the Board. (*Id.* at 8-9)

---

[2] Petitioner withdraws his claim, as well as his prior objection to the ALJ's failure to include it in the November 10, 2003 Order, regarding payment for unused sick leave. Petitioner confirms that the Board has since made the required payment. (Petitioner's Exceptions to Initial Decision at 1)

[3] Petitioner also notes a non-material error in the Initial Decision's recitation of facts, clarifying that at no time did he serve as principal in an *acting* capacity. (Petitioner's Exceptions to Order at 9-10)

With respect to his allegations that the Board acted arbitrarily and/or in bad faith in abolishing his position of Principal, petitioner contends that evidence on record, but ignored by the ALJ, amply demonstrates the truth of his claims. Petitioner points to evidence showing, among other things, that there was, in fact, no cost savings to the Board as a result of the reorganization notwithstanding that it was justified by claims of reducing administrative costs by 50%; that Dr. Gibson received at least $10,000 in additional compensation for assuming the duties of Principal and retired one year after doing so, whereupon the Board restored the full-time Principal position; that Dr. Gibson recommended a teacher she had personally mentored for the restored principalship;[4] that the School Business Administrator's salary was doubled by extending his position to full-time, ostensibly to relieve Dr. Gibson of central office duties notwithstanding that he was not certified to supervise teaching staff or students, and, upon his indictment, the Board returned to the previous part-time structure; and that the only minutes of Board finance and personnel committees that purportedly made the decision to recommend elimination of petitioner's position surfaced after the hearing with the certification of Dr. Gibson. (Petitioner's Exceptions to Initial Decision at 3-6) Petitioner also reiterates that Dr. Gibson was annoyed with petitioner for requesting additional compensation for the many times he performed her duties in her absence, that the mayor and council did not recommend elimination of petitioner's position despite the budget defeat, and that the Board could have eliminated the Director of Special Services position and assigned its duties to petitioner, who was qualified to perform them. (*Ibid.*)

[4] Petitioner notes a factual error in the ALJ's recitation of the testimony of Dr. Warren Pross at 9-10, which states that Dr. Pross elevated the teacher in question to the principalship, when, in fact, his testimony along with that of Kathleen Hovern establishes that this was done by his predecessor, Dr. Gibson. (Petitioner's Exceptions to Initial Decision at 2, referencing transcripts of 10/28/04 hearing at 115 and 10/27/04 hearing at 147).

In reply, while noting its continuing disagreement that petitioner's contract rolled over for the years 2000-02, the Board urges adoption of the ALJ's reasoning and determinations with respect to the contract's termination clause and the sufficiency of the notice provided by the Board. (Board's Reply to Petitioner's Exceptions to Order at 1-2) The Board further supports the ALJ's conclusions with respect to petitioner's allegations of arbitrariness and bad faith, noting that petitioner's exceptions reiterate argument and proposed fact-finding presented in post-hearing submissions which were rejected by the ALJ for the reasons cogently stated in the Initial Decision. (Board's Reply to Petitioner's Exceptions to Initial Decision at 1-2)

Having thoroughly reviewed the record and considered the arguments of the parties, the Commissioner determines to adopt the Initial Decision as clarified herein.

Initially, the Commissioner notes, and neither party disputes, that the Board had the authority to abolish petitioner's position so long as it did not do so for unlawful reasons.[5] In this instance, notwithstanding petitioner's contention to the contrary and his selective recitation of facts in support thereof, the record as a whole, including extensive testimony judged credible by the ALJ,[6] amply supports the conclusion that the Board acted lawfully and in good faith.[7]

---

[5] The Commissioner here clarifies that it is not necessary, as the ALJ appears to assume in the Initial Decision at 14-15, to treat a staff member as though he or she is tenured in order to ascertain the legitimacy of a reduction in force.

[6] There is no basis in the record that would enable the Commissioner to disturb the ALJ's credibility determinations pursuant to *N.J.S.A.* 52:14B-10(c).

[7] The Commissioner notes that the after-the-fact "finance and personnel committee minutes" referenced in petitioner's Exceptions are nothing more than Dr. Gibson's personal notes from an executive session where administrative reorganization and reallocation of savings was discussed. These notes were entered into the record by certification under cover letter dated December 7, 2004, in response to testimony by Karen Sorbello (Transcript of 10/28/04 hearing at 200-201) to the effect that, although actual minutes of committee meetings were not taken, Dr. Gibson generally took personal notes as memory aids to prepare her various reports to the Board. (Certification of Frances Colon Gibson, November 13, 2004)

As to the question of the notice due petitioner prior to termination of his contract, the Commissioner concurs with the ALJ that the contract is, indeed, vague and unclear with respect to the notice required upon termination of the contract by the Board. In fact, taken literally, the contract, which does not follow the standard model, makes no provision whatsoever for unilateral termination on the part of the Board, only for unilateral termination on the part of petitioner, or for termination by mutual agreement. In this regard it is clearly distinguishable from the precedent relied upon by petitioner, a matter specifically decided on "unique circumstances" where a standard notice clause was left blank *and* the contract's general provisions expressly required the agreement to run for its full term in the absence of any provision for a definite number of days' notice. (*Siegel, supra,* at 766; Order at 10-11)

Under these circumstances, where petitioner's contract made no express provision for termination by the Board and where petitioner was notified before the end of the school year that he would not be employed for the following year,[8] the Commissioner also agrees with the ALJ that it was reasonable for the Board to apply the 60-day notice provision found in standard contracts, numerous school law decisions, and petitioner's counter-obligation to the Board. In so holding, the Commissioner is not unmindful of the principle, cited by petitioner, that contractual ambiguities are to be construed against the drafter, *In re Miller, supra*; for the Commissioner to find, however, as petitioner would have him do, that this principle acts to prevent a board of education, during the life of a teaching staff member's individual employment contract, from

[8] Indeed, had the Board elected, or been in a position, to effectuate reorganization by nonrenewing petitioner's contract pursuant to *N.J.S.A.* 18A:27-10 rather than by terminating it, petitioner's May 15 notice of nonrenewal would have afforded him two weeks more notice than he actually received and would not have afforded him pay beyond the end of the school year on June 30.

terminating employment or ending the board's salary obligation following termination unless the employee first agrees to the length of notice to be provided, would compromise both boards' legitimate managerial authority and their discretion to adjust staffing for lawful reasons, as occurred in the present instance. Such a result is clearly contrary to law and sound public policy, and the Commissioner cannot countenance it herein.

Accordingly, the Initial Decision of the OAL, including the incorporated Order, is adopted as the final decision in this matter for the reasons expressed therein and clarified above. The Board is reminded, in view of what the record has revealed about its past contractual practices, of the need to review and reform such practices to any extent yet necessary to ensure that its contracts of employment are issued consistent with the requirements of law.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 2/10/05

Date of Mailing: 2/10/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTITIAL DECISION

OAL DKT NO. EDU 6404-02

AGENCY DKT. 242-8/02

THOMAS GRIGGS,

Petitioner,

v.

BOROUGH OF MAGNOLIA

BOARD OF EDUCATION

Respondent.

Andrew Babiak, Esq., for petitioner (NJ Association of School Administrators)

George Wilgus, III, Esq., for respondent (Lenox, Socey, Wilgus, Fornidoni, Brown, Giordano & Casey, attorneys)

Record Closed: December 21, 2004 Decided: December 27, 2004

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on August 6, 2002. Petitioner, a School Principal for the Borough of Magnolia School District, contends that the non-renewal of his alleged contract was improper and unlawful. The District asserts that the position was eliminated pursuant to a reduction in force (RIF). Petitioner

asserts that the RIF was not done for reasons of efficiency or economy. The matter was transmitted to the Office of Administrative Law ("OAL") on September 11, 2002. The Director of the OAL assigned the undersigned to hear this matter pursuant to pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on January 3, 2003. A settlement conference was scheduled for May 27, 2003, and hearing dates for June 11 and 12, 2003. On May 7, 2003, petitioner submitted a letter motion seeking to compel discovery of information in certain personnel files. The letter motion was preceded by a telephone conference regarding the discovery request and procedure.

On August 27, 2003, petitioner submitted a motion for partial summary judgment concerning the contract claims and issues. On November 10, 2003, an Order was issued holding that petitioner's employment contract rolled over for the years 2000, 2001 and 2002. (hereinafter "Order") It was further held that the contract termination clause was vague and unclear and therefore, sixty (60) days notice of termination was reasonable. (The November 10, 2003, Order is incorporated herein by reference.) Pursuant to petitioner's request, the Order was submitted to the Commissioner of Education pursuant to *N.J.A.C.* 1:1-12.5(e) seeking immediate review as if it were a final decision. On December 17, 2003, the Commissioner denied petitioner's request.

The matter was scheduled for a plenary hearing regarding the RIF issues on October 27 and 28, 2004, at the OAL office in Atlantic City, New Jersey. The record remained open until December 21, 2004 for post hearing submissions and the record closed on that date.

UNDISPUTED FACTS

1. Petitioner, Thomas F. Griggs (hereinafter "Griggs" or "petitioner") is a former employee of respondent, Board of Education of the Borough of Magnolia (hereinafter "respondent," "Board" or "District"). From July 1, 1999 to June 30, 2002, Griggs was employed by the Board as Principal of its elementary school.

2. During the 2001-2002 school year, Griggs was the Acting Principal pursuant to an unsigned contract. It is apparent from the submissions of the parties that at no time did Griggs or the Board ever formally execute a written agreement.

3. On May 28, 2002, the nine (9) member Board voted 8 to 1 to eliminate Griggs' position effective June 30, and to continue the position of Principal with the position of Superintendent of Schools.

4. The school budget, which had been approved on March 26, 2002, by the Board, was defeated in an election held in April 2002. Once the budget was defeated, there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget due to its defeat in the April election.

5. On May 28, 2002, the Board approved the reduction of force with abolishment, for economic reasons, of the Principal's position, effective June 30, 2002.

6. In accordance with the RIF, the Superintendent's job title and description was revised to reflect the chief school administrator's duties and responsibilities. By letter dated May 29, 2002, Dr. Gibson advised Griggs that the Board of Education had met on May 28, 2002, and had abolished his position as part of a RIF procedure. Dr. Gibson informed petitioner that a letter of May 29, 2002, would serve as a 60 day notice of termination wherein he would receive compensation until July 30, 2002.

7. During the period 2001 through May 2002, Griggs and the Board, through its agents and representatives, had been actively negotiating contractual terms and provisions. On May 28, 2002, Griggs notified the Board and the Superintendent, in writing, that he accepted continued employment in the District for the 2002-2003 school year. The written notification was forwarded to the Superintendent's office via telefax and it provided as follows:

> Based on my attorney's advice, I accept the employment contract as Principal for the 2002-2003 school year. Respectfully, Thomas F. Griggs

The fax indicates that it was transmitted at approximately 2:25 p.m. on May 28, 2002.

SUMMARY OF RELEVANT TESTIMONY

Petitioner offered the testimony of Dr. Frances Gibson, former Superintendent of Schools. Petitioner contends that Dr. Gibson improperly RIF'd him. Dr. Gibson had been Superintendent since 1993. She retired on June 30, 2003. Dr. Gibson explained that Magnolia has an elected school board. It is a Type II District. The 2002-2003 budget was defeated on April 16, 2002. Consequently, the Board voted to eliminate the principal's position pursuant to reduction in force on May 28, 2002.

Elections for the Board of Education and school budget were held on April 16, 2002. The taxpayers voted down the school budget. This was not an uncommon event in Magnolia. Dr. Gibson explained that once a budget is defeated, it is then turned over to the Borough Mayor and Council for resolution and approval. Dr. Gibson also emphasized that at no time prior to the defeated budget was petitioner's position considered for a RIF. Notably, even after the budget was defeated, petitioner's position was not considered for elimination. It was not until the Board of Education met with the Borough Mayor and Council in May 2002 that a RIF was conceived. In fact, the District prepared a budget as late as May 16, 2002. The line item entitled Principal/Assistant Principal provides for the position of principal to remain for the budget year 2002-2003. (R-26). However, on May 14, 2002, Peter Martorana, non-tenured staff member, was notified that he would not be rehired for the 2002-2003 school year. (R-25).

Dr. Gibson discussed the budget process for the 2002-2003 school year. The budget process commenced in October or November of the preceding year and took several months to complete. The Board, staff members, Business Administrator, Principal and various Board of Education committees were all involved in developing the budget. The prior year's budget became the base for the ensuing year's discussions. Materials, curriculum, supplies and staff needs are all factors that are considered. Dr. Gibson explained that she typically meets with the Business Administrator at least once or twice per week during the budget process. James

Hayden[1], Business Administrator was charged with compiling the budget after receiving input from staff and management.

Dr. Gibson explained the decision-making process that resulted in RIF. The Mayor and Borough Council arranged for two separate meetings with the Board in response to the defeated budget. During these meetings, members of the Board were criticized for eliminating various programs in the defeated budget. Assertions were made that the District was top heavy in administrative staff. The Borough Mayor and Council urged the District to restore the programs that had been eliminated. This included the T-1 program, schoolyard aides and honors program. The T-1 program was an intermediate program for students who participated in kindergarten but were not ready for first grade in the subsequent year. The schoolyard aides provided supervision before and after school. Thus, the finance committee and the Board members took the comments of the Mayor and Council and discussed them at the committee and Board level. The decision-making for the making budgetary adjustments and cuts involved various factors. Dr. Gibson explained that cuts in staff usually invoke a response from the union. Cuts in programs brought on criticism from parents and staff. Moreover, the union, staff, parents and other members of the public ultimately urge that cuts be made at the administrative level so as not to affect classroom services, school services or in-class educational components. Again, Gibson stated that the Borough believed that the District was top heavy at the administrative level. The Mayor and Borough Council suggested that they would approve the budget in the amount that was defeated by the voters so long as the programs and services that were eliminated from the prior year were restored.

Dr. Gibson described the committee process, subsequent to the defeated budget. In particular, the finance committee had explored various alternatives or options to reduce the budget and bring back numerous programs that had been eliminated. Dr. Gibson noted that the

[1] In July 1997, the District employed James Hayden as their Business Administrator. In September 1998, Hayden resigned. The Somerdale Board of Education employed him as their Business Administrator. Effective November 1, 2000, through June 30, 2001, Hayden returned to the Magnolia District as a part-time or shared Business Administrator. Magnolia and Somerdale negotiated a Shared Agreement for these services. (P-13). In May or June 2002, Hayden returned to his position as full-time Business Administrator for the Magnolia District. The full-time Business Administrator position was created as a result of the RIF action involving Principal Griggs. When Griggs was RIF'd, the District decided to fill the void by making the Business Administrator's position full-time. On September 12, 2002, a criminal compliant was filed against the Business Administrator for work relating to the

District is very small. It only has 400-500 students in kindergarten through eighth grade. The committee focused on the instructions received from Borough Mayor and Council. Gibson explained that they explored and exhausted all options and alternatives. After discussing the situation with the Business Administrator and the finance committee over several dates, Gibson stated that the following alternatives remained on the table: 1) eliminate the Superintendent; 2) eliminate the Principal; 3) eliminate the Business Administrator who was currently employed in a part-time shared position; or 4) eliminate the Director of Special Education Services. These were the only four administrative positions in the District.

The finance committee made the initial recommendation and the Board of Education made the final decision. The decision involved a reduction in force at the Principal's level, returning the Business Administrator's position to full-time and changing the Superintendent's position to Chief School Administrator. Financially, these changes saved the District approximately $25,000 - $35,000. The savings allowed the District to restore the T-1 program and playground aides without increasing the budget. The savings resulted from the elimination of the Principal's salary of $80,000, offset by the increase of the Business Administrator's salary from $40,000 to $80,000 (an approximate $40,000 net savings). The Superintendent received a $10,000 increase for assuming the title of Chief School Administrator, which would incorporate the Superintendent and Principal's duties. The Business Administrator estimated that it would cost $45,000 to restore the T-1 program. The savings of $25,000 to $35,000 allowed the Board to reinstitute the desired programs without affecting the overall budget. Finally, Gibson explained that she and petitioner had an excellent working relationship. Petitioner did not dispute this Gibson assessment of their relationship.

Board President, Karen Sorbello explained the rationale that went into the RIF decision. She did not believe that petitioner could serve a dual role as Principal and Business Administrator. Therefore, the Business Administrator had to remain. The District needed an experienced Business Administrator. Petitioner was not certified to hold this title according to Sorbello. Further, Gibson had been with the District since 1993. It made more sense to keep a superintendent who was familiar with the District's business that to elevate the principal to the

---

Somerdale District. On September 24, 2002, the Magnolia District suspended him. On March 25, 2003, his contract was not renewed.

title of superintendent. Petitioner had less experience and had not been tested in that title with this District. Gibson had already served as a principal in Camden County. Therefore, she possessed more experience than petitioner. Sorbello reasoned that Gibson would better serve the District in the capacity of Chief School Administrator. Gibson would assume the duties of superintendent and principal. Therefore, Sorbello urged that keeping Gibson and Hayden made the most sense. Critical titles would be filled with experienced and certified personnel. On May 28, 2002, the Board voted 8 in favor and 1 against the action to RIF petitioner for economic reasons. (R-29, p. 3). The vote was taken after exploring all of the options proposed by the finance committee, personnel committee and superintendent.

Petitioner, Thomas Griggs testified. Mr. Griggs possesses a Bachelors of Arts degree in General Elementary Education and Special Education. He holds a Masters Degree in School Information Services. Griggs also holds New Jersey certifications as a Supervisor, Principal, Director of Education, and Chief School Administrator. In addition to the New Jersey certifications, Mr. Griggs is also certified in Special Education and Supervisor of Special Education in the State of Pennsylvania.

The Magnolia Board of Education hired Mr. Griggs on July 1, 1999. He entered into a two-year contract. (See Order regarding to details and problems encountered with petitioner's contract.) Griggs testified that at no time prior to May 2002 did he encounter any discussions regarding the elimination of his position. Griggs stated that he had an excellent working relationship with Dr. Gibson. He explained that this good relationship extended from 1999 all the way through May 2002. The relationship soured when Griggs requested a stipend while he was purportedly covering for Dr. Gibson during her medical absences. Griggs calculated that Gibson was absent approximately 25% of the time. Dr. Gibson had two or three heart attacks that caused her to be absent for a substantial period. In addition, she served on several outside boards. Collectively, she was out of the District at least one day per week while she was healthy and for several extended periods while on medical leave. As a result, he was required to cover many of her Superintendent's duties. As a result of her medical absences and his increased responsibility, Griggs believed that he was entitled to additional compensation. He brought this to the attention of Dr. Gibson in early 2002. Griggs speculated that if he were compensated it would reveal the magnitude Gibson's absences. Therefore, upon making this request, Griggs

claims their relationship immediately turned bad. Griggs believed that if he were compensated, it would expose the extent of Gibson's absences to the administration and school board members. It would put her job or title at risk. Griggs urged that Gibson retaliated against him. This was evident by her insistence that his title be eliminated through a RIF.

Griggs stated that there was no other reason for his title to be eliminated. He had excellent evaluations and a good relationship with the Board of Education and administration. In May 2002, he expected to be re-employed. The fact that the budget was defeated did not surprise him. The budget had ordinarily been defeated and he did not view this as a threat to his title.

May 28, 2002, was the first time that Griggs learned that his title would be eliminated. It occurred approximately six hours before the school board meeting. He was served with a "RICE" notice shortly before the meeting. (R-28). Mr. Griggs immediately contacted his attorney. On the advice of counsel, Griggs faxed a letter stating that he accepted employment on May 28, 2002. (R-32).

The RIF forced Griggs to file for early retirement. He could not procure a teaching position in a short period. He needed medical benefits. In 2000, his wife was ill and he was concerned about continued medical coverage. The submission of retirement papers secured the appropriate medical coverage for his family. However, the effect of filing for early retirement had significant consequences. His salary was effectively cut in half. Additionally, he had car payments and a mortgage. His monthly debts exceeded his income. Accordingly, he had to eliminate one car and sell his house to reduce his debt. He would have preferred to retire in June 2004. Griggs agreed that early retirement was good for his wife because he could assist her through her medical problems.

Griggs was subject to cross-examination. The District challenged his testimony that he performed many of Dr. Gibson's duties in her absence. During Gibson's absence the administrative staff included the Director of Special Education Services, Business Administrator and Guidance Counselor. Griggs acknowledged that it was commonly known by all staff that Dr. Gibson was frequently out of the office. Therefore, if Griggs were paid a stipend, it would not draw any additional attention to Gibson, while she was on medical leave. Griggs conceded that

the Board of Education, teachers, parents and staff all knew that Dr. Gibson had several serious medical setbacks in the past year. Therefore, the District urged that the payment of a stipend to Griggs would not have revealed anything more than that which was already known about Dr. Gibson's medical leave.

Merri Hansen testified. Ms. Hansen is the former Secretary for Superintendent Gibson. The District has employed her for five years. While working for Dr. Gibson, her duties included preparing administrative reports, personnel and discipline matters, as well as performing other secretarial duties. Ms. Hansen's testimony was offered to illustrate that Dr. Gibson continued to perform most of her duties, even while on medical leave. Ms. Hansen explained that most of Dr. Gibson's responsibilities included preparing, reviewing, and signing official documents, reports, and other similar matters. Hansen personally delivered matters of this nature to Gibson while she was convalescing at home. If the matters were not hand-delivered, e-mails and telephone contact were used. Hansen stated that there was no significant reduction in the work performed by Gibson while she was convalescing at home in terms of official reports and paperwork. Otherwise, the various administrative staff performed routine functions ordinarily done by Dr. Gibson. The Superintendent's position did not require direct contact with the teachers or students. Her duties consisted of administrative responsibilities and most of those were performed through accommodations such as home deliveries, telephone and e-mail.

Hansen was subject to cross-examination. She was asked to delineate the extent of Dr. Gibson's absences that were within her knowledge. During the school year 1999-2000, Dr. Gibson was not absent very often. However, during the school year 2000-2001, Hansen approximated that Gibson was absent for 90 days. For the school year 2001-2002, Hansen could not recall with specificity the numbers of days Dr. Gibson was absent. Hansen was asked who was the person in charge in Dr. Gibson's absence. Hansen stated that it would either be Principal Griggs or Linda Maciewcz, Director of Special Education Services. James Hayden had some supervisory authority as the Business Administrator; however, he was only serving part time.

Petitioner offered the testimony of Dr. Warren Pross. Dr. Pross was hired as the school's Superintendent in July 2003. Dr. Gibson retired on June 30, 2003. Business Administrator Hayden's contract was not renewed as of March 2003. Therefore, Dr. Pross elevated Dale Horner

to Principal in June 2003 at a salary of $70,000. This was substantially less that the $90,000 plus that Dr. Gibson received. The new Business Administrator, Henry Burmann, was hired on a part-time or shared basis. Accordingly, the present structure of the school administration is a Superintendent, Principal and part-time Business Administrator. This is the identical organization that existed prior to petitioner's termination. However, the salary figures were significantly less because the new hires had less experience.

Dr. Pross explained that the T-1 program, originally restored for the 2002-2003 budget year, was eliminated. Dr. Pross found this program to be educationally unnecessary. However, the school playground aides remain. The aides serve approximately one hour a day. They receive approximately $7.50 to $8.00 per hour. The school Honor Club also remains. The teacher who supervises the program receives an annual stipend of $2,000. Pross made additional budgetary adjustments during the 2003-2004 budget year. He reduced the guidance counselor from a full-time position to a part-time position. Further, the school psychologist was reduced from three days to two days per week. Thus, under Pross, the T-1 program was eliminated and the staff positions of guidance counselor and school psychologist were reduced. This allowed the tile of Principal to be restored. These organizational changes represented a fresh approach and were within the educational judgment of Dr. Pross.

Sandra Manning testified for petitioner. Ms. Manning was a Board member from 1998-2002. Manning served on the liaison and personnel committees. She resigned after the school board elections in April 2002. This was before petitioner was RIF'd. Manning was not particularly fond of Board President Sorbello or Dr. Gibson. She recalled the Board expressing concern about Dr. Gibson's extended medical leave and its impact upon the school.

Kathleen Hovern testified for petitioner. Ms. Hovern was a Board member for 12 years. She served on the finance, curriculum, public relations and legislation committees. In 2001-2002 she was the finance committee chairperson. Hovern was not on the finance committee when the RIF was finalized. She recalled that Griggs requested a stipend and Dr. Gibson was defensive after the request was made. Hovern believed the stipend request by Griggs was justified.

Ms. Hovern recalled the discussions leading up to the RIF. She first learned of the RIF at the May 28, 2002, Board meeting. The Board met in closed session for 30-60 minutes. Most of the discussion centered on RIFing petitioner. They discussed the Mayor and Borough Council demands that the programs eliminated in the budget be restored. If petitioner was RIF'd and Gibson was out on medical leave, the Business Administrator or Director of Special Services could cover in her absence. Hovern believed petitioner should not be terminated. The school was headed in the right direction. She attributed this to petitioner's leadership. Ms. Hovern was the only Board member to vote against the RIF. She did not believe that staff cuts were necessary. Rather, she would not have re-instituted the T-1 program. The program was not financially prudent. She also believed the board members elected in April 2002, were not as informed as they should have been before the RIF vote.

Hovern was subject to cross-examination. She admitted being friendly with petitioner. She had children in the school. She met with Griggs in his office once a week on issues related to her children.

Marie Lavigne testified. Ms. Lavigne was a member of the Board since April 2001. She recalled both May 2002 meetings with the Mayor and Borough Council after the budget was defeated. She stated that the Mayor and Council "maligned" the Board because of the program cuts. Lavigne referred to the second meeting as a "public bashing." She believed the municipal body wanted the budget increased, if necessary, so as to restore the programs. The meetings concluded with a directive that the programs be brought back. After the meetings with the municipal body, the Board evaluated Dr.Gibson's performance. They concluded that Dr. Gibson was getting her work done, in spite of her medical problems. The Board consulted with the County officials before reaching this conclusion. Lavigne stated that she felt pressured from the Borough to restore the programs. She did not feel pressured by Dr. Gibson or from any other Board members. Lavigne did not observe any scheme, plan or improper motives to RIF petitioner.

Borough Mayor, Betty Ann Cowling-Carson testified. Ms. Cowling-Carson has been Mayor of Magnolia for 13 years. She served on Council for 9 years. She knows petitioner. She recalled meeting with the Board of Education on two occasions in May 2002. She recalled

recommending that the school aids be reinstated. She had no recollection if the Borough insisted that the T-1 and Honors programs be restored. The Borough did not recommend downsizing the educational staff. After petitioner was RIF'd, she did recall mentioning that if anyone was RIF'd it should have been Dr. Gibson. Mayor Cowling-Carson was stunned when the Board RIF'd petitioner.

LEGAL ANALYSIS AND DISCUSSION

Respondent, Board of Education approved a reduction in force in May 2002. Consequently, petitioner's title was eliminated. The pertinent statute entitled "Reduction of force; power to reduce and reasons for reduction" provides:

> 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.
>
> *N.J.S.A.* 18A:28-9.

The New Jersey Supreme Court has recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely `for reasons of economy.' *Impey v. Board of Educ. of Shrewsbury,* 142 *N.J.* 388, 399 (1995). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. *Id.* at 399-40. Substance, rather than the form of a change in employment, is the controlling factor in making this determination, and if a position is replaced with an identical position but a different title, that action does not constitute a valid RIF. *See Viemeister v. Prospect Park Bd. of Educ,* 5 *N.J. Super.* 215, 218 (App. Div. 1949).

The District argues that the Board of Education has complete authority to determine if a RIF should be implemented for reasons of economy. *In Re Maywood Board of Education*, 168 *N.J. Super.* 45 (App. Div. 1979); *cert. denied* 81 *N.J.* 292 (1979). Furthermore, the RIF is non-negotiable and non-grievable. *Jamison v. Morris School District Board of Education*, 198 *N.J. Super.* 411 (App. Div. 1985). The District suggests that each and every contract between the Board of Education and teaching staff member must be in writing and signed by the President and the Secretary of the Board of Education, in addition to being signed by the teaching staff member. *N.J.S.A.* 18A:27-5. The RIF statute, if properly executed, "trumps" a non-teaching staff member's contract rollover provisions contained in *N.J.S.A.* 18A:27-11. Therefore, so long as the RIF was performed in good faith and for economic reasons, a teaching staff member can be terminated.

Courts have held that Districts have discretion in dealing with the management of the public schools.

> The School Law vests the management of the public school ... 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. Montclair BOE*, 1 938 *S.L.D* 647 (1935), *aff'd.*, St. Bd. at 653
>
> (Emphasis added).

A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. *Quinlan v. North Bergen BOE,* 73 *N.J. Super.* 40, 46 (App. Div. 1962); *see also Schinck v. Westwood BOE*, 60 *N.J. Super.* 448 (App. Div. 1960). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to a reduction in force. *Jamison v. Morris Sch. Dist. BOE, supra.* at 415. Actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. *See Kopera v. West Orange BOE*, 60 *N.J. Super.* 288 (App. Div. 1960). Bad faith has been explained as meaning improper or evil purpose or motive. *Thompson v. Pleasantville BOE*, 95 *N.J.A.R. 2*d (EDU) 278, 282 (citation omitted).

While a District has the power and authority to reduce the work force, pursuant to *N.J.S.A.* 18A:28-9, the courts have held that the Board's decisions are subject to review, to determine if the position was in fact abolished or merely transferred to another person in violation of the incumbent's tenure rights. *See Viemister v. Prospect Park Bd. Of Ed., supra.* at 215. Petitioner has the burden of proving, by a preponderance of the credible evidence, that the abolition of the position was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of *N.J.S.A.* 18A:28-9. *Dearden v. Trenton BOE*, 96 *N.J.A.R.* 2d (EDU) 321, 323; *Wollman v. Trenton BOE,* 96 *N.J.A.R.* 2d (EDU) 20, 22, *aff'd*, Comm'r at 27. The specific burden was espoused in *Wollman* wherein the Court stated:

> [I]n order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be [sic] generally not prevail in situations where there exists any reasonable justification for the reduction absent such proof of bad faith. *See Klig v. Borough of Palisades BOE*, 1 95 *S.L.D.* 168, 173-174. *In re Maywood Board of Education, supra.*
>
> [*Wollman, supra*, 96 *N.J.A.R.* 2d (EDU) at 24 (emphasis added).]

Here, the District failed to timely provide petitioner with notice of non-renewal of his employment contract by May 15, 2002. Consequently, the provisions of *N.J.S.A.* 18A-27-11 were triggered and petitioner was deemed to have been offered employment for the succeeding school year under the same terms and conditions as the preceding year. Petitioner was offered and accepted employment (P-32) for what would be his tenure year 2002-2003. In the *Order*, this ALJ held that petitioner's employment contract rolled over on or after May 15, 2002, (*Order* at page 10). The District's termination of petitioner's employment agreement effective June 30, 2002, was upheld, subject to the implications of the RIF statute. *N.J.S.A.* 18A:28-9. Thus, the analysis that follows must be done as though petitioner was a tenured teacher. *N.J.S.A.* 18A-27-11. Even though petitioner did not start of his fourth year of teaching service, it is undisputed that the District did not provide petitioner with notice of non-renewal in accordance with *N.J.S.A.* 18A-27-10 and -11. In *Canfield v. Board of Ed. of Borough of Pine Hill*, 51 *N.J.* 400 1968, the Court stated "tenure is designed to aid in the establishment of a competent and efficient school system by affording to teachers a reasonable measure of security after a reasonably fixed

probationary period. With this goal in mind, the provisions of the Tenure Act should be construed and administered fairly and sensibly rather than harshly." See *Bd. of Ed. of Manchester Tp., Ocean County v. Raubinger*, 78 *N.J.Super.* 90 (App.Div.1963); See also, *Jamison v. Morris Sch. Dist. BOE,* 198 *N.J.Super.* at 415 (App. Div. 1985). Furthermore, the District defended this matter on the basis of the RIF action (*N.J.S.A.* 18A:28-9) rather than on the basis of the rights of a non-tenured teacher staff member *N.J.S.A.* 18A:27-4.1.

Thus, I **FIND** and **CONCLUDE** that the RIF action must be resolved as though petitioner was a tenured teacher. If petitioner was not tenured, the provisions of *N.J.S.A.* 18A:27-4.1 would apply and he could have been non-renewed without cause, leaving him with limited relief. (See *Order*, November 10, 2003 resolving the contract claims). A board of education has broad discretionary authority in regard to the granting of tenure. *Donaldson v. Board of Educ. of North Wildwood*, 65 *N.J.* 236, 240-41 (1974); *Dore v. Bedminster Board of Educ.*, 185 *N.J. Super.* 447, 453-54 (App. Div. 1982). In *Dore* the Appellate Division concluded:

> The decision of the Commissioner recognized a local board's right to base its decision not to re-employ on matters outside of a teacher's evaluations due to a board's virtually unlimited discretion in hiring or renewing nontenured teachers.
>
> [185 *N.J. Super.* at 453.]

The contract issues have been addressed above and in the November 10, 2003, *Order.* The thrust of the remaining dispute is the validity of the RIF action. Petitioner advanced two charges attacking the District's actions. First, that Superintendent Gibson and Business Administrator Hayden conspired to eliminate petitioner's position for their benefit. Second, the District did not eliminate the position of principal to promote real economic savings or efficiency. I **FIND** that petitioner did not meet his burden in establishing bad faith in that the Board or administration conspired to eliminate his position or that the RIF was arbitrary or capricious.

There was no evidence of a conspiracy to RIF or eliminate petitioner before or after the budget was defeated in April 2002. The 2002-2003 budget, prepared in part by Gibson and Hayden, included funding for petitioner's title through the period until the budget was defeated. Prior to the defeated budget, Board minutes do not reflect any consideration or discussion to eliminate petitioner's title. (R-18, March 26 meeting). The budget process was then statutorily shifted to the Borough for consultation and resolution. *N.J.S.A.* 18A:22-37. Even after the taxpayers defeated the budget, petitioner's title was included in the budget. (R-21, April 25, 2002 meeting; R-26, proposed budget). Neither the Board, Gibson nor Hayden initiated any action to RIF petitioner until after the joint meeting between the Borough and the Board. This meeting occurred on May 16, 2002. Witnesses from the District described the meeting as contentious. Board members received a "scolding" or were "berated" by the Mayor and Council. This set in motion a series of reactions by the Board. Council inferred that the District was to top heavy with administrative salaries. In the end Council approved the defeated budget with the caveat that: the T-1 program, playground aides and/or the honors programs be reinstated for 2002-2003. Based upon the defeated budget and Council's recommendation, the Board sought more money to restore these programs. The Board was compelled to react to the stern message from Mayor and Council.

Subsequent to the joint meeting, the District's finance committee met several times to develop a new budget consistent with the conditions set by Borough. The committee discussed eliminating the titles of Superintendent, Principal, Business Administrator or the Director of Special Services in order to restore the programs. This action would not generate a gross budget dollar change but rather shifted monies around. The committee explored each option. The committee included Dr. Gibson, Hayden, Board Vice President, Adrianne Boice and others. Boice stated that the committee called the New Jersey School Board Association and consulted with their solicitor. They explored as many options as possible. Dr. Gibson then presented the options to the full Board on May 28, 2002. Her recommendation was to eliminate the principal's position and make the Business Administrator full-time. Gibson characterized this action as saving 50% in administrative cost. (R-35). This calculation was not in line with the real savings in dollar terms. But the savings generated from the budgetary adjustments were clearly intended to return the T-1 program, school aides and Honor's program as expressed the May 31, 2002,

memorandum of Gibson. (R-35). This was consistent with the testimony of Board members Sorbello and Boice. This was also what the Mayor and Council demanded.

Hence, I **FIND** that Hayden and Gibson did not conspire to RIF petitioner for their benefit. Their action, as well as the Boards (vote 8 to 1 for RIF), was driven by economic and efficiency considerations fostered by the budget defeat and Mayor/Counsel comments. The Board never intended to RIF petitioner prior to the budget defeat or meeting with the Borough. Petitioner suggests that once the RIF was put into play, he became the likely, but unnecessary, target. This may be true; however, the public defeat of the budget and the subsequent meeting with the Mayor and Borough Council, stimulated the RIF concept. It was not Dr. Gibson or Hayden. The Board had to submit the defeated budget to the Mayor and Council as a matter of law. *N.J.S.A.* 18A:22-37. Gibson and Hayden had a duty to find ways to restore certain programs that were eliminated. They presented various options for what they believed was appropriate. These options were developed from committees that involved several Board members. It was the Board that made the final decision, not Gibson or Hayden. The Board made a painful decision to RIF petitioner. There were many other ways the programs could have been restored that may not have resulted in petitioner being RIF'd. However, that does not mean the Board members acted without good intentions or violated the RIF guidelines. They did restore certain programs without increasing the budget. That was the end product sought by the Mayor and Council and by the taxpayers.

Hence, the Board did not act in bad faith when it voted to eliminate the position of principal in May 2002. I agree with petitioner that many other options might have been available to the District as evidenced by the actions taken by Dr. Pross in subsequent years. Dr. Pross faced a different set of circumstances. The Business Administrator's contract was not renewed. Dr. Pross reduced costs in other areas, such as special services and guidance. In his educational judgment he eliminated the T-1 program. However, based upon the information available to the Board in May 2002, together with the constraints imposed by the Mayor and Borough Council once the budget was defeated, I **FIND** the RIF action was within the realm of management's discretion. *G.M. v. Roselle Park Borough Board of Education*, 95 *N.J.A.R.* 2d. (EDU) 107, 109.

There was no persuasive evidence, beyond inference or speculation, that Dr. Gibson or James Hayden improperly influenced the entire Board's the final vote on the RIF.

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that petitioner has not satisfied his burden that the reduction in force imposed by the District in May 2002, was done in bad faith or not for reasons of efficiency or economy. *N.J.S.A.* 18A:28-9. Therefore, I **ORDER** that the action filed by petitioner be **DISMISSED**.

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

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

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

12-27-04
DATE

W. Todd Miller
W. TODD MILLER, ALJ

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

12-27-04
DATE

Mailed to Parties:

JAN 3 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

EXHIBITS

P-1 PERS Enrollment Application for James Hayden (appointed as bookkeeper by Magnolia BOE 07/01/1997)

P-2 Not offered by petitioner

P-3 Employment Contract between Somerdale Board of Education and James Hayden as School Business Secretary/School Business Administrator dated 09/22/1998 (term 10/06/1998 to 06/30/1999)

P-4 Letter of Resignation from Hayden to Dr. Gibson dated 09/22/1998

P-5 Not offered by petitioner

P-6 Magnolia Public School Superintendent's Report dated 06/29/1999 (regarding approval of Mr. Griggs as principal)

P-7 Proposed Employment Contract between Thomas Griggs and Magnolia Board of Education (term 07/01/2001 to 06/30/2003)

P-8 Employment contract between the Magnolia Board of Education and Dr. Frances Colon-Gibson as Superintendent (term07/01/1999 to 06/30/2003)

P-9 Memo from Dr. Gibson to Mr. Griggs dated 07/07/1999 regarding board approvals for June 29, 1999 meeting.

P-10 Not offered by petitioner

P-11 Employment Contract of James J. Hayden as School Business Secretary/School Business Administrator for the Somerdale Board of Education dated 08/05/1999 (term 07/01/999 to 06/31/2000)

P-12 Somerdale Board of Education Meeting Minutes (excerpt) for 10/23/2000 re: approval of shared B.A. agreement

P-13 Contract between Magnolia and Somerdale Boards of Education dated 11/14/2000 regarding shared business administrator

P-14 Memo from Dr. Gibson to Thomas Griggs regarding "Salary Increase 01-02" dated 07/25/2001

P-15 Fax from Merri Hansen to Ron Sahli dated 01/16/2002 re: new contract for Mr. Griggs

P-16 Fax from Ron Sahli to Merri Hansen dated 01/21/2002 re: no contract for Mr. Griggs

P-17 Magnolia Board of Education Regular Meeting Minutes dated 03/12/2002 regarding budget approval

P-18 Magnolia Board of Education Regular Meeting Minutes dated 03/26/2002 regarding budget approval

P-19 Borough of Magnolia Resolution #2002-53 re: approval of school district budget with no decrease

P-20 Magnolia Board of Education Reorganization Regular Meeting Minutes dated 04/25/2002

P-21 Magnolia Board of Education Regular Meeting Minutes dated 04/25/2002 regarding renewal of certified staff

P-22 Borough of Magnolia Council Meeting Minutes dated 04/30/2002 re: school district budget defeat

P-23 Memo from Dr. Gibson to Ron Sahli dated 05/03/2002: Administrative Contract Items List

P-24 Correspondence from Mayor Betty Ann Cowling-Carson to Dr. Gibson dated 05/08/2002

P-25 Correspondence to Mr. Peter Martorana from Dr. Gibson regarding "not being offered a contract for the 2002-03 school year" dated 05/14/2002

P-26 Annual School District Budget Statement Supporting Documentation (Pages F6 and F7) dated 05/16/2002

P-27 Borough of Magnolia Council Meeting Minutes dated 05/16/2002 re: school district budget defeat

P-28 Correspondence from Dr. Gibson to Mr. Griggs dated 05/20/2002

P-29 Magnolia Board of Education Regular Meeting Minutes dated 05/28/2002

P-30 Resolution Number XI-A-9 dated 05/28/2002

P-31 Superintendent's Report dated 05/28/2002 re: Recommendations from the Personnel and Finance Committee

P-32 Fax transmittal to Dr. Gibson and Mrs. Sorbello from Mr. Griggs accepting the employment contract as Principal for 2001-03 school year dated 05/28/2002

P-33 Correspondence from Dr. Gibson to Mr. Griggs dated 05/29/2002 abolishing the position of Principal

P-34 Correspondence from Mr. Hayden resigning as School Business Administrator/Board Secretary dated 05/29/2002

P-35 Memo to all staff regarding reorganization for 2002-03 school year dated 05/31/2002

P-36 Staff Attendance Roster for May 2002

P-37 Not offered by petitioner

P-38 Not offered by petitioner

P-39 Letter from Dr. Gibson to parents dated 06/13/2002 re: School Reorganization for 2002-03 School Year

P-40 Not offered by petitioner

P-41 Comprehensive Annual Financial Report of Somerdale Board of Education for the fiscal year ended 06/30/2002

P-42 Not offered by petitioner

P-43 Letter from TPAF to Mr. Griggs dated 08/01/2002 re: retirement approval

P-44 Letter from Dr. Debra L. Bruner dated 08/22/2002 re: indicators of mismanagement in the business office

P-45 Not offered by petitioner

P-46 Not offered by petitioner

P-47 Hayden Criminal Complaints dated 09/19/2002

P-48 Letter from Dr. Gibson to Hayden dated 09/23/2002 re: notice for Board of Education meeting on 09/24/2002

P-49 Memo from Dr. Gibson to Hayden dated 10/17/2002 re: salary reinstatement

P-50 Letter from Dr. Gibson to Mr. Hayden dated 01/27/2003 re: notice for Board of Education meeting on 01/28/2003

P-51 Not offered by petitioner

P-52 Memo from Dr. Gibson to Dr. Mastrobuono dated 03/20/2003 re: elimination of B.A. position

P-53 Letter from Dr. Gibson to Mr. Hayden dated 03/28/2003 re: non-renewal of contract effective 06/30/2003

P-54 Comprehensive Annual Financial Report of Magnolia Board of Education for the fiscal year ended 06/30/2003

P-55 Hayden Indictment 4492-12-03 from stated session November 2003

P-56 Employment Contract for Dale Horner as Principal of the Board of Education of the Borough of Magnolia commencing 07/01/2003

P-57 Not offered by petitioner

P-58 Magnolia Board of Education Budget for 2002-2003

P-59 Not offered by petitioner

P-60 2004-05 Defeated Budget Packet

P-61 Not offered by petitioner

P-62 Contract between Magnolia Board of Education and Frances Colon-Gibson as Superintendent dated 05/28/2002 (term 03/26/2002 to 06/30/2005)

WITNESSES

For Petitioner:

Dr. Frances Gibson

Dr. Warren Pross

Dr. Debra Bruner

Sandra Manning

Kathleen Hovern

Betty Ann Cowling-Carson

For Respondent:

Merri Hansen

Adrienne Boice

Marie Lavigne

Karen Sorbello

Joint:

James Hayden (Transcript by consent)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR IMMEDIATE REVIEW, PURSUANT TO *N.J.A.C.* 1:1-12.5(e)

OAL DKT NO. EDU 6404-02

AGENCY DKT. 242-8/02

THOMAS F. GRIGGS,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA,

Respondent.

Andrew Babiak, Esq. for petitioner (New Jersey Association of School Administrators)

George Wilgus, III, Esq. for respondent (Lenox, Socey, Wilgus, Fornidoni, Brown, Giordano & Casey, attorneys)

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on August 6, 2002. Petitioner, a School Principal for the Borough of Magnolia School District contends that the non-renewal of his alleged contract was improper and unlawful. The district asserts that position was eliminated pursuant to a reduction in force (RIF). The matter was transmitted to the Office of Administrative Law (OAL) on September 11, 2002. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14B-1

to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on January 3, 2003. A settlement conference was scheduled for May 27, 2003, and hearing dates for June 11 and 12, 2003. On May 7, 2003, petitioner submitted a letter motion seeking to compel discovery of information in certain personnel files. The letter motion was preceded by a telephone conference regarding the discovery request and procedure. During the May 27, 2003, conference the plenary hearing was adjourned until October 1, 2003. Thereafter, on August 27, 2003, petitioner submitted a motion for partial summary judgment concerning the contract claims and issues. Respondent filed opposition and oral argument was heard on October 27, 2003.

Petitioner requested, in the interest of avoiding unnecessary litigation and expense, that this Order be submitted to the Commissioner of Education for immediate review as an initial decision, as it makes up the primary claims sought to be adjudicated by petitioner. *N.J.A.C.* 1:1-15.5(c).

UNDISPUTED FACTS

1. Petitioner, Thomas F. Griggs (hereinafter "Griggs" or "petitioner") is a former employee of respondent, Board of Education of the Borough of Magnolia (hereinafter "respondent" or "Board"). From July 1, 1999 to June 30, 2002, Griggs was employed by the Board as Principal of its elementary school.

2. During the 2001-2002 school year, Griggs was the Acting Principal pursuant to an unsigned contract.

3. On May 28, 2002, the seven member Board voted 6 to 1 to eliminate Griggs' position effective June 30, and to continue the position of Principal with the position of Superintendent of Schools.

4. The school budget, which had been approved on March 26, 2002 by the Board, was defeated in an election held in April 2002. Once the budget was defeated, there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget due to its defeat in the April election.

5. On May 28, 2002, the Board approved the reduction of force with abolishment, for economic reasons, of the Principal's position, effective June 30, 2002.

6. In accordance with the RIF, the Superintendent's job title and description was revised to reflect the chief school administrator's duties and responsibilities. By letter dated May 29, 2002, Dr. Gibson advised Griggs that the Board of Education had met on May 28, 2002 and had abolished his position as part of a RIF procedure. Dr. Gibson informed petitioner that a letter of May 29, 2002 would serve as a 60 day notice of termination wherein he would receive compensation until July 30, 2002.

7. During the period 2001 through May 2002, Griggs and the Board, through its agents and representatives, had been actively negotiating contractual terms and provisions. On May 28, 2002, Griggs notified the Board and the Superintendent, in writing, that he accepted continued employment in the district for the 2002-2003 school year. The written notification was forwarded to the Superintendent's office via telefax and it provided as follows:

> Based on my attorney's advice, I accept the employment contract as Principal for the 2002-2003 school year. Respectfully, Thomas F. Griggs

The fax indicates that it was transmitted at approximately 2:25 p.m. on May 28, 2002.

SUMMARY OF LIMITED TESTIMONY

The present motion for partial summary judgment revolves around contract law in a school law setting. Petitioner also asserts that respondent violated the RIF provisions, but has chosen to submit the contract issues for summary decision in the interest of judicial economy and cost savings. The testimony of Superintendent Gibson and Petitioner Griggs were offered at oral argument. From their testimony the following facts were developed.

It is undisputed that, in or around June 1999, petitioner and the district entered a two-year agreement wherein petitioner would serve as the principal. This agreement was executed and its term was from July 1, 1999 to June 30, 2001. There remains a legal question as to whether it was appropriate for the district to enter into a multi-year contract for the position of principal. (Petitioner's letter dated October 6, 2003, page 2.) This agreement expired on June 30, 2001, pursuant to its terms, or on June 30, 2000, if multi-year contracts are prohibited as a matter of law.

On June 26, 2001, the Board of Education authorized the hiring of petitioner as its principal for another two years. The Board solicitor was authorized and directed to prepare the necessary contract. No contract was ever prepared by the solicitor. In or around January 2002, petitioner marked up his old 1999-2001 contract and submitted it to Superintendent Gibson. Gibson and petitioner met sometime between January 2002, and April 2002, to discuss the marked up contract. Petitioner's proposed changes were generally minor, except that he wanted to be paid at the superintendent's daily rate in situations where he temporarily served in that capacity. Petitioner was advised by Dr. Gibson that this modification "would not fly" because it was contrary to school law. Also, at this time, the district was preparing the 2002-2003 budget. Petitioner's title as principal was contained in the budget.

In or around May 2002, Gibson also marked up the draft agreement and forwarded it to the solicitor for review and comment. The district did not provide petitioner with notice on or before May 15, 2002, that it intended not to renew his agreement *N.J.S.A.* 18A:27-10. On May 28, 2002, petitioner faxed a handwritten note to Dr. Gibson stating that he accepted the employment contract for the 2001-2003 school year. On May 28, 2002 the Board voted 6 to 1 to eliminate petitioner's position pursuant to a RIF. The position was abolished as of June 28, 2002. The Board however, gave petitioner 60 days notice and, therefore, paid his salary until July 30, 2002.

ARGUMENTS OF THE PARTIES

Petitioner Griggs argues that he is entitled to all the rights and benefits that flow from the unexecuted or unsigned employment contract for the 2002-2003 school year, citing *N.J.S.A.*

18A:27-11. This includes, but is not limited to, full salary, vacation, sick time and other benefits arising from the district's failure to provide notice of termination pursuant to what petitioner argues is a valid contract. More specifically, petitioner relies upon *N.J.S.A.* 18A:27-11, which provides as follows:

> Should any Board of Education **fail** to give any non-tenured teaching staff member either an **offer of contract for employment** for the next succeeding year or **notice that such employment will not be offered,** all within the time and manner provided by this Act, then the Board of Education shall be deemed to have offered to the teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the Board of Education.

Petitioner's argument is that the board is required to provide him with notice by May 15, 2002, of its intention not to renew his employment contract. *N.J.S.A.* 18A:27-10. If the district failed to provide such notice of non-renewal, his contract is automatically renewed. The contract that would be renewed is the agreement that was signed back in 1999. Petitioner refers to termination provisions in the unexecuted 2001-2003 contract and places significant reliance thereupon. The termination provisions in the unexecuted contract provide as follows:

> 8. TERMINATION OF EMPLOYMENT CONTRACT.
>
> A. Mutual Agreement. This contract may be terminated by mutual agreement of the parties.
>
> B. Notice of Termination. By notice of the Principal, this contract may be terminated upon giving 60 days notice to the Board.

Petitioner argues that he cannot be terminated unless it is reached by mutual agreement as expressed in the unsigned 2001-2003 contract. Again, petitioner urges that if the Board fails to notify him by May 15th of the given calendar year, his employment contract is automatically renewed.

In the present matter, petitioner argues that he never agreed to be terminated. Petitioner also argues that, while the present matter arose pursuant to the RIF statute, the Board does not have unfettered authority to override contractual notice provisions, even if it is proceeding

pursuant to a good faith RIF action, *citing, Siegel v. Board of Education of the City of Garfield*, 93 *N.J.A.R.* 2d (EDU) 766, *aff'd,* 94 *N.J.A.R.* 2d (EDU) 319. Petitioner offers the aforementioned authority to support the theory that the district must honor the notice and termination provisions of a non-teaching staff member's employment contract.

In opposition, respondent district argues that the board of education has complete authority to determine if a RIF should be implemented for reasons of economy. *In Re Maywood Board of Education*, 168 *N.J. Super.* 45 (App. Div. 1979); *cert. denied* 81 *N.J.* 292 (1979). Furthermore, the district argues that a reduction in force is non-negotiable and non-grievable. *Jamison v. Morris School District Board of Education*, 198 *N.J. Super.* 411 (App. Div. 1985). The district suggests that each and every contract between the board of education and teaching staff member must be in writing and signed by the President and the Secretary of the Board of Education, in addition to being signed by the teaching staff member. *N.J.S.A.* 18A:27-5. The district argues that the RIF statute and provisions supercede the non-teaching staff member's contract rollover provisions contained in *N.J.S.A.* 18A:27-11. Therefore, so long as the RIF was performed in good faith and for economic reasons, a teaching staff member can be terminated.

STANDARD FOR SUMMARY DECISION

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of *Rule* 4:46-2 and the Supreme Court's decision in *Judson v. Peoples 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 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 Co. of American*, 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden,* 993 *F. Supp.* 255, 261 (D.N.J. 1998).

Based upon the testimony, briefs, affidavits and interrogatory answers and having considered the oral argument of the parties, I **FIND** that there are no genuine issues of material facts and the contract issues and claims can be decided by summary decision. Petitioner's claims and issues concerning the validity of the RIF action have not been submitted with this motion. They are reserved for a plenary hearing.

LEGAL ANALYSIS AND DISCUSSION

Petitioner filed a Motion seeking an Order for Partial Summary Judgment carrying forth the terms and condition of petitioner's employment contract for the 2000-01 school year to the 2001-02 school year; binding the Board by contractual notice provisions and not arbitrarily determining the length of notice to be given; granting the equivalent of one year's compensation (less mitigation); and compensation for petitioner's unused sick leave days.

Petitioner argues that his contract automatically rolls over pursuant to *N.J.S.A.* 18A:27-11. Specifically, the statute provides that if the district fails to give a nontenured teaching staff member either an offer of a contract for employment for the next succeeding year or notice that such employment will not be offered, then the board of education shall be deemed to have offered continued employment under the same terms and conditions. The only executed agreement between petitioner and the district was in June 1999. Neither the original nor a copy of that agreement could be located. The parties agreed that multi-year contracts are generally forbidden, except for the position of superintendent. *See, N.J.S.A.* 18A:17-15. Therefore, the

district was required to offer employment and prepare agreements for 2000, 2001, 2002 and 2003. The district did not comply with the applicable statutes in 2000, 2001 and 2002. It prepared multi-year agreements and therefore, skipped 2000, 2001 and 2002. It did not retain on file or cannot locate the original agreement from 1999. The solicitor was authorized to prepare the 2001-2003 employment agreement, but did not do so. Dr. Gibson summarized the contract status in her September 5, 2002, memorandum as follows:

> The original contracts were with Mr. Wade and were to be forwarded to Mr. Sahli so that renewal contracts could be prepared. Believe it or not, we tried but we were not able to get them. As a last resort, Mr. Sahli asked that I do the changes by hand and his office would re-type the re-newal contracts. As you and former board members know, **all of our contracts were up in the air for that one year and with no signatures**. We can blame the former Board, we can blame the Solicitors, the administrators, the current Board and everyone else till doomsday, but the bottom line is that **neither Mr. Griggs nor I had any legally signed contract at the time that the Board made a decision to restructure the school district and abolish the Principal's position**. I know you recognize that a Board has the authority to restructure, abolish, or cut positions as needed and I did personally call and advise the County Superintendent of their intent to re-structure in order to downsize administration and free up funds to bring back other services. The current Board has complied with getting all current administrative and association contracts completed and signed.
>
> Respondent's Brief –Exhibit 5

For purposes of employment in 2001-2002, petitioner was left to mark up and submit his old 1999 contract almost 6 months after the official Board action. This was done in January 2002. The marked up version was reviewed by Dr. Gibson and the Board and than sent to the solicitor in May 2002. This occurred substantially after the board directed the solicitor to prepare agreements in June 2001. Almost one year passed and a simple six-page employment contract was left unfinished. The administrative contracts for this title were poorly handled.

Petitioner complicated matters when he marked up the agreement in January 2002, and added a material change to the former agreement. He effectively made a new offer or a counter offer when he requested payment at the superintendent's daily rate. This proposal caused the district and its solicitor, to further mishandle petitioner's employment agreement.

In spite of all of the inappropriate handling of the employment agreement, petitioner served the district for the 2001-2002 school year pursuant to the terms of the original 1999 contract. Similarly, petitioner and the district operated pursuant to the terms in the 1999 agreement in all subsequent years even though they never signed the contract. Therefore, when the May 15, 2002, deadline passed, the district was obligated to have responded in some fashion. *N.J.S.A.* 18A:27-10 and -11. There were unequivocally ongoing contract negotiations. Superintendent Gibson sent the Board solicitor a memorandum regarding this subject on May 2, 2002. (Respondent's Brief exhibit 2.) But, by all indications, the material terms from 1999 were operational. Therefore, the Board either had to reject petitioners marked up counter offer, reject the 1999 agreement in its original form or provide notice that employment would not be offered.

The district's lack of diligence in finalizing its administrative contracts is analogous to *W.V. Pangborne & Co. v. New Jersey Dept. of Trans.,* 116 *N.J.* 543 (1989). In *Pangborne,* the Court held that government bodies must "turn square corners" when dealing with taxpayers. The "square corners" doctrine applies even where the party cannot satisfy the stricter evidentiary requirements that justify equitable estoppel. The Court, in *Pangborne,* stated:

> [W]e have insisted that in the exercise of statutory responsibilities, government must "turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. [Citing to *FMC Stores Co.*] ["The government's primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another."]

Here, the district, a government body, neglected to finalize the 2001-2002 administrative contract for petitioner for almost an entire year. It did not deal fairly with petitioner in terms of preparing his employment contract. It is inexcusable that his employment contract was not reduced to writing and executed. Having done very little on or before May 15, 2002, I **FIND** and **CONCLUDE** that the 1999 original employment contract rolled over pursuant to *N.J.S.A.* 18A:27-10 and -11. The district was in the better position and is statutorily obligated to maintain executed employment contracts on file. *N.J.S.A.* 18A:27-5. It failed to fulfill its statutorily obligation for all years. The original contract cannot be located and admittedly no formal

contracts were prepared and executed in any years after 1999. The district improperly prepared multi-year contracts.

Having determined that petitioner's 1999 agreement rolled over on or after May 15, 2002, the question remains what contractual notice is petitioner entitled to a since the contract was terminated pursuant to a RIF. The actual contract terms provide that the agreement may be terminated by mutual agreement of the parties and the principal of this contract may unilaterally terminate it by giving sixty (60) days notice to the board.

Petitioner argues that, notwithstanding the RIF action, the board, only upon mutual agreement of the parties, can terminate the contract. Therefore, the RIF action does not "trump" the contract termination notice requirements. Petitioner suggests that he is entitled to one-years notice as a mutually agreeable termination date and, therefore, he is entitled to one-years salary and benefits. The district argues that its RIF action supersedes an employment contract and awarding a full years salary would, in effect, nullify the important function of the RIF statute. *Old Bridge Twp. Bd. Of Educ. v. Old Bridge Educ. Ass'n*, 98 *N.J.* 523, 531-533 (1985); *N.J.S.A* 18A:29-9. Moreover, the district contends that 60 days notice is reasonable absent mutual agreement of the parties. Sixty days notice is also consistent with other RIF actions for nontenured teaching staff members. *Old Bridge*, *supra*. Finally, the district urges that 60 days notice is reasonable because it is the same period of time petitioner proposed to give the board if he terminated the contract.

Since the parties did not reach a mutual agreement as to the length of notice before effective termination, it has been submitted to this tribunal for determination. Petitioner relies upon *Siegle v Garfield Board of Education*, 93 *N.J.A.R.* (EDU) 766, decided August 10, 1993. In *Siegle*, the boilerplate employment contract contained notice provisions that were left blank at the time the agreement was executed. The ALJ observed:

> Here, however, the contractual language is not susceptible of such interpretation. Language chosen by the Board itself plainly provides that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Under these unique circumstances, where the Board could have easily limited its liability by using the appropriate language in its contract, it does

> not seriously interfere with managerial prerogatives to require the Board to honor the commitment that it voluntarily made.

The ALJ and Commissioner agreed that since the notice clause was left blank and the general provisions in the agreement specifically required the agreement to run for its full term, the teacher was entitled to entire years salary. The decision was an exception to the more typical 60 day notice requirement set forth in *Old Bridge*. *Siegle* also turned on the fact that the teacher was terminated in October. The teacher was unable to obtain a new teaching position because of the timing of the RIF in October.

In *Seigle* the ALJ stated:

> Had this been a non-tenured teacher, the Commissioner of Education would have looked to the standard contract of employment to find the correct resolution. 98 *N.J.* at 531. Relying on prior school law decisions, the Court elaborated:
>
> > To determine the amount of the award the State Board has drawn upon the provisions in the standard contract of employment for non-tenured teachers requiring 60 days. *Armstrong v. East Brunswick Bd. of Educ.*, 1975 *SLD* 117, *aff'd* 1976 *SLD* 1104 (App. Div. 1976) (non-tenured teacher who did not receive notice of nonrenewal until two days after statutory deadline awarded 60 days salary). Had the reduction in force occurred in mid-term to a non-tenured teacher, the Commissioner would presumably draw upon the same provisions in teachers' contracts calling for 60 days notice of termination to value the claim. *Cf. Contaldi v. Board of Educ. of Jersey City* (Commissioner of Education, January 23, 1981) (non-tenured teacher awarded 60 days pay when he was not properly notified of his dismissal until the new school year had begun and he had already taught for one school day). 98 *N.J.* at 532.
>
> While 60 days' notice of cancellation seems to have become the generally-recognized practice in the educational field, it is not enshrined in any statute or regulation. Review of the two administrative decisions cited by the Supreme Court reveals that in each instance the underlying contract or salary policy specified 60 days' notice. *Armstrong*, 1975 *S.L.D.* at 1104. *Contaldi*, slip op. at 4. *Accord, Mozier*, 450 *F.Supp.* at 748 n.4, where it was said that the presence of an express 60-day notice provision in a teacher's contract "vitiates any expectancy of year long employment." *See also, Canfield v. Pine Hill Bd. of Educ.* 97 *N.J. Super.* 483, 492 (App. Div. 1967) (Gaulkin, S.J.A.D. dissenting), rev'd for reasons expressed in the dissent, 51 *N.J.* 400 (1968), suggesting that, absent a

> cancellation clause, "the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure."

Nothing prohibits the parties from negotiating a shorter or longer notice period. *Rahway Educ. Ass'n v. Rahway Bd. of Educ*, 1986 *S.L.D.* 1588, 1600 (wherein the Commissioner declared that any agreement which extends salary benefits to nontenured teachers beyond the 60-day termination provision included in their employment contracts is contrary to law.) Even if the cancellation clause was silent as to time, the Commissioner would be likely to impute 60 days as a "reasonable" time period. Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate*, 90 *N.J.* 210, 219 (1982); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 27 (1958).

Here, petitioner was RIF'd before the start of the next school year (2002-2003) and compensated through July 30, 2002, while only obligated to work through June 28, 2002. Moreover, there was no specific contract clause that required the agreement to run for its full term as in *Seigle*. These facts distinguish this matter from *Siegle* and make it more analogous to *Old Bridge*. Finally, petitioner included 60 days a reasonable period to give the board notice if he terminated the agreement. Absent more specific language, 60 days is reasonable for both parties.

In sum, petitioner's original 1999 contract rolled over each year, but remained subject to a good faith RIF action. The RIF action is a statutorily sanctioned breach of the agreement. Petitioner may be entitled to the full benefit of the termination clause in his employment agreement. However, in this matter, the termination provisions were left vague and unclear. Therefore, if a contract contains no clear expressed terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate, supra.* There is sufficient decisional law citing 60 days as a reasonable period for notice for termination, if the notice was given in a way the future employment opportunities were not adversely impacted. A RIF'd teacher should be given notice at or near the end of one school year so that future employment may be explored during the summer recess for the start of the next year. Petitioner was given notice of the RIF in May 2002. Accordingly, in the school law tradition, 60 days notice and compensation was reasonable. I so **FIND**.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that petitioner's employment contract rolled over for the years 2000, 2001 and 2002. I further **CONCLUDE** that the contract termination clause was vague and unclear and therefore, sixty (60) days notice of termination was reasonable. Accordingly, petitioner's motion for summary decision is **GRANTED,** in part and **DENIED,** in part.

Petitioner requested that this Order be submitted to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for immediate review as if it were an initial decision. *N.J.A.C.* 1:1-12.5(e).

This order granting petitioner's motion for summary judgment in part and denying petitioner's motion for summary judgment in part is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order 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 order 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.

11-10-03
DATE

W J Miller
W. TODD MILLER, ALJ

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

11-12-03
DATE

Mailed to Parties:

NOV 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sd

APPENDIX

Documents considered

For petitioner:

Motion and Brief with exhibits, August 27, 2003

Letter, September 16, 2003

Letter, October 6, 2003

For respondent:

Opposition Brief with exhibits

Letter, September 30, 2003

Letter, October 7, 2003

Witnesses

For petitioner:

Thomas Griggs, petitioner

For respondent:

Dr. Gibson, Superintendent

#61-05

OAL DKT. NO. EDU 7955-04
AGENCY DKT NO. 238-7/04

IN THE MATTER OF THE TENURE	:	
HEARING OF STEPHEN FOX,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF NEW PROVIDENCE,	:	
UNION COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent requested and was granted two extensions of time within which to file exceptions to the Initial Decision and such exceptions were filed pursuant to the extended timeframe. These and the District's reply submission were fully considered by the Commissioner in making his determination herein.

Respondent's exceptions charge that, in reaching her recommended penalty determination, the Administrative Law Judge (ALJ), at pp. 2-7 of her decision, made certain factual findings which were neither based on hearing testimony nor supported by any competent evidence, wholly ignoring the requirements of the residuum rule. (Respondent's Exceptions at 9-13) Specifically, according to respondent, the ALJ found:

> that the Respondent told Scott Brogan, Director of Color Guards at New Providence High School, on several occasions that he felt bad about kissing the student, that Brogan asked the student if he should report the matter to the administration, but the student asked him not to, (A.L.J. Decision, pp. 2-3); that the student was involved with an older man (not Resplondent (*sic*)) for a considerable period of time, that some other student told Brogan that J.F. was in big trouble, that Brogan reported the affair with the older man to the State Police, that the student was taken to the Police Station and questioned about the relationship, that the student threatened suicide, that the student believed he and the

> adult were in a loving relationship, that other students taunted J.F. about the relationship with the older man, that Brogan asked J.F.'s permission to report the kiss with Fox to the administration, that J.F. asked him not to do so, that the adult entered into a plea bargain and revealed Fox's name to the police, that Brogan brought the incident with the Respondent to the attention to (*sic*) the School District when he found out the District would learn from others about the incident, that J.F. was terrified of returning to school for his senior year because of the adult being released from prison, that J.F. told Brogan he did not want to face Fox, that the incident with Fox could be placed in time with J.F.'s mother finding his diary, that J.F.'s conduct, after the incident with the Respondent, shows that it "changed his already difficult school environment for the worse" (A.L.J. decision, pp. 2-7)
> (Respondent's Exceptions at 7-8)

To the extent there is any evidentiary support for these factual findings, respondent argues, such evidence can be found "in statements identified by Feinberg and Pepper as documents provided to them by other individuals who did not testify" (*Id.* at 9) and, therefore, these findings are pure hearsay and should be dismissed by the Commissioner.

Respondent further challenges the ALJ's conclusions that respondent took the role of counselor for which he was untrained and unqualified and that the damage to J.F. as a result of respondent's conduct was immeasurable (Initial Decision at 9-10) as justification of her dismissal recommendation, contending such conclusions are based on a presumption of facts rather than on facts in the record. (Respondent's Exceptions at 16)

Finally, respondent urges that the penalty assessed by the ALJ is too harsh in light of his exemplary employment history with the District, his admission of the act and acknowledgement that his behavior was improper, and the realization that there is no likelihood of a repetition of his behavior. (*Id.* at 17) In support of this contention, he cites a series of school law decisions where it was determined that one incident of inappropriate behavior by an educator with an otherwise unblemished employment history does not warrant the individual's termination but, rather, calls for reinstatement with the imposition of some lesser penalty, which, respondent contends, should be the case here. (Respondent's Exceptions 17-22)

In reply, the District charges that respondent's exceptions attempt to obfuscate the application of both the hearsay and the residuum rules. Pointing to *N.J.A.C.* 1:1-15.5(b), the District submits that it is without question that the use of hearsay evidence is permissible in an administrative proceeding. Further, citing the Appellate Division's decision in *In the Matter of the Tenure Hearing of M. William Cowan*, 224 *N.J. Super.* 737 App. Div. (1988), the District proffers that "the residuum rule comes into play pursuant to that same rule only when hearsay evidence is the basis for each ultimate finding of fact, and application of that residuum rule requires identifying the ultimate finding of fact made by the Administrative Law Judge." (District's Reply Exceptions at 3)

Here, the District urges that the ultimate factual finding upon which the ALJ based her conclusion was that the respondent kissed the student, a fact which was uncontested and specifically admitted by respondent. (*Ibid.*) It further cites to the hearing transcript to establish other direct admissions made by respondent in his testimony, including:

> from the time he met the student he developed a relationship whereby he was someone whom the student could come and talk to about his struggle with sexual orientation, bullying, and his home life[;] that this relationship was continuous until the kissing incident occurred at which point the student immediately left the room, and thereafter there were no further personal conversations. (citations omitted) (District's Reply Exceptions at 3-4)

In addition to his direct testimony, the District urges that respondent made various other admissions during his interview with Assistant Superintendent Pepper, who testified at hearing. Such admissions, which were reduced to writing and placed into evidence (Exhibit P-4) included:

> that in the later Spring of 2004 J.F. had confided in him about the relationship with the adult P.B. and had asked for confidentiality[;] that he had general concerns about J.F., but never reported the P.B. matter to Administration[;] that he saw himself as a mentor for J.F., someone J.F. could use as a sounding board for dealing with the issues he was facing. (*Id.* at 4-5)

The District, therefore, submits that each of the ALJ's ultimate findings of fact, on Page 6 of the Initial Decision, is based on either respondent's own testimony or admissions made to Pepper, and, therefore, is properly grounded in competent evidence and not hearsay.

As to respondent's exception challenge to the ALJ's conclusions as to the severity of his admitted conduct, as a consequence of the role he assumed and the damage done to J.F., being unsupported by competent evidence in the record, the District charges that respondent is attempting to obfuscate the line between the ALJ's factual findings and her conclusions regarding these. In this regard, the District points out that respondent's testimony at hearing and his admissions to Mr. Pepper establish:

> that Mr. Fox was aware of the student's relationship with [P.B.], was aware that the youngster was deeply conflicted as to his sexuality, had problems dealing with both his school experience and his home life resulting from the relationship with [P.B.], and yet, in Mr. Fox's own words, served as mentor and confidante to this student from his initial contact through the time of the incident wherein the kiss took place. Fox admits to his repeated meetings with the youngster and, perhaps most tellingly, sets forth the fact that immediately before he kissed the youngster they were engaged in a hug. (District's Exceptions at 7-8)

In light of this direct evidence, the District professes that the ALJ's conclusion that respondent placed himself in the role of counselor to an extremely troubled adolescent was entirely proper.

Similarly, it argues, respondent's objection to the ALJ's conclusion that the damage to J.F. was immeasurable as being unsupported in the record is misplaced. Rather,

> as Dr. Feinberg testified, when she met with the youngster to discuss the incident of the kiss, he stated to his therapist and to the others present, "Now you understand why I don't trust adults." He went on to state that the fact that Fox was an icon in the district was what led him to believe that he thought nothing would happen regarding the incident. Clearly, it was not inappropriate for the Administrative Law Judge to take note of the fact that the youngster was still in therapy at the time of this meeting with Dr. Feinberg, some two years after the kiss incident, that the child had expressed an interest in leaving the New Providence School District to change his educational environment and, finally, the

> child's evident belief in his inability to trust adults because of his experiences in which he had been taken advantage of.
> (District's Reply Exceptions at 11)

In light of the above, the District contends the conclusion of the ALJ that respondent willingly engaged in a personal relationship with J.F., a youngster whom he knew had significant emotional problems, which led to respondent's unbecoming conduct, which contributed to the young student's difficulties, was well grounded. (*Id.* at 12-13)

As to the penalty in this matter, the District charges that the series of cases cited by respondent as justification for mitigation of penalty are inapposite in that, although they deal with a wide variety of unbecoming conduct, none involves "physical sexual contact between a teacher and a student." (District's Reply Exceptions at 14). It further contends that determination as to penalty is based on the particular nature and severity of what is under review. Here, it advances, respondent

> used his position of trust as a teacher to invite a youngster whom he knew to have recently undergone a traumatic event in terms of the child's sexual relationship with an adult male, encouraged conversations involving the child's sexuality and parental problems, and culminated in his having inappropriate sexual contact with the child.
> (*Id.* at 18)

Citing *In re Fulcomer*, 93 *N.J. Super.* 404 App. Div. (1967), the District argues that this behavior is sufficiently flagrant, notwithstanding that it may have been a single incident or that respondent had a heretofore unblemished record and positive evaluations in the District, that nothing short of his termination is warranted. (District's Reply Exceptions at 19-21)

Upon a careful and independent review of the record, the parties' exception submissions and the transcript of the one day of hearing held in this matter,[1] the Commissioner determines to adopt the Initial Decision of the ALJ, as he finds that respondent's admitted behavior with respect to fifteen-year-old student, J.F., is wholly outside the boundaries of

[1] The OAL hearing was conducted on October 14, 2004.

professional propriety and inimical to the expectations placed on teaching staff members, and hence is unquestionably conduct unbecoming a teacher. He further concurs with the ALJ that respondent's dismissal from his tenured teaching position is the appropriate penalty.

In so determining, the Commissioner rejects respondent's challenge to certain of the ALJ's factual findings as justification for imposition of a penalty less than termination. Rather, even assuming, *aguendo*, such identified findings were improper and should be excluded from consideration in this matter, the Commissioner finds that, as persuasively argued by the District, the ALJ's underlying factual findings which formed the basis of her conclusions, *i.e.*, that respondent kissed minor child J.F. on the lips in April 2002; that he engaged in this conduct while presenting himself to the young boy as a concerned adult and counselor and encouraging his confidences; that this sexual physical contact occurred during a period when respondent knew that J.F. was in great emotional distress for a number of reasons, including his home life, concerns about his sexual orientation, his harassment by other students and, quite probably, his relationship with P.B.; and that respondent's unwelcome physical contact altered J.F.'s educational environment in an offensive way (Initial Decision at 6-7), are well established by a preponderance of the credible, competent evidence in the record and, in and of themselves, amply justify respondent's removal from his position.

Similarly rejected are the prior school law decisions cited by respondent in support of mitigation of penalty in consideration of what he apparently believes is the less serious nature of his offense and his exemplary prior work record. Rather, the Commissioner finds that these cases are not particularly beneficial to respondent in the context of this matter. As recognized in *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 *S.L.D* at 188.:

> the Commissioner finds significant differences between these ***cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident

> itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion *each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.* (emphasis added)

Said differently, because in tenure matters each case is extremely fact sensitive, meaningful comparisons between cases can be difficult to make. The Commissioner's full review persuades him that none of the cases advanced by respondent is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for respondent's position.

It is well-established that the obligation and responsibilities of a public school teacher impose a heavy duty of self-restraint and controlled behavior "rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321. As an educator, respondent stands in a fiduciary relationship with all of his students. As such, he owes each of them a duty of trust and loyalty which means that he is responsible, at all times, to act in the best interests of his students and may not engage in any activity which would serve his own self interests to the detriment of his students. That respondent here abrogated his duty of trust to J.F. is undeniable. That he did so knowing J.F. was already an extremely conflicted and troubled young man makes his actions here all the more outrageous and reprehensible.

Although duly considering respondent's unblemished prior record, his positive performance evaluations and letters from individuals attesting to his many laudable contributions to students, the school and the community, the Commissioner concludes that these factors, which ordinarily might serve to mitigate against respondent's dismissal, are greatly outweighed by the seriousness of his admitted conduct in this matter. In light of the fact that respondent's behavior reflects a clear violation of his obligation to educate, not endanger, and protect, not exploit,

vulnerable children (*Frugis v. Bracigliano*, 177 *N.J.* 250, 268 (2003)), the Commissioner finds that such behavior is "sufficiently flagrant" to warrant respondent's dismissal from his tenured position. *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967).

Accordingly, the Initial Decision of the ALJ is adopted as the final decision in this matter. Stephen Fox is hereby dismissed from his tenured teaching position in the New Providence School District as of the date of this decision. This matter is being referred to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/10/05

Date of Mailing: 2/10/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7955-04
AGENCY DKT. NO. 238-7/04

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FOX, SCHOOL DISTRICT OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY

Martin R. Pachman, Esq., for petitioner, New Providence Board of Education

Nancy I. Oxfeld, Esq., for respondent, Stephen Fox (Oxfeld Cohen, attorneys)

Record Closed: November 29, 2004 Decided: December 10, 2004

BEFORE **EDITH KLINGER**, ALJ:

On July 12, 2004, petitioner, the New Providence Board of Education (Board), certified tenure charges against respondent, Stephen Fox, with the Commissioner of Education (Commissioner) alleging that respondent established a personal relationship with a fifteen-year-old student, J.F., which culminated in physical contact between the two. On July 26, 2004, respondent filed his answer. On August 17, 2004, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The evidentiary hearing was held on October 14, 2004, at which time a briefing schedule was established. The record closed on November 29, 2004, when the final submissions were received from the parties.

Fox was hired by the Board as a music teacher on September 1, 1993. Since the 1995-1996 school year, he has also served as chairman of the music department.

At all relevant times, Fox was the choir director for the New Providence middle school and high school. J.F. began to participate in the choir when he was a student in the seventh grade and this was when Fox first became acquainted with him.

Fox testified that J.F. confided in him. The student was struggling with his sexual orientation and a difficult home life. He was also being bullied at school. This relationship continued after the seventh grade through the 2002-2003 school year. Respondent said that in other respects, on the professional level, J.F. was just one of many students in his class.

In April 2002, Fox was working in the school's music library to reorganize it after ongoing construction. He testified that he was just about to leave when J.F. entered. When the student hugged him, Fox kissed him on the lips. J.F. pulled away and said he had to leave.

After that, their relationship became strained. J.F continued to participate in the choir but there was little conversation between them. Fox was on a sabbatical leave during the 2003-2004 school year and J.F. switched to another school for his senior year before Fox returned.

At all relevant times, Scott Brogan was the director of Color Guards at New Providence High School. He has never been a member of the teaching staff. In September 2002, Fox confessed to Brogan that he kissed J.F. in April 2002. According to Brogan's written statement of May 2004 to Deborah Feinberg, Ed.D., the principal of New Providence High School, Brogan discussed the incident with Fox several times

subsequently because Fox said he felt bad about it. Brogan asked J.F. whether he should report the matter to the administration, but, for reasons that will become clear later, J.F. asked him not to do this.

As a result, Brogan did not mention the incident until the summer of 2003 when he spoke to Michael Niedziejko, a high school music teacher and the acting head of the music department while Fox was on sabbatical leave.

On April 7, 2004, Niedziejko disclosed this information to the administration for the first time. He explained to Feinberg that Brogan told him this in confidence but Niedziejko was concerned that external circumstances would now bring the matter into the open and he did not want the school district to be "blindsided" by the revelations when Fox returned from his sabbatical. He provided Feinberg with a written statement on May 10, 2004.

Scott Pepper is now the superintendent of schools in Hanover Township. At the relevant time he was the assistant superintendent of schools in New Providence. Pepper was also the affirmative action officer and was therefore given the job of investigating the allegations against Fox.

On May 21, 2004, Pepper met with Fox and Ken Hess, Fox's union representative. Fox was advised that he could have an attorney present but he chose to proceed with the interview. During the course of the interview, respondent admitted kissing J.F. and alleged that the boy was flirting with him. Following the meeting, Pepper hand-delivered a letter to Fox directing him not to attend any further school events until and unless the matter was resolved in his favor.

The Board of Education of New Providence had a policy on sexual harassment in effect at the time. According to the policy:

> An employee who engages in the sexual harassment of a pupil will be subject to stringent discipline and may be terminated.
>
> [R-1.]

The policy defines sexual harassment as follows:

> The sexual harassment of a pupil includes all unwelcome sexual advances or suggestions, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened but for the pupil's gender. Whenever such conduct has the purpose or effect of intimidation or tends to create or alter the educational environment in ways that are intimidating, hostile, or offensive, such conduct shall be construed to be sexual harassment.
>
> [*Ibid.*]

In order to properly evaluate Fox's conduct and place the incident in the appropriate context, it is unfortunately necessary to review the external events surrounding the participants that were referred to briefly above.

According to Brogan, in 2001 and 2002 J.F. was the victim of ongoing sexual abuse at the hands of a thirty-nine-year-old man, P.B. The perpetrator was in no way connected with the school system. As Brogan later learned, in the late winter of 2002 J.F.'s mother found his diary, which described his "love affair" with P.B.

The discovery of the diary apparently caused great distress to J.F. because another student later told Brogan that J.F. said he was in big trouble and did not know what to do. Since J.F. would not tell Brogan what was wrong, Brogan advised him to talk to Fox, who might be able to help if it were a school problem. Fox subsequently told Brogan that the trouble involved J.F.'s mother and some students harassing him at school.

Brogan only learned of the situation with P.B. in August 2002 and he contacted a friend in the State Police for advice. In late August, Brogan reported the matter to law

enforcement. J.F. was taken to the police station and questioned but would not admit anything. He later threatened suicide if P.B. were arrested.

Brogan explained that J.F. was extremely upset about the situation because he believed that he and P.B. were engaged in a loving relationship. Brogan thought that J.F. might have confided this to Fox in the late winter of 2002. Fox told Pepper that he only learned about P.B. in the late spring of 2002.

Brogan obtained permission from J.F.'s parents and then convinced J.F. to tell his story to the police. He was present when J.F. gave his statement.

After P.B. was arrested and charged, the other students learned from the newspapers that J.F. had been molested by P.B. and they taunted him. All during this time, J.F.'s parents said nothing about the situation to the school administration.

As stated above, Brogan found out about the incident between J.F. and Fox in September 2002. In November 2002 he asked J.F.'s permission to report it to the school. J.F. asked him not to because he was going to have to testify against P.B and he did not want to go through the same interrogation and notoriety again with respect to Fox.

J.F. felt that no one would believe him because of Fox's standing in the school and the community. When Fox's accomplishments are described below, it can be seen what a formidable obstacle this would have been for a vulnerable fifteen-year-old boy to face.

At the end of August 2003, P.B. entered into a plea bargain. One of the conditions of the bargain was that he reveal the names of any other adults that had molested J.F. and P.B. named Fox. When Brogan learned this, he realized that the matter would now be brought to the attention of the school. As a result, he broke his silence and told Niedziejko what he knew, including the incident with Fox.

P.B. was finally convicted in October 2003. However, in January 2004 he was released from custody for good behavior. J.F. was terrified and decided to change schools for his senior year. In addition to being frightened of P.B., he told Brogan that he could not face Fox, who was scheduled to return to school from his sabbatical in the fall.

J.F. did switch schools. In June 2004, Feinberg met with J.F., his father, Pepper and the boy's therapist. When he was asked about the incident with Fox, J.F. nodded and said, "Now you understand why I don't trust adults." He told Feinberg that Fox was considered an "icon" in the school district and he believed nothing would happen to Fox if he reported the incident.

Feinberg testified that, when she met with Fox, he admitted to her that he had kissed J.F.

The parties stipulated that J.F. was not available to testify.

At hearing, respondent raised the issue of why the Board took no disciplinary action against Brogan and Niedziejko for failing to bring the matter to the attention of the District in a timely manner. I **FIND** this issue to be irrelevant to the charges brought against Fox. The present hearing does not concern Brogan and Niedziejko and the Board's action or inaction with respect to these men is not evidence that it failed to take the allegations against Fox seriously.

Based upon the testimony of the witnesses, respondent's admissions and the undisputed documentary evidence, I **FIND** that Fox kissed J.F. on the lips in or about April 2002. I **FIND** that he engaged in this conduct while presenting himself to the boy as a concerned adult and counselor and encouraging his confidences. I **FIND** that this contact occurred during a period when Fox knew that J.F. was in great emotional distress for other reasons, including his home life, his concerns about his sexual orientation, his harassment by other students and, quite probably, his relationship with

P.B. This last is suggested because, if Brogan's chronology is approximately correct, J.F.'s mother had already found his diary by April 2002.

I **FIND** that Fox's conduct constituted sexual harassment pursuant to the District's policy since it was an unwelcome physical contact that altered J.F.'s educational environment in an offensive way. J.F.'s reported conduct subsequent to the incident provides sufficient insight into his mental state to show that the contact was unwelcome and changed his already difficult school environment for the worse. I further **FIND** that the policy gave Fox sufficient warning that such conduct could lead to termination.

N.J.S.A. 18A:6-10 provides:

> 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 . . . .

In the present matter, the Board alleges that the conduct of Fox violates the public trust and renders him unfit to serve as a member of the teaching staff.

It is the clear responsibility of the Board to protect the public trust:

> The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care. A board of education must take

> reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children.
>
> [*Frugis v. Bracigliano*, 177 *N.J.* 250, 268 (2003).]

In addition to its general responsibility toward the children in its care, the New Providence Board promulgated a specific policy to prevent the sexual harassment of students by faculty. This policy spelled out in unambiguous terms that certain forms of conduct were prohibited and could result in the loss of employment and Fox was in clear violation of the policy.

I, therefore, **CONCLUDE** that Fox's conduct constitutes unbecoming conduct and "other just cause" for discipline pursuant to *N.J.S.A.* 18A:6-10(a) since it constitutes sexual harassment of a student in violation of the Board's policy.

PENALTY

It must now be determined whether dismissal is the appropriate penalty.

The esteem in which Fox was held is obvious from his annual evaluations as department head at the relevant times. In his evaluation for 1999-2000, the evaluator wrote the following comment:

> Mr. Fox has earned the respect of students, staff, and community for his outstanding achievements in maintaining the highest standards of excellence for his students. In and out of the classroom, Mr. Fox works to ensure that every student has the opportunity to develop his/her fullest potential.
>
> [R-17.]

In Fox's Annual Evaluation for the 2000-2001 school year, the evaluator commented:

> Mr. Fox is a teacher who inspires students to develop to their fullest potential. He utilizes instructional strategies that reflect a clear understanding of the learning process and student-centered performance.
>
> [R-20.]

During the course of Fox's teaching career, the reports of his classroom observations and his annual evaluations show him to be satisfactory in every respect. His accomplishments are listed and highly praised. A packet in evidence contains letters and other communications from students, families, members of the community and various organizations which applaud his outstanding contributions to his students, the school and the community.

Respondent argues that, based upon his excellent record as a teacher in the District, some penalty less than removal is appropriate. He cites cases where teachers with long unblemished records were reinstated after isolated instances of corporal punishment or other inappropriate conduct. Nevertheless, an unblemished record does not prevent removal. It has long been the case that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967).

The facts in this matter show that Fox placed himself in the role of counselor, as well as teacher, to an extremely troubled adolescent and this role was made possible by his excellent and unblemished record. It will be recalled that J.F. regarded him as an "icon" and, for that and other reasons, J.F. was afraid to report respondent's conduct. He was convinced that no one would believe him on account of Fox's reputation.

Respondent himself established the circumstances leading to the ultimate outcome when he undertook the role of counselor lacking the ability or training to provide guidance without personal involvement. As a result, the fact that he meant well provides no excuse. The damage to J.F. was immeasurable because of the student's

overwhelming emotional problems and Fox's special position of trust, over and above even that of a teacher.

I, therefore, **CONCLUDE** that Fox's conduct renders him unfit to remain a teacher and was sufficiently egregious to warrant removal from his position. *In re Fulcomer*, *supra*, 93 *N.J. Super.* at 421. The Board must remove this teacher because an extremely vulnerable child in his care was exploited and further damaged as a result of Fox's thoughtless acts. *Bracigliano*, *supra*, 177 *N.J.* at 268.

ORDER

Accordingly, it is **ORDERED** that Stephen Fox be removed from his position for unbecoming conduct and other just cause pursuant to *N.J.S.A.* 18A:6-10(a).

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

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

December 10, 2004
DATE

EDITH KLINGER, ALJ

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

December 10, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 13 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Deborah Feinberg, Ed.D.

Scott Pepper

For Respondent:

Stephen Fox

Exhibits

For Petitioner:

P-1 Statement of Feinberg

P-2 Statement of Michael Niedziejko

P-3 Statement of Brogan

P-4 Report of Pepper

For Respondent:

R-1 District Sexual Harassment Policy

R-2 Classroom Observation Report, October 19, 1993

R-3 Classroom Observation Report, October 27, 1993

R-4 Classroom Observation Report, November 17, 1993

R-5 Classroom Observation Report, December 10, 1993

R-6 Classroom Observation Report, February 25, 1994

R-7 Classroom Observation Report, October 17, 1995

R-8 Classroom Observation Report, October 24, 1995

R-9 Classroom Observation Report, February 15, 1996

R-10 Annual Performance Evaluation – Department Head, 1995-96

R-11 Classroom Observation Report, May 1, 1997

R-12 Annual Performance Evaluation – Department Head, 1996-97

R-13 Annual Performance Evaluation – Department Head, 1997-98

R-14 Classroom Observation Report, February 26, 1999

R-15 Annual Performance Evaluation – Department Head, 1998-99

R-16 Classroom Observation Report, October 15, 1999

R-17 Annual Performance Evaluation – Department Head, 1999-2000 (6/1/00)

R-18 Annual Performance Evaluation – Department Head, 1999-2000 (5/31/00)

R-19 Classroom Observation Report, April 20, 2001

R-20 Annual Performance Evaluation – Department Head, 2000-2001

R-21 Classroom Observation Report, May 29, 2002

R-22 Classroom Observation Report, May 21, 2003

R-23 Annual Performance Evaluation – Department Head, 2002-2003

R-24 Packet, letters of commendation

#68-05

68-05

OAL DKT. NO. EDU 34-05
AGENCY DKT. NO. 2-1/05

L.A., on behalf of minor children, T.A. and P.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/05

Date of Mailing: 2/25/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 34-05
AGENCY DKT. NO. 2-1/05

L.A. o/b/o MINOR CHILDREN,
T.A. AND P.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,
Respondent.

Duane T. Phillips, Esq., for petitioner

Clement F. Lisitski, Esq., for respondent

Record Closed: January 27, 2005 Decided: January 31, 2005

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 6, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

1-31-05
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

2-3-05
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

FEB 4 2005
DATE

Mailed to Parties:
Laura Rendeiro
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

RECEIVED

2005 JAN 27 P 2:39

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION CONCERNING SETTLEMENT OF THE MATTER
L.A. on behalf of minor children, T.J.A. and P.M.A. v. Board of Education of the City of Port Republic

WHEREAS, the Board of Education of Port Republic School District went to trial before the Honorable Bruce M. Gorman, A.L.J., on emergent relief from a determination by the Port Republic Board of Education that L.A.had not satisfied the condition of establishing residency in the district; L.A. was not domiciled in the district and within 60 days of her request to have her children attend school in the district based upon entering into a contract for the purchase of a home in Port Republic; and the Court, after hearing from counsel for the parties, Clement F. Lisitski, Esquire for the Port Republic School District and Duane T. Phillips, Esquire for L.A. and the parties having reached a settlement before trial;

WHEREAS, the Board has considered a resolve of the matter and has entered into a Consent Agreement concerning the issues of establishing residency and tuition owed by L.A. to the Port Republic School District for attendance of her children, T.J.A. and P.M.A. for the school year 2004/2005, a copy of which is attached to this resolution as Exhibit A; and

WHEREAS, the Board has considered the Consent Agreement and approves the terms,

NOW THEREFORE on this 19th day of January 2005, at a regularly scheduled meeting, be it **RESOLVED that:**

The matter concerning the attendance of T.J.A. and P.M.A.. is memorialized in the Consent Agreement attached as Exhibit A, and the Board approves the form and substance of the Consent Agreement requesting it to be signed by Honorable Bruce D Gorman, A.L.J. and filed with the Office of the Administrative Law; and

BE IT FURTHER RESOLVED that this matter is now concluded, all parties waiving any rights to appeal and relying on the terms of the Consent Agreement.

Kass Piotrowski
Board President

CERTIFICATION

I, Michael Cibuliew, School Business Administrator/Board Secretary of the Board of Education of Port Republic, **CERTIFY** that the foregoing is a true copy of the Resolution as it appears in the records of the Board of Education of Port Republic and as was duly and legally adopted by a majority roll call vote, of the full Board at a meeting of the Board of Education held on January 19, 2005; that it has not been modified, amended or rescinded, and is in full force and effect as of the date hereof.

Michael Cibuliew, School Business Administrator/Board Secretary

Dated: Jan. 19, 2005

Document JI

(1)

The parties agree to the following to resolve this matter:

1) Petitioner shall establish residency within 30 calendar days from January 10, 2005, time being of the essence (including settling on home and children sleeping in home). Should Petitioner fail to do this, she shall remove the children from Port Republic schools and enroll them elsewhere and she waives any rights to appeal this decision or the removal of the children if she does not meet this condition.

2) On Monday, January 10, 2005, Petitioner shall [redacted] pay to Port Republic

School Board $680 to be held in escrow. This represents the tuition rate for January 10, 2005 through February 10, 2005. If the terms of paragraph one are met, then the School Board shall return these monies to Petitioner by March 10, 2005.

3) Petitioner shall pay to Port Republic by January 18, 2005 School Board $1,360, to be held in escrow. This represents the tuition rate for the 60 days the children attended in Fall 2004. The Port Republic school board shall pay these funds to the title or mortgage company at the closing on the Port Republic house to be occupied by Petitioner. If Petitioner

does not meet the terms of paragraph one, these funds compensate the Port Republic School Board. It is the responsibility of the Port Republic School Board to put these funds in the closing with 48 hours written notice (2 business days).

4) Petitioner shall submit the paperwork for non-residents that was given her by January 14, 2005 (emergency numbers and updated health records) ~~etc.~~

5) The children shall return to school on January 10, 2005. ~~The Petitioner shall pick up homework and books today, on 4:00 PM~~ Friday, January 7, 2005. The oldest child

may attend the dance tonight.

6) Petitioner shall present evidence of residency which is defined as an electric bill within 45 days of settlement.

~~petitioner after saying she did as per paragraph one and establish~~ residency

7) If the Port Republic School Board is able to prove in a court of law OR ADMINISTRATIVE TRIBUNAL that Petitioner has not established residency during the 2004-2005 School Year then Petitioner shall be responsible for investigation fees and attorneys fees and tuitions (at the cost per pupil tuition rate) from Oct. 28th, 2004 and Petitioner agrees to remove the children from the school upon the day after the date of such a finding. This paragraph does not apply if petitioner fails to settle and establish residency pursuant to the terms of paragraph one.

8) This agreement resolves this ~~action~~ appeal with prejudice. Both parties make releases

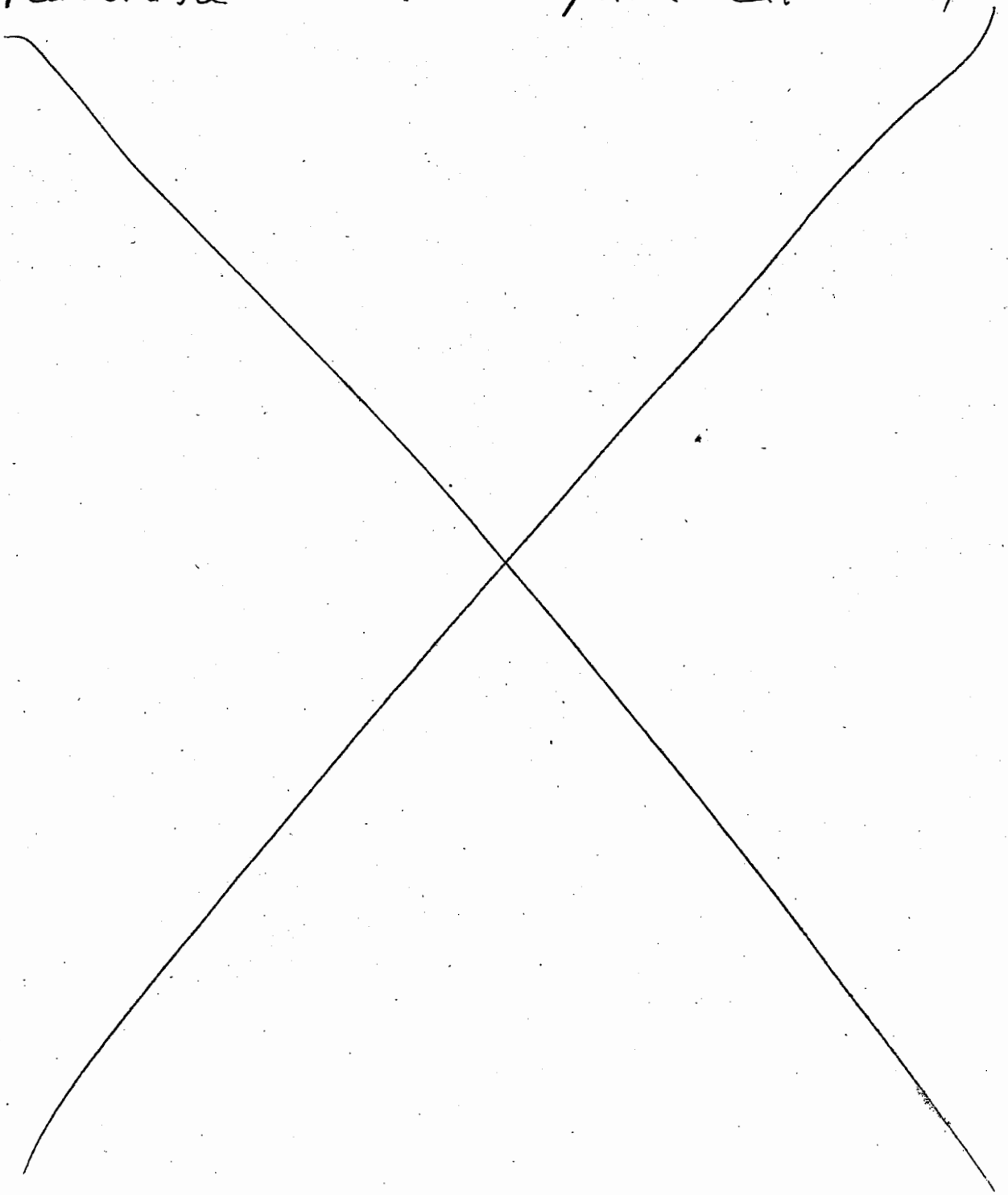
to the other regarding this appeal.

9) If any party has to enforce this order, the prevailing party receives attorneys fees and costs from the other party

10) Petitioner shall not enter the school without permission from the Superintendent or a designated person, with such permission to enter the school not being unreasonably withheld. Petitioner shall check in with the office upon entering the school through the front door. During events that parents are invited to (during the school day only), Petitioner shall report to the office prior to attending.

11) The superintendent shall accept or

respond to Petitioner's phone calls on a reasonable basis. The phone calls shall



not be excessive.

12) Children shall attend health class as previously agreed and as previously agreed with regard to the nurse. (See 11-10-04 letter signed by petitioner)

13) All contact with school staff and teachers shall be through the superintendant or a designated representative.

~~14) The terms of this agreement are limited to the 2004-2005 school year.~~

14) The terms of this agreement are limited to the 2004-2005 school year.

Petitioner

Superintendent

Attorney

Attorney

69-05

#69-05

OAL DKT. NO. EDU 4112-04
AGENCY DKT. NO. 89-3/04

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, BURLINGTON 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 settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/05

Date of Mailing: 2/25/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4112-04
AGENCY DKT. NO. 89-3/04

BOARD OF EDUCATION OF
THE TOWNSHIP OF RIVERSIDE,
BURLINGTON COUNTY,
Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF MANSFIELD,
BURLINGTON COUNTY.
Respondent.

Roger A. Barbour, Esq., appearing for petitioner (Barbour & Barbour, P.A., attorney)

Frank P. Cavallo, Esq., appearing for respondent (Parker, McCay & Criscuolo, attorneys)

Record closed date: January 19, 2005 Decided date: January 26, 2005

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

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on May 18, 2004 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was originally scheduled for October 20, 2004, but was adjourned in advance at respondent's request due to illness of the only witness on its behalf.

The matter was re-scheduled for hearing at the OAL, Mercerville, N.J. on January 19, 2005. On that date the parties met and negotiated the matter.

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)

After being place under oath, the parties stated that they understood and agreed to be bound by the terms of the settlement.

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

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

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

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

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

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

January 26, 2005
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

Feb 1, 2005
DATE

DEPARTMENT OF EDUCATION

FEB 2 2005

Mailed to Parties:

CHIEF ADMINISTRATIVE

DATE

OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

WITNESSES

For petitioner:

Charles Weisberg

For respondent:

Lisa Giovanelli

J-1

in evidence
1-19-05

Township of Riverside
Board of Education,

Petitioners

v.

Township of Mansfield
Board of Education,

Respondents

Commissioner of Education
State of New Jersey

Agency Docket No. 89-3/04

OAL Docket No. EDUC-4112-2004S

SETTLEMENT AGREEMENT

WHEREAS the Township of Riverside, filed a Petition of Appeal against the Township of Mansfield over the issue of payment for tuition of Hancock pupils;

WHEREAS, a HEARING was scheduled before the Honorable John Futey, OLJ on January 19, 2005;

WHEREAS, the parties engaged in settlement discussions at the request of Judge Futey;

WHEREAS, the parties successfully negotiated a settlement Agreement as included herein;

It is on this 19th day of January, 2005, hereby agreed as follows:

1. The Riverside Township Board of Education shall pay to the Mansfield Township Board of Education an amount equal to the per pupil cost of Riverside Township School District for the three (3) pupils at an amount of approximately $18,000.00, but not to exceed $25,000.00. Said payment will be made within thirty (30) days.

Riverside Township Board of Education

by

Mansfield Township Board of Education

by

Frank P. Coviello, Jr. Esquire

#70 05E

70-05

OAL DKT. NO. EDU NO. 1871-05
AGENCY DKT. NO. 53-2/05

DEREK ORR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL SCHOOL DISTRICT, *ET AL.*, SUSSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law on February 24, 2005 and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner'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. *Crowe* at 132-34.

Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed on the record and petitioner's request for emergent relief is, therefore, denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.[1]

Isaac R. Bryant
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 2/25/05

Date of Mailing: 2/25/05 Faxed

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 1871-05

AGENCY REF NO. 53-2/05

DEREK ORR,

Petitioner,

v.

HIGH POINT REGIONAL DISTRICT BOARD OF EDUCATION, ESSEX COUNTY

Respondent.

William F. Kehoe, Esq., for petitioner

Philip E. Stern, Esq., for respondent High Point Regional Board of Education, (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: February 25. 2005 **Decided:**

BEFORE **DANIEL B. MCKEOWN,** ALJ, (t/a):

Derek Orr, petitioner, filed a petition of appeal before the Commissioner of Education challenging the legal propriety of his dismissal from the High Point Regional High School wrestling team. He also filed an application for emergent relief to compel the High Point Regional Board of Education (Board) to allow him to participate on the wrestling team at the New Jersey State Interscholastic Athletic Association District

Wrestling Tournament that begins Friday, February 25, 2005. He was removed from the team for the remainder of the season on February 18, 2005 following disciplinary action taken against him. Petitioner's removal effectively end his high school wrestling career because he is to be graduated at the end of the academic year. Petitioner seeks emergency relief in the form of an Order from the Commissioner of Education by which he would be allowed to participate on the team for the tournament pending disposition on the merits of his petition.

On February 23, 2003, the matter was transferred to the Office of Administrative Law (OAL) for emergent hearing or a preliminary injunction until a plenary hearing could be held. A hearing on the emergent relief was held February 25, 2005.

Attached hereto and incorporated herein is an Order signed following argument on the motion.

This order may be reviewed by **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.

2/25/05
DATE

DANIEL B. MCKEOWN, ALJ (t/a)

SILLS CUMMIS EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent, High Point Regional High School
Board of Education,
Sussex County

BEFORE THE COMMISSIONER OF
EDUCATION OF THE STATE
OF NEW JERSEY

DEREK ORR, Petitioner v. DR. JOHN HANNUM, SUPERINTENDENT, JEFFREY T. HULL, ASSISTANT PRINCIPAL, AND HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY Respondent	OAL DKT EDU 1871-05 Agency Docket No.: 53-2/05 **Before the Honorable Daniel McKeown** **A.L.J.** **ORDER**

THIS MATTER having been brought before the Court by way of Application for Emergent Relief by Petitioner, Derek Orr, William Kehoe, Esq., appearing, on notice to Sills Cummis Epstein & Gross, attorneys for the High Point Regional High School Board of Education, ("Board") Philip E. Stern, Esq., appearing, and the Court having considered the arguments and papers submitted by counsel in this matter, and good cause having been shown:

IT IS on this 25th day of February , 2005

ORDERED as follows:

contrary to the interests of the District

1. Petitioner has failed to demonstrate the standards set forth in N.J.A.C. 6A:3-1.6(b).

2. Petitioner has ~~admitted to potentially criminal~~ engaged in conduct while participating as a wrestler on the Board's wrestling team.

3. Petitioner's application for emergent relief is hereby denied.

IT IS FURTHER ORDERED, that a copy of this Order ~~be served on all parties within~~ is hand-delivered ~~days of its receipt.~~ on 2/25/05

Daniel McKeown, A.L. J.

71-05

OAL DKT. NO. EDU 11429-03
AGENCY DKT. NO. 384-10/03

DAISY LAZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that an unidentified individual signed the Settlement Agreement and General Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concern 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: 3/2/05

Date of Mailing: 3/2/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.EDU 11429-03
AGENCY DKT. NO. 384-10/03

DAISY LAZO,

Petitioner,

v.

BOARD OF EDUCATION OF
THE CITY OF ENGLEWOOD,
BERGEN COUNTY,

Respondent.

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

Mark A. Tabakin, Esq., for respondent
(Weiner Lesniak, attorneys)

Record Closed: December 30, 2004 Decided: January 12, 2005

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

On or about October 20, 2003, petitioner, Daisy Lazo, filed a verified petition of appeal with the Commissioner of Education, alleging that she gained tenure pursuant to *N.J.S.A.* 18A:28-5 and thus was entitled to a one-year maternity/child rearing leave of

absence. On October 29, 2003, respondent Board of Education of the City of Englewood (Board) filed its answer requesting dismissal of the petition. On December 2, 2003, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on December 18, 2003, and a telephone prehearing conference scheduled for January 27, 2004. It should be noted that on or about November 17, 2003, respondent filed a motion for summary decision in the above-referenced matter. During the telephone prehearing on January 27, 2004, the issues were isolated and, in light of the pending motion, a hearing was not scheduled. Counsel were advised to file a joint stipulation of facts on or before February 20, 2004.

Subsequent to the receipt of the stipulation of facts, oral argument on the pending motion was scheduled for April 21, 2004. However, settlement conferences held on that date and continued on July 2, 2004 resulted in a tentative settlement, which required the approval of the Board. On or about November 3, 2004, the undersigned was advised that the Board had approved the settlement, and a signed settlement agreement would be filed. The signed settlement agreement was received on December 30, 2004.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore,

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 12, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1-19-05
DATE

M. Kathleen Duncan/dr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

Resp. 05-P-47

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 DEC 30 P 2:17

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the Englewood Board of Education ("Board") and Daisy Lazo ("Lazo"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about October 17, 2003, Lazo filed a Verified Petition of Appeal with the Commissioner of Education alleging that she acquired tenure on or about September 1, 2003, and that the Board improperly concluded that she did not acquire tenure pursuant to N.J.S.A. 18A:28-5, thereby depriving her of a maternity/child rearing leave of absence in accordance with the parties' collective negotiations agreement; and

WHEREAS, the parties elect to settle all outstanding matters and allegations in dispute in lieu of continuing to litigate the matter, so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Lazo deem it to be in their best interests to set forth in a formal written agreement their respective rights; duties and obligations regarding Lazo's position with the Board; and

WHEREAS, the Board and Lazo are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or representative of their choice.

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board" as used herein, shall at all times mean the Englewood Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, successors, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. "Lazo," as used herein, shall mean Daisy Lazo, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. The Board and Lazo agree that, on or about November 26, 2003, Lazo fulfilled the employment service and certification requirements of N.J.S.A. 18A:28-5 and acquired tenure.

4. In consideration of the Board's covenant set forth in Paragraph 3, Lazo agrees that her attendance record will reflect an unpaid leave of absence from November 27, 2003 until June 30, 2005.

5. Lazo agrees that during her unpaid leave of absence, she waives any entitlement she may have for paid health benefits as provided in any collective negotiation agreement, past practice, Board Resolution, policy or applicable statutes and regulations. Therefore, Lazo is responsible to arrange and pay for health benefits during her unpaid leave of absence. Lazo may pay the Board the full amount of the cost to the Board of providing her health benefits in order to maintain her health benefit coverage during this time.

6. Lazo shall forfeit any right she may have to accrue benefits during her unpaid leave as provided in any collective negotiations agreement, past practice, Board Resolution, policy or applicable statutes and regulations. Benefits includes, but is not limited to, seniority, vacation time, sick days, personal days, compensatory days, holidays and the like. Lazo acknowledges that any and all benefits that she may have been entitled to accrue during her unpaid leave are forfeited and she will not receive any monetary payments or credits of any kind for any benefits during her unpaid leave.

7. Lazo releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Agreement. This Agreement releases all claims, including those of which Lazo is aware or not aware and those not mentioned in this Agreement. Lazo specifically acknowledges and agrees that this is a full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by Lazo for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Lazo's employment with the Board, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth

Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not.

8. Lazo agrees that in consideration of the promises set forth above, neither party shall: (a) file an appeal with the Commissioner of Education seeking any type of relief whatsoever from the Board; (b) file a grievance or seek arbitration over the unpaid leave, or forfeiture of health care coverage or Benefits or any other issue whatsoever relative to Lazo's unpaid leave or the underlying facts; and (c) initiate any type of judicial or administrative action of any type or nature in connection with Lazo's unpaid leave or the underlying facts. The parties further agree and understand that this Agreement is a full and final waiver and release between them covering any and all claims between the parties.

9. The parties further agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Lazo's unpaid leave of absence. By entering into this Agreement, neither party admits that it has violated any contractual provisions of the collective negotiation agreement or statutory provision. Thus, the furnishing of the consideration for this Agreement by the parties shall not be deemed or construed as an admission of liability or responsibility by either party at any time for any purpose. The parties hereto expressly agree that the terms of this Agreement shall be non-precedential for any purpose whatsoever.

10. Lazo expressly agrees and understands that the promises and conditions set forth herein are premised and conditioned upon her forfeiture health benefits and other benefits as provided in Paragraphs 5 and 6.

11. This Agreement shall be irrevocable, fully binding and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

12. In the event that any one or more of the provisions of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

13. This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

14. This Agreement supersedes all prior written and/or oral agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

15. The waiver by Lazo and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

16. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Lazo and the Board.

17. This Agreement shall become irrevocable and effective immediately following execution by Lazo and the Board. However, both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgments shall be rendered null and

void and the parties shall be returned to the status quo existing prior to this Agreement.

18. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

19. This Agreement contains a settlement and stipulated dismissal of claims. By signing this Agreement the parties affirm that they have read this Agreement carefully and that they fully understood the terms and the provisions of this Agreement before signing. Lazo expressly states that she has had the opportunity to consult with an attorney with respect to the terms of this Agreement and knowingly, freely and without coercion enters into the Agreement by affixing her signature hereto.

NOW, THEREFORE, the parties, by their designated representative do set forth their signatures in confirmation of the above recitals and agreements to be effective on July __, 2004.

DAISY LAZO

DATED: 9/16/04

GREGORY T. SYREK, ESQUIRE

For the Board of Education

DATED: 11/4/04

STATE OF NEW JERSEY)
) ss.
COUNTY OF Passaic)

I, Gregory T Syrek, a ~~Notary Public~~, do hereby certify that Daisy Lazo, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that she signed and delivered the said instrument as her free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 16 day of ~~July~~ Sept. 2004.

Gregory T Syrek
~~Notary Public~~
An Attorney at Law of New Jersey

\\SERVER2\SYS\wp-data\lit\matters\ENG-135 Lazo Settlement Agreement 7-07-04.bja.doc

77-05

#77-05

OAL DKT. NO. EDU 7631-04
AGENCY DKT. NO. 163-5/04

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
LEE ANNE INCALCATERRA,	:	DECISION
SCHOOL DISTRICT OF HARMONY	:	
TOWNSHIP, WARREN COUNTY.	:	
	:	

SYNOPSIS

The Board filed a Motion for an Order to Show Cause, seeking suspension of respondent's instructional certificate for failure to provide adequate notice of resignation pursuant to *N.J.S.A.* 18A:26-10.

The Commissioner issued an Order directing respondent to show cause why further order should not be entered suspending her certificate for unprofessional conduct. After initially filing an Answer to the Order to Show Cause, respondent later withdrew her opposition to the Order after the matter was transmitted to the Office of Administrative Law for hearing. Based on respondent's failure to defend herself against the Show Cause Order allegations, each allegation against the respondent was deemed to be admitted.

Therefore, the Commissioner ordered that respondent's instructional certificate be suspended for a period of one year commencing as of the date of the decision, and forwarded the matter to the State Board of Examiners for the purpose of effectuating this order.

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

March 2, 2005

OAL DKT. NO. EDU 7631-04
AGENCY DKT NO. 163-5/04

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
LEE ANNE INCALCATERRA,	:	DECISION
SCHOOL DISTRICT OF HARMONY	:	
TOWNSHIP, WARREN COUNTY.	:	
	:	

For the Petitioning Board: Robert J. Merryman, Jr. Esq. (Appruzzese, McDermott, Mastro & Murphy)

This matter was opened by way of Motion for an Order to Show Cause before the Commissioner of Education by the Board of Education of Harmony Township, seeking suspension of the instructional certificate of Lee Anne Incalcaterra ("respondent") for resigning from employment with the Harmony Township School District on inadequate notice; and

The Commissioner issued, on May 11, 2004, an Order directing respondent to show cause why further order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10; and

The Order and accompanying Certification of Vicki J. Pede, Chief School Administrator, Harmony Township School District, was sent by the Board, via certified mail, to respondent; and

On July 6, 2004, respondent filed an Answer to the Order to Show Cause, so that on July 14, 2004 the matter was transmitted to the Office of Administrative Law (OAL) for hearing; and

On October 28, 2004, the Office of Administrative Law received a letter from Ms. Incalcaterra which states:

> I would like to withdraw my appeal for the suspension of my teaching license. If you have any questions please do not hesitate to contact me (610-419-XXXX). Thank you for your time.

This matter was then returned to the agency due to respondent's withdrawal of her opposition to the Order to Show Cause; and

Respondent having chosen not to defend herself against the Board's Show Cause Order allegations, each allegation against respondent is, therefore, deemed to be admitted; and

Respondent having ceased to perform her duties as a teacher in the Harmony Township School District before the expiration of the term of her employment, without the Board's consent, and under the circumstances set forth in the Certification of Vicki J. Pede, Chief School Administrator, Harmony Township School District, and, thereby engaging in unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10; now therefore

IT IS ORDERED on this 2nd day of March 2005, that Lee Anne Incalcaterra's instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order.*

COMMISSIONER OF EDUCATION

Date of Decision: 3-2-05

Date of Mailing: 3-2-05

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

#78-05

78-05

OAL DKT. NO. EDU 11086-03
AGENCY DKT. NO. 367-10/03

S.F., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 3-3-05
Date of Mailing: 3-3-05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11086-03

AGENCY DKT. NO. 367-10/03

S.F., ON BEHALF OF MINOR CHILD, K.F.,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY

Respondent.

Joseph M. Wenzel, Esq., for petitioner
(Lum, Danzis, Drasco & Positan, attorneys)

Natalie Shahinian, Esq., for respondent
(Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: January 25, 2005 Decided: January 26, 2005

BEFORE **BARRY N. FRANK**, ALJ:

Petitioner requested a hearing challenging the Board of Education's residency determination. This matter was transmitted to the Office of Administrative Law (OAL)

from the Department of Education on November 10, 2003, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for May 27, 2004 at the OAL, 33 Washington Street, Newark, New Jersey; however, the hearing was adjourned to September 20, 2004, to allow petitioner to retain counsel. On July 29, 2004, counsel for petitioner notified my chambers of his representation and his unavailability for the September 20, 2004, hearing due to court conflict. The hearing was rescheduled to November 1, 2004, but notices were not mail in a timely manner; therefore, the case was rescheduled to January 25, 2005. At the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

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

January 26, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

Jan 28, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 1 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO: EDU-11086-03

AGENCY NO:367-10/03

DATE: January 25, 2005

Paula L. Freeman
Petitioner

Settlement

v.

South Orange-Maplewood Board of Education
Respondent

Petitioner: Joseph M. Wenzel, Esq. (Lum, Danzis, Drasco and Positan, Attorneys)

Respondent: Natalie Shahinian, Esq. (Purcell, Ries, Shannon, Mulcahy, and O'Neill, Attorneys)

THIS MATTER HAVING BEEN BROUGHT BEFORE THE COURT ON THE APPLICATION OF Joseph M. Wenzel, Esq. , attorney for the Petitioner, Paula L. Freeman, IN THE PRESENCE of Natalie Shahinian, Esq., ESQ., ATTORNEY FOR THE RESPONDENT, and the parties having fully discussed all aspects of this matter in the presence of the court, said parties have amicably agreed to resolve this matter as follows:

1. Petitioner agrees to reimbursement the respondent for one (1) year of educating her children while she did not reside in the school district. Total amount due is $18, 300 dollars to be paid to the school district in the following manner:

    a. First year - $100.00 per month or $1200.00 for the year.
    b. Second year- $125.00 per month or $1500.00 for the year.
    c. Third year to sixth year - $150.00 per month or $7200.00 for this time frame.
    d. Seventh year to tenth year - $175.00 per month or $8400.00 for this time frame.

Grand total = $18, 300.00

2. Payment is to commence on or about Tuesday, February 15, 2005 and will continue thereafter and be due and payable on the 15th of every month until all payments are completed. A five (5) day grace period for payment will be allowed.

3. All payments are to be made payable to the South Orange/Maplewood Board of Education and mailed to: Karla Milanette
Business Administrator
525 Academy Street
Maplewood, New Jersey 07040

4. It is agreed and understood that the Respondent is waiving any and all claims to for tuition reimbursement for the 2002-2003 school year **provided petitioner fully pays all amounts as set forth in this agreement.**

5. In the event the petitioner defaults with regard to her obligations under this agreement, it is agreed and understood that the Respondent can seek repayment in court for all amounts due including the amounts due for the 2002-2003 school year.

6. This constitutes the complete agreement of the parties. Petitioner acknowledges that she entered into this agreement after consulting with counsel and reviewing same with counsel.

Paula F. Freeman

Natalie Shahinian, Esq.
Attorney for Respondent

Joseph M. Wenzel, Esq.
Attorney for Petitioner

#79-05

79-05

OAL DKT. NO. EDU 11809-04
(ON REMAND FROM EDU 9379-02)
AGENCY DKT. NO. 299-9/02

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE-MAPLEWOOD EDUCATION ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

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

Upon review, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 3/3/05

Date of Mailing: 3/3/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED
INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11809-04
AGENCY DKT. NO. 299-9/02
OAL DKT. NO. EDU9379-02 (REMANDED)

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION,

Petitioner,
v.

SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION,

Respondent.

Mary J. Hammer, Esq. for petitioner
(Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq. for respondent
(Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: January 19, 2005 Decided: January 20, 2005

BEFORE **SANDRA ANN ROBINSON,** ALJ:

Prior to hearing, the parties agreed to an amicable settlement of the matter and submitted Certified Resolution #1781 adopted on January 26, 2004 at a duly convened meeting of the South Orange and Maplewood Board of Education and a fully executed Settlement Agreement. Having reviewed the Record, the Resolution and terms of the Settlement Agreement, I **FIND:**

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

2. The Resolution of authorization and the Settlement Agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

January 20, 2005
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Jan 28, 2005
DATE

Receipt Acknowledged:
Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 1 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

Attachments:
Resolution #1781 – 1 page
Settlement Agreement – 2 pages

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY
PUBLIC BOARD MEETING
January 26, 2004

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
AUG 17 4 07 PM '04

RESOLUTION 1781

FOR ACTION

SUBJECT: STIPULATION O F SETTLEMENT AGREEMENT

BE IT RESOLVED THAT the Board of Education hereby authorizes the Board President to execute a stipulation of settlement agreement resolving all issues raised in the matter Cicenia v. South Orange Maplewood Board of Education, Docket Number EDU OT 09379-2002N.

MOTION made by Ms. Slafkes, seconded by Mrs. Gagnier, to approve Resolution 1781.

ROLL CALL: Motion 1781 passed; 7 yes, 1 no (Mr. Frazer), 1 abstain (Mr. Campbell).

I, Karla Milanette, Secretary of the South Orange-Maplewood Board of Education, hereby certify that the attached resolution was adopted at a duly convened meeting of the Board of Education on January 26, 2004 by the roll call vote set forth above and remains in full force and effect.

Karla Milanette, Board Secretary

).

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent,
Board of Education of South Orange/
Maplewood, Essex County

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 FEB 23 P 1:13

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW EDU NO. 299-9/02
Petitioners	OAL DOCKET NO. EDU OT 09379-2002N
v.	
SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION	**SETTLEMENT AGREEMENT**
Respondent.	

This matter having been brought before the Court upon the filing of a petition by Anthony Cicenia, Betty Cicenia and the South Orange/Maplewood Education Association and the parties having determined to amicably resolve this matter, herein agree as follows:

1. On or before January 20, 2004, the Superintendent of Schools of Respondent shall recommend to Respondent's Policy Committee that Board Policy 5612 be amended to expand the definitions of "assault" to also include the definition under N.J.S.A. 2C:12-1(a)(3).

2. Respondent agrees that if a teaching staff member employed by Respondent is the victim of an assault, as defined under Board Policy 5612, as amended, the teaching staff member shall be notified of (i) the scheduling of a suspension/expulsion hearing before the Board and given the opportunity to submit a statement to the Board; and (ii) the Board determination, if any.

3. Respondent agrees that 68.5 sick days shall be restored to Betty Cicenia's account of accumulated, sick leave days.

4. In consideration of the foregoing, Petitioners hereby release, waive, and give up any and all claims and rights which they may have against the Board, its employees and agents, arising out of or otherwise related to the claims which were raised or could have been raised.

5. This action is hereby withdrawn with prejudice.

6. The parties acknowledge that they have been represented by counsel in this action, and that the terms of the Settlement have been fully explained to them by counsel, and that they understand the terms.

7. This Agreement is subject to the approval of the Respondent, Board of Education.

ANTHONY CICENIA

Dated: 11-24-03 Anthony Cicenia

BETTY CICENIA

Dated: 11-24-03 Betty Cicenia

SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION

Dated: 12/10/03 By: Harvey Ehrlich

Its President - SOMEA

SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION

Dated: 1/21/04 By: Nilda M. Savery

Its President - BOE

(00557050.1 /SAS)

81-05

AGENCY DKT NO. 194-5/04

VICTORY SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a petition of appeal seeking "complete, unlimited waiver" of *N.J.A.C.* 6A:23-4.3(c)iii, which sets forth the average daily enrollment (ADE) requirement of private schools for the disabled, following notification from the New Jersey Department of Education that the petitioner was in jeopardy of having its preliminary approval status as a private school rescinded unless it attained the minimum ADE of 16 students for the 2004-05 school year. Subsequent to filing the petition of appeal, the Victory School submitted an application for a waiver of these regulations through the equivalency and waiver process set forth at *N.J.A.C.* 6A:5-1 *et seq.*, and requested that the matter be placed in abeyance pending decision on the waiver application.

The Commissioner considered the petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii under the regulations established for application for a waiver and issued a determination on that request on December 7, 2004 denying Victory School's waiver request. Subsequently, petitioner requested that its appeal be reinstated.

Having previously rendered a determination on petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii in the appropriate forum, *i.e.*, under the regulation governing requests for a waiver, *N.J.A.C.* 6A:5-1.1 *et seq.*, the Commissioner found that the relief requested within the instant petition is moot. Accordingly, respondent's motion was granted and the petition of appeal 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.

March 4, 2005

AGENCY DKT NO. 194-5/04

VICTORY SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

For Petitioner, Stephen F. Hehl, Esq. (Hehl & Hehl)[1]

For Respondent, Carolyn Grace Labin, DAG (Peter C. Harvey, Attorney General)

This matter was opened by way of a Petition of Appeal filed on May 24, 2004, wherein petitioner seeks a "complete, unlimited waiver" of *N.J.A.C.* 6A:23-4.3(c)iii.[2] (Petition of Appeal at 3) *N.J.A.C.* 6A:23-4.3(c)iii sets forth the requirement that any previously-approved private school for the disabled, whose enrollment falls below the minimum Average Daily Enrollment (ADE) of 16 full-time students in a school year, shall have its status rescinded and shall be considered preliminarily approved. Further, if it should fail to attain the minimum average daily attendance of 16 full-time students by the end of the third year after the year in question, its approval shall be rescinded and it shall no longer be considered an approved private school for the disabled. The impetus for this appeal arises from a January 20, 2004 notification from the Department's Division of Finance, advising petitioner that it must attain an ADE of 16 students for the 2004-05 school year or its preliminary approval status as a private school would be rescinded. (*Id.* at 1)

[1] It is noted that the within petition was filed by Mark Lasky, President/Chief Executive Officer of the Victory School, upon his notice of appearance/application to represent petitioner, a close corporation, pursuant to *N.J.A.C.* 1:1-5.4(a)5 and *N.J.A.C.* 1:1-5.5(g). Mr. Hehl entered his appearance by way of the filing of an answer to respondent's motion to dismiss on behalf of petitioner on February 8, 2005, followed by a Substitution of Attorney on February 25, 2005.

[2] Although the petition specifically asks for a waiver of *N.J.A.C.* 6A:23-4.1, the regulation petitioner seeks to waive is actually *N.J.A.C.* 6A:23-4.3(c)iii, as clarified in the arguments expressed on pages one and two of the petition and in petitioner's reply to respondent's motion.

Petitioner states that it "is appealing based on (6:3A-1.3) 6A:5-1.3"[3] and argues, *inter alia*, that it has been an effective, approved private secondary school since the 1986-87 school year, and that it is the only private school in Union County with a unique academic/vocational environment that assists students in completing their education, and making a smooth transition to work or the adult service continuum. Additionally, petitioner states that the spirit and intent of the applicable Federal and State laws and regulations are served by granting its request for a waiver. (*Id.* at 1-2)

By letter of July 13, 2004, petitioner requested that this matter be placed in abeyance pending a decision on its application for a waiver of *N.J.A.C.* 6A:23-4.3(c)iii, submitted to the county superintendent through the Equivalency and Waiver Process set forth at *N.J.A.C.* 6A:5-1.1 *et seq.* Subsequently, by letter of December 30, 2004, petitioner requested that its appeal be reinstated in light of the Commissioner's rejection of its request for a waiver and the "judgment" by the Division of Finance to rescind its longstanding license to operate as a private school for the disabled as of July 2005. Petitioner attached the Commissioner's determination of December 7, 2004, denying its request for a waiver of *N.J.A.C.* 6A:23-4.3(c)iii to continue the operation of a private school for the disabled that falls below the minimum ADE of 16 by the end of the third school year. (Attachment to Petitioner's Letter of December 30, 2004) Petitioner also attached a letter, dated November 23, 2004, from Richard Rosenberg, Assistant Commissioner, Division of Finance, noting that petitioner's ADE was 4.4, 4.1 and 4.95 in the 2001-02, 2002-03 and 2003-04 school years and stating that petitioner must attain an ADE of 16 for the 2004-05 school year or the school's approval will be rescinded, effective July 1, 2005. (*Ibid.*)

On January 25, 2005, respondent filed a motion to Dismiss in Lieu of Answer, claiming that the issues raised in the within petition are moot in that the Commissioner issued a decision on December 7, 2004 regarding the relief requested through his denial of petitioner's

[3] In that regulation *N.J.A.C.* 6:3A-1.3 does not exist, presumably, petitioner is referring to *N.J.A.C.* 6A:3-1.3 which sets forth the procedures to be followed to initiate the contested case process for the Commissioner's determination of a controversy or dispute arising under the school laws. *N.J.A.C.* 6A:5-1.3 describes the criteria that must be met for the application for an equivalency or waiver of State Board regulations.

application for a waiver of *N.J.A.C.* 6A:23-4(c)iii, pursuant to *N.J.A.C.* 6A:5-1.5(a)iii, and noting that petitioner has appealed the denial of its waiver request to the State Board. (Motion to Dismiss at 5)

In reply, petitioner claims that a grant of respondent's motion to dismiss this matter would deny petitioner its absolute right to appeal the Commissioner's decision of December 7, 2004, "which is contrary to *N.J.A.C.* 6A:4-1.1." (Petitioner's Reply to Motion to Dismiss at 3) Moreover, petitioner asserts that its request for an appeal and/or waiver of *N.J.A.C.* 6A:23-4(c)iii is not moot in that it has not been provided the opportunity to present any evidence or witnesses in support of its contention that a wavier is appropriate in that: 1) it provides an essential service to students with disabilities ages 15 to 21 that cannot be duplicated by the sending districts and 2) the sending districts of Union County and Union County Education Services would lose an important alternate educational option for students who require a modified setting that includes vocational development and academic services with individualized support. (*Id.* at 4) Petitioner, therefore, concludes that "[t]o leave the Commissioner's decision would clearly deny the Claimant its right to proceed on Appeal." (*Ibid.*)

Respondent points out in its response that nowhere in the petition does petitioner assert that it is appealing the regulatory language of *N.J.A.C.* 6A:23-4.3(c)iii, but, instead, specifically states in its petition that it is seeking a waiver of the regulatory provision set forth in *N.J.A.C.* 6A:23-4.3(c)iii and, even now, in its response to the motion to dismiss, requests that it be heard on its application for a waiver. (Respondent's Response at 3) Respondent contends that the term waiver, as set forth in *N.J.A.C.* 6A:5-1.2, has the specific meaning of "approval to avoid compliance either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally and fiscally sound" and that, pursuant to *N.J.A.C.* 6A:5-1.5(a), a school district must submit an application to the Commissioner demonstrating why the waiver of a specific regulatory provision is warranted. (*Id.* at 3-4) Upon the Commissioner's review of the application and determination, respondent submits, a school district may appeal the Commissioner's decision to the State Board, if it is not satisfied with the

Commissioner's determination. (*Ibid.*) With respect to petitioner's contention that it has not been provided the opportunity to present any evidence or witnesses in support of its waiver request, respondent avers that there is no language in the applicable code that states that a school district shall have the opportunity to present evidence and testimony regarding its waiver application. (*Id.* at 4) In conclusion, respondent submits that the relief requested within its petition is moot in that petitioner has had its opportunity to be heard before the Commissioner and that an appeal of the Commissioner's denial of its request for a waiver is now pending before the State Board. (*Ibid.*)

Upon a thorough review of the parties' submissions, the Commissioner has determined to grant respondent's motion to dismiss the within petition. In so concluding, it is emphasized that the Commissioner fully considered petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii and issued a determination on that request on December 7, 2004, pursuant to the procedures for consideration of equivalency and waiver requests found at *N.J.A.C.* 6A:5-1.1 *et seq.* In the instant matter, petitioner requests the same relief denied in the Commissioner's December 7, 2004 decision and provides no basis for additional consideration of this matter under *N.J.A.C.* 6A:3, which sets forth the procedures to initiate a contested case where there is an allegation that an action by a school district is in violation of the school laws or where the action being challenged may involve the implementation of a waiver or equivalency granted by the Commissioner. *See, also, N.J.A.C.* 6A:5-1.7. Having previously rendered a determination on petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii in the appropriate forum, *i.e.*, under the regulation governing requests for a waiver, *N.J.A.C.* 6A:5-1.1 *et seq.*, therefore, the Commissioner finds that the relief requested within the instant petition is moot.

With respect to petitioner's claim that a finding that its claim is moot under the contested case process set forth at *N.J.A.C.* 6A:3 would deny petitioner its absolute right to appeal the Commissioner's decision of December 7, 2004, "which is contrary to *N.J.A.C.* 6A:4-1.1," the Commissioner points out that *N.J.A.C.* 6A:4-1.1 *governs appeals to the State Board, not the*

Commissioner, and that petitioner has preserved its right to appeal the Commissioner's decision by filing an appeal with respect to the issue herein to the State Board. Moreover, although the Commissioner finds that petitioner was provided the opportunity to which it was entitled under the regulations to present its arguments in support of its request for a waiver of the ADE requirement set forth at *N.J.A.C.* 6A:23-4.3(c)iii, in that an appeal of the Commissioner's decision is currently pending before the State Board, any argument that petitioner wishes to present in support of its allegation that it was not provided an adequate opportunity to present its arguments in support of its contention that a wavier was appropriate should be made to the State Board.

Accordingly, for the reasons set forth above, respondent's motion is granted and the within petition is dismissed, with prejudice.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 3/4/05

Date of Mailing: 3/4/05

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

84-05

AGENCY DKT. NO. 26-2/02

BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,

PETITIONER,

V.

WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION, AND WALTER KEISS, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS,

RESPONDENTS.

AND

TOWNSHIP OF MANSFIELD, BURLINGTON COUNTY,

PETITIONER,

V.

WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION, AND WALTER KEISS, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner Northern Burlington County Regional School District, Frank P. Cavallo, Jr., Esq. (Parker McCay, attorneys)

For the Respondents, Allison Colsey Eck, DAG (Peter C. Harvey, Attorney General of New Jersey, attorney)

For the Intervenor Township of North Hanover, Joseph A. D'Aversa, Esq. (Costa, Vetra & LaRosa, PC, attorneys)

March 7, 2005

At its meeting on February 2, 2005, the State Board of Education remanded this matter to the Commissioner for determination of the apportionment of seats on the Northern Burlington County Regional School District Board of Education, consistent with the directive of the Appellate Division of the Superior Court in its decision of October 14, 2004.

By letter dated February 8, 2005, the Burlington County Superintendent of Schools effectuated the required reapportionment, noting that any dispute arising from it could be appealed to the Commissioner through the filing of a petition pursuant to *N.J.A.C.* 6A:3.

Accordingly, the directive of the State Board having been duly fulfilled, no further proceedings are required in this matter, which is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2005

Date of Mailing: March 7, 2005

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

86-05

OAL DKT. NO. EDU 9969-04
AGENCY DKT. NO. 298-9/04

T.J., on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, returned to the Commissioner by the Office of Administrative Law (OAL) as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, has been reviewed. The Commissioner notes that the request for withdrawal was made by letter from petitioner dated January 25, 2005, wherein petitioner states that he and S.T. do not reside at the address previously claimed and that S.T. has been withdrawn from the respondent's school district.

However, the Board's Answer in this residency matter contained a demand for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains neither a statement that the Board is no longer seeking tuition nor an affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of S.T.'s ineligible attendance in its schools, this matter is hereby remanded to the OAL for supplementation of the record and, if appropriate, a recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/10/05
Date of Mailing: 3/10/05

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

#85-05

OAL DKT. NO. EDU 10761-04
(ON REMAND FROM EDU 746-04)
AGENCY DKT. NO. 66-2/04

LORI LAFRENNIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/9/05
Date of Mailing: 3/9/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10761-04

AGENCY DKT. NO. 66-2/04

(ON REMAND FROM EDU 746-04)

LORI LAFRENNIE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

Respondent.

Tobin G. Nilsen, Esq., for petitioner

Avis Bishop-Thompson, Esq., for respondent (DeCotiis, Fitzpatrick, Cole & Wisler, attorneys)

Record Closed: January 24, 2005 Decided: January 26, 2005

BEFORE **BRUCE M. GORMAN,** ALJ:

On February 24, 2004, the Bureau of Controversies and Disputes of the Department of Education referred the present matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14-b-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Commissioner requested that an administrative law judge be assigned to conduct a hearing. The

Director of the Office of Administrative Law assigned the matter to me to hear. *N.J.S.A.* 52:14F-5(o).

Prior to a hearing being scheduled, the parties arrived at a settlement agreement, and the terms were reduced to writing in the attached Stipulation of Settlement. The settlement was rejected by the Commissioner for technical reasons.

On December 10, 2004, the Commissioner of Education issued a Decision remanding this matter to the OAL for revision of the Settlement Agreement to include a copy of the Board of Education's Resolution approving the settlement, designating the Board President to sign the agreement on its behalf and to include the signature of the Board's attorney.

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 Stipulation of Settlement and initially filed with this ALJ on October 28, 2004. The original stipulation has been amended to include the signature of Avis Bishop-Thompson, Esquire, the Board Solicitor for the Board of Education of the City of Pleasantville, and attaching a copy of the august 24, 2004 Pleasantville Board of Education Resolution authorizing the settlement and authorizing the Board President to execute the appropriate settlement documents.

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

Therefore, I **ORDER** that the parties 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**, why by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

1/26/05
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

Jan 28, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 31 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

Pleasantville Board of Education
Office of Financial Services
900 West Leeds Avenue
P.O. Box 960
Pleasantville, New Jersey 08232-0960
(609) 383-6800 Extension 2527

Ms. Helene McBride, CPA
Business Administrator/Board Secretary

RECEIVED
2005 JAN 24 A 9:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

December 17, 2004

I hereby certify and attest that the following is a true copy of an extract taken from the Minutes of the Meeting of the Board of Education of the City of Pleasantville, dated August 24, 2004.

Helene L. McBride

Helene McBride, CPA
Business Administrator/Board Secretary

RESOLUTION OF THE PLEASANTVILLE BOARD OF EDUCATION APPROVING THE SETTLEMENT WITH LORI LAFRENNIE AND AUTHORIZING THE BOARD PRESIDENT TO EXECUTE THE SETTLEMENT AGREEMENT

WHEREAS, Lori LaFrennie (" Ms. LaFrennie ") is employed with the Pleasantville School District (" District "); and

WHEREAS, Ms. LaFrennie has filed a cause action in the Office of Administrative Law (" OAL ") entiled Lori LaFrennie v. City of Pleasantville Board of Education, Atlantic County, Docket No. EDUOR 00746-2004S, Agency Ref. No. 66-2/04; and

WHEREAS, the OAL action has amicably settled subject to a fully executed settlement agreement; and

WHEREAS, the Board desires to enter into settlement accordance with the following terms:

a. Ms. LaFrennie will voluntarily resign;
b. Ms. LaFrennie will receive her contracted annual salary of $40, 245 minus the appropriate withholding allowances. Additionally, the salary will be mitigated by the $9,000 earnings supported by the appropriate documentation;
c. Ms. LaFrennie will receive $14,657.500 for medical benefits;
d. Upon execution of the Release and Settlement, the OAL action will be dismissed with prejudice.

NOW, THEREFORE, BE IT RESOLVED, by the Pleasantville Board of Education as follows:

1. The terms of the settlement are hereby approved by the Board.
2. The Board authorizes the Board President to execute the appropriate settlement documents having terms substantial similar to the terms as set forth above.

The approval of the settlement is subject to the execution of a mutually acceptable written settlement agreement.

Pleasantville Board of Education
Office of Financial Services

Received Check No. 52252 in the amount of $29,731.69 and check No. 52253 in the amount of $14,647.50 both dated October 18, 2004 from the Pleasantville Board of Education as final payment of all monies due, which is in full and complete satisfaction pursuant to the terms of the Resignation from Employment and Settlement Agreement.

Date: _____ By: _____
Lori LaFrennie

ACTION:

Motion to accept Employment Settlements

MOTION: Teddy Bryant SECOND BY: Harriet Jackson

ROLL CALL
Adams – Yes
Bryant – Yes
Graves – Yes
Hayer – Yes
Jackson – Yes
Pressley – Abstain
Royal – Yes
Page - Yes
ABSENT: Leary
MOTION APPROVED

RESIGNATION FROM EMPLOYMENT
SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Resignation from Employment, Settlement Agreement and General Release (the "Agreement"), is entered into this ____ day of September, 2004, by and between Lori LaFrennie ("Ms. LaFrennie") and the Pleasantville Board of Education, Atlantic County (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Pleasantville Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Ms. LaFrennie" shall mean and include Lori LaFrennie and any and all of her executors, administrators, successors, assigns, agents and representatives. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Ms. LaFrennie's employment by the Board, the termination of her employment and any claims or actions she has brought or could have brought against the Board.

W I T N E S S E T H:

WHEREAS, Ms. LaFrennie filed an administrative action against the Board in the Office of Administrative Law (the "OAL"), entitled Lori LaFrennie vs. The Pleasantville Board of Education, Atlantic County, Docket No. EDUOR 0076-2004S, Agency Ref. No., 66-2/04 (the "Administrative Action"); and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss with prejudice Ms. LaFrennie's Administrative Action and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Ms. LaFrennie may have against the Board; and

WHEREAS, Ms. LaFrennie acknowledges and agrees that the payment provided for herein is provided as consideration for this Agreement to voluntarily dismiss, waive and withdraw the Administrative Action and any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (a) In consideration for Ms. LaFrennie's execution of this Agreement and the promises and covenants contained herein, the Board commits that it shall issue and remit to Tobin G. Nilsen, Esq. (Ms. LaFrennie's "Counsel") a check payable to Lori LaFrennie, in the gross amount of forty thousand two hundred forty-five dollars ($40,245), less applicable statutory deductions and withholding taxes which represents her contractual salary for the 2003-2004 year. The salary payment will also be mitigated by the $9,000

earned by Ms. LaFrennie during the 2003-2004 years supported by appropriate documentation. The Board will report the salary payment to the taxing authorities via an IRS Form 1099. The check will be sent to Ms. LaFrennie's Counsel after (i) this Agreement is executed and the Stipulation of Dismissal with Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Court;(ii) the seven-day revocation period referred to in Paragraph 11 has expired and (iii) documentation is provided evidencing earnings of $9,000.

(b) The Board commits that it shall issue and remit to Mr. Nilsen a check payable to Lori LaFrennie and Tobin G. Nilsen, Esq. in the gross amount of fourteen thousand six hundred fifty-seven dollars and fifty cents ($14,657.50) which represents her contractual benefits for the 2003-2004 year. The Board will report the salary payment to the taxing authorities via an IRS Form 1099. The check will be sent to Ms. LaFrennie's Counsel after (i) this Agreement is executed and the Stipulation of Dismissal with Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Court and (ii) the seven-day revocation period referred to in paragraph 11 has expired.

(c) In the event that it is subsequently determined that Ms. LaFrennie owes any employment taxes with respect to this payment, Ms. LaFrennie expressly acknowledges and agrees that she and/or her heirs, executors, administrators and assigns, and not the Board, will be responsible for the payment of any such taxes, liabilities, payments or costs, interest and penalties. Ms. LaFrennie agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments or costs, interest and penalties, which may be assessed against the Board in connection with any payment made to or on behalf of Ms. LaFrennie hereunder.

2. Ms. LaFrennie, for the consideration given by the Board as set forth above, which she acknowledges is adequate and satisfactory to her, hereby commits as follows:

(a) Ms. LaFrennie agrees that by signing this Agreement she is irrevocably resigning her employment with the Board effective upon the execution of this Agreement.

(b) Ms. LaFrennie irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Ms. LaFrennie has ever had or now has against the Board including, but not limited to, claims arising out of or relating to or arising from or in connection with her employment with the Board, the resignation of her employment, compensation and/or benefits with the Board and the Administrative Action. Ms. LaFrennie further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any

kind whatsoever which could be or could have been brought by her and which seeks personal, equitable or monetary relief for her against the Board, including, but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment discrimination; employee benefits; collective bargaining agreement; and the termination of employment and any other claim arising from or relating to Ms. LaFrennie's employment. Ms. LaFrennie understands that she is not releasing any claims she may have to enforce the provisions of this Agreement. This release covers both claims that Ms. LaFrennie knows about and those she may not know about, except for claims (i) that may arise after the date Ms. LaFrennie executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Ms. LaFrennie has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Ms. LaFrennie further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction to remedy the breach and an award of reasonable attorney's fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(c) Ms. LaFrennie agrees to dismiss with prejudice the Administrative Action. In that regard, Ms. LaFrennie's Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal With Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Ms. LaFrennie that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

(d) Ms. LaFrennie agrees to withdraw fully and finally and to dismiss with prejudice any and all administrative, state or federal court actions, which have been filed by her against the Board which have not already been closed or otherwise terminated. Ms. LaFrennie will ask each agency or court with which she has filed an action to enter an order, without appearance by

either Party, withdrawing and dismissing the action with prejudice. Any such orders shall be attached to and become a part of this Agreement. It is acknowledged and understood by Ms. LaFrennie that any and all obligations set forth in this Agreement are conditioned completely and entirely upon the withdrawal and dismissal with prejudice of any and all administrative, state and federal court actions.

(e) Ms. LaFrennie agrees that she will not talk about, discuss or consult with, advise, counsel or otherwise cooperate with or assist any employees or former employees of the Board in the pursuit of any legal or administrative action(s) against the Board, including, but not limited to, any action(s) in connection with any matters relating to her employment or the termination of her employment, unless compelled to do so by court order or lawful subpoena. Ms. LaFrennie further agrees that she will not participate, directly or indirectly, as a party, witness or otherwise, in any action at law, proceeding in equity or in any administrative proceeding in which the Board or Board personnel are Parties, unless compelled to do so by force of law.

(f) Ms. LaFrennie acknowledges and agrees that other than the consideration provided for herein, she is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to her regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect Ms. LaFrennie's receipt of the benefits in which she is vested or to which she is entitled under the Board's current pension, disability and/or other vested plans or policies.

3. Ms. LaFrennie agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Ms. LaFrennie may discuss or disclose this Agreement (i) with her immediate family; (ii) with her attorney(s) or tax advisor(s); and (iii) in response to inquiries from, any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities Ms. LaFrennie or the Board.

4. (a) Ms. LaFrennie agrees that she shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the Board or which encourages any adverse action, provided that Ms. LaFrennie is permitted to testify truthfully under oath pursuant to a subpoena.

(b) With respect to any inquiries regarding Ms. LaFrennie, the Board shall have responsibility only as provided below or only insofar as Mr. LaFrennie has directed inquiries to Mr. Skender T. Avrami, or his successor, of the Board's Human Resources Department. If any inquiries are made to Dr. Gail D. Brooks, Dr. Brooks will direct those inquiries to Mr. Avrami, or his successors,

they will be responded to with a neutral reference consisting of Ms. LaFrennie's name, dates of employment and position held while employed with the Board.

5. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board, nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Ms. LaFrennie has ever had or now has against the Board arising out of or relating to his employment with the Board, the termination of her employment, her compensation and benefits with the Board or the Administrative Action. The Board expressly denies any wrongdoing of any kind in regard to Ms. LaFrennie's employment, the termination of her employment, her compensation and benefits with the Board and the Administrative Action.

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

7. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

8. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Atlantic.

9. Ms. LaFrennie and her Counsel agree that Ms. LaFrennie is responsible for her own attorneys' fees and costs incurred in connection with the Administrative Action and her claims against the Board and warrant that

both Ms. LaFrennie and her Counsel waives and release any claims against the Board for attorneys' fees and costs, statutory or otherwise, related in any way to the matters covered by this Agreement, and covenant not to sue or otherwise proceed against the Board with respect to any such claims for attorneys' fees and/or costs. By signing this Agreement, Ms. LaFrennie and her Counsel affirm that they are waiving and releasing any claims they may have against the Board for attorneys' fees.

10. Ms. LaFrennie agrees that neither this Agreement nor any portion hereof is assignable. Ms. LaFrennie represents, warrants and covenants that she has not previously assigned or transferred, or purported to assign or transfer, to any individual or entity, any of the rights, claims, demands or causes of action being released herein, and agrees that no such assignment or transfer may occur without a written consent executed by the Board, and any attempt to do so shall be void.

11. Ms. LaFrennie certifies that she has read the terms of this Agreement, they have been explained to her by an attorney of her choice and that she understands them in full. The execution hereof by Ms. LaFrennie shall indicate that this Agreement conforms to Ms. LaFrennie's understandings and is acceptable to her as a final agreement. It is further understood and agreed that Ms. LaFrennie has been advised of the opportunity to consult with counsel of his choice and that she has been given a reasonable and sufficient period of time of no less than twenty-one (21) days in which to consider and return this document. It is further agreed and understood that, upon Ms. LaFrennie's execution and return of this Agreement, she is thereafter permitted to revoke the Agreement at any time during a period of seven (7) days. To be effective, the revocation must be in writing and hand-delivered or telecopied to counsel for the Board within the seven (7) day period.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

PLEASE READ CAREFULLY. THIS AGREEMENT IS A LEGAL DOCUMENT AND INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AMERICANS WITH DISABILITIES ACT, TITLE VII OF THE ADMINISTRATIVE RIGHTS ACT OF 1964, THE EQUAL PAY ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, THE FAIR LABOR STANDARDS ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, STATE AND FEDERAL FAMILY LEAVE LAWS, STATE AND FEDERAL WAGE AND HOUR LAWS AND ANY OTHER FEDERAL, STATE, LOCAL OR COMMON LAW CLAIM.

BY SIGNING THIS AGREEMENT MS. LAFRENNIE ACKNOWLEDGES AND AFFIRMS THAT SHE IS COMPETENT, THAT SHE HAS BEEN AFFORDED A TIME PERIOD OF NO LESS THAN 21 DAYS TO REVIEW AND CONSIDER THIS AGREEMENT AND HAS BEEN ADVISED TO DO SO WITH AN ATTORNEY OF HER CHOICE, THAT SHE HAS READ AND UNDERSTANDS AND ACCEPTS THIS DOCUMENT AS FULLY AND FINALLY WAIVING AND RELEASING ANY AND ALL CLAIMS, DEMANDS, DISPUTES AND ANY DIFFERENCES OF ANY KIND WHATSOEVER WHICH SHE MAY HAVE HAD OR NOW HAS AGAINST EMPLOYER ARISING OUT OF OR RELATING TO HER EMPLOYMENT WITH EMPLOYER, THE TERMINATION OF HER EMPLOYMENT, HER COMPENSATION AND BENEFITS WITH THE BOARD, THE ADMINISTRATIVE ACTION, OR OTHERWISE, THAT NO REPRESENTATIONS, PROMISES, OR INDUCEMENTS HAVE BEEN MADE TO HER EXCEPT AS SET FORTH IN THIS AGREEMENT, AND THAT SHE HAS SIGNED THESE DOCUMENTS FREELY AND VOLUNTARILY, INTENDING TO BE LEGALLY BOUND BY ITS TERMS, AND WITH FULL UNDERSTANDING OF ITS CONSEQUENCES.

AGREED AND ACCEPTED:

Lori LaFrennie Date: 9/14/04

Subscribed and sworn to before me
this 15 day of September 2004.

Notary Public

KIM A. BOLTON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 3/11/2008

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

Jerome Page, Board President Date:

Witness:

Helene L. McBride

Helene McBride, CPA
Business Administrator/
Board Secretary

Avis Bishop-Thompson

Avis Bishop-Thompson, Esq.
Board Solicitor

Date: January 14, 2025

#87-05

OAL DKT. NO. EDU 4860-04
AGENCY DKT. NO. 144-4/04

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ESTHER BAITA AND WILLIAM NATERONE,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner observes that the Board President and the Interim Board Secretary/Business Administrator signed the Stipulation of Settlement and Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating these individuals to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, 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 concern set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/10/05

Date of Mailing: 3/10/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4860-04

AGENCY DKT. NO. 144-4/04

SOUTH PLAINFIELD BOARD OF EDUCATION,

Petitioner,

v.

ESTHER BAITA AND WILLIAM NATERONE,

Respondents.

Marc H. Zitomer, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Diane K. Smith, Esq., for respondent

Record Closed: January 20, 2005 Decided: January 27, 2005

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

This matter was transmitted to the Office of Administrative Law on July 6, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

1-27-05

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

2-4-05

DATE

DEPARTMENT OF EDUCATION

FEB 8 2005

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Petitioner,
South Plainfield Board of Education

RECEIVED
2005 JAN 20 P 3:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SOUTH PLAINFIELD BOARD OF EDUCATION,

Petitioner,

vs.

ESTHER BAITA and WILLIAM NATERENO,

Respondents.

OFFICE OF ADMINISTRATIVE LAW
DEPARTMENT OF EDUCATION

OAL DKT. NO.: EDUOS 04860-0224S
Agency Dkt. No.: 144-4/04

Civil Action

STIPULATION OF SETTLEMENT AND RELEASE

This Stipulation of Settlement is made by and between the South Plainfield Board of Education ("Board"), with administrative offices located at 125 Jackson Avenue, South Plainfield, New Jersey 07080 and Esther Baita, 3 Cooper Street, Manville, New Jersey 08835. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, the Board has filed a Petition of Appeal with the Commissioner of Education against Ms. Baita and Mr. Natereno, jointly and severally, seeking $8,880.96 in back-tuition, plus interest, costs and counsel fees for the alleged ineligible attendance of Ms. Baita's children, B.N.H. and B.A.H., in the South Plainfield School District; and

WHEREAS, Mr. Natereno also was named as a respondent in this action for allegedly allowing his South Plainfield address to be used for the purpose of enrolling Ms. Baita's children in the District; and

WHEREAS, a hearing in this matter has been scheduled for January 26 & 27, 2005; and

WHEREAS, the parties desire amicably to resolve the matter without the necessity of further litigation;

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

1. Ms. Baita will pay the Board back-tuition in the amount of $2500.00 in full and complete satisfaction of the alleged amount which is due and owing.

2. This $2500.00 tuition amount will be paid to the Board's legal counsel, Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932, with a certified check made payable to the "South Plainfield Board of Education", by no later than June 30, 2005. If said amount is not received by the Board's legal counsel by that date, the Board will provide Ms. Baita and her legal counsel, Diane K. Smith, Esq., in writing, with a final fifteen (15) days notice period to pay the amount before the Board institutes any collection action.

3. Ms. Baita understands that if she fails to remit the agreed-upon amount by June 30, 2005, the Board will take whatever legal action is necessary to enforce this Agreement and collect the sum set forth herein.

4. Ms. Baita agrees to pay the Board's attorney's fees and costs, in addition to all collection fees, in the event that the Board must take action to collect the aforesaid sum of money.

5. Ms. Baita, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever,

which have been brought, or could be brought, arising under or relating in any way to B.N.H. and B.A.H.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.

6. The Board, in consideration of this Agreement, hereby releases Ms. Baita from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to B.N.H. and B.A.H.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.

7. Ms. Baita acknowledges that she has reviewed this agreement with independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Agreement and the duties and obligations enumerated herein.

8. The Board, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal against both respondents.

9. Nothing contained in this agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

10. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

SOUTH PLAINFIELD BOARD OF EDUCATION

By: _____
Pio ~~Pennisi~~, Board President

By: _____
Robert Davis, Int. Bd. Sec./Bus. Admin.

_____
Esther Baita

Sworn and subscribed before me this
14th day of January, 2005

_____

MARGARET LATTRELL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires December 3, 2006

#92-05

92-05

OAL DKT. NO. EDU 1847-03
AGENCY DKT. NO. 411-12/02

MARIA DiCARLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/05

Date of Mailing: 3/16/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1847-03
AGENCY DKT. NO. 411-12-02

MARIA DiCARLO,

Petitioner,

v.

BOARD OF EDUCATION OF WESTFIELD,

Respondent.

Timothy R. Smith, Esq., for petitioner (LaRocca, Feeley & Smith, attorneys)

Richard J. Kaplow, Esq., for respondent

Record Closed: January 28, 2005 Decided: February 2, 2005

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

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in March 2003 as the result of the filing of a petition by Maria DiCarlo asserting that the respondent Board of Education of Westfield had refused to indemnify her for certain expenses incurred in defending against a criminal complaint. *See, N.J.S.A.* 18A:16-6.1. Hearing dates scheduled for December 2003, March 2004 and September 2004 were adjourned for a variety of reasons. Ultimately, the parties advised that they had entered into a tentative settlement.

Thereafter, a Stipulation of Settlement signed by petitioner, her attorney and the attorney for the Westfield Board of Education was submitted to me for review and is

attached hereto. The settlement agreement provides for reimbursement in the amount of $2548 to petitioner and, in return, she agrees to withdraw any claims against the Board with prejudice.

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

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

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

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

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

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

February 2, 2005
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

2-4-05
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 8 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

ERSEY
LAW

JAN 27 2 01 AM '05

RICHARD J. KAPLOW, P.A.
53 Elm Street
Westfield, New Jersey 07090
(908)232-8787
Attorney for Respondent

MARIA DI CARLO, Petitioner, vs. BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDUOA 01847-2003N Agency Ref. No. 411-12/02 STIPULATION OF SETTLEMENT

THIS MATTER having been brought on by the Petitioner Maria DiCarlo's complaint to the New Jersey Commissioner of Education, and the matters in dispute having been voluntarily and amicably resolved, and the parties having set forth the terms and conditions of said settlement in the form of this Stipulation;

NOW, THEREFORE, on this 20 day of January 2005,

IT IS Stipulated and Agreed by the parties as follows:

1. Respondent Westfield Board of Education agrees to pay the total lump sum amount of Two Thousand Five Hundred Forty-eight and 00/100 Dollars ($2,548.00) to Petitioner Maria DiCarlo, payment and receipt of which is hereby acknowledged.

2. All claims by Maria DiCarlo relative to and

arising from the allegations set forth in the Petition filed with the New Jersey Commissioner of Education are hereby withdrawn, with prejudice as to all issues, except as set forth herein. This Stipulation of Settlement, when signed by the Petitioner Maria DiCarlo, shall have the same force and effect as a General Release executed by Petitioner in favor of Respondent.

3. This Stipulation of Settlement shall be filed with Administrative Law Judge Stephen G. Weiss and transmitted by the Office of Administrative Law to the New Jersey Commissioner of Education for similar approval.

Accepted and Agreed to
this 20 day of January, 2005.

Maria T. Di Carlo
Maria DiCarlo
Petitioner

Timothy R Smith
Timothy R. Smith, Esq.
LaRocca, Feeley & Smith, LLC
Attorney for Petitioner

Richard J. Kaplow
Richard J. Kaplow, Esq.
Attorney for Respondent
Westfield Board of Education

94-05

#94-05

C. DeV., on behalf of minor child, N. DeV.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a Petition of Appeal, challenging the Board's residency determination that her daughter, N. DeV., was not eligible for a free education in the Hamilton School District.

After directing the Board to file an Answer to the petition by notices dated December 22, 2004 and January 19, 2005, the Commissioner deemed the Board's failure to Answer the petition to be a removal of its opposition to N. DeV.'s claim of entitlement to attend its schools. Therefore, the Commissioner granted a summary decision on behalf of the petitioner, and ordered that the petitioner's daughter is entitled, for as long as circumstances remain unchanged, to attend school free of charge in the Hamilton School District pursuant to *N.J.S.A.* 18A:38-1.

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

March 16, 2005

AGENCY DKT. NO. 442-12/04

C. DeV., on behalf of minor child, N. DeV.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

This matter having been opened before the Commissioner of Education by way of a Petition of Appeal, filed on December 21, 2004, claiming that petitioner and her daughter are domiciled in the Township of Hamilton so as to entitle the child to attend school in the Hamilton School District free of charge pursuant to *N.J.S.A.* 18A:38-1, and seeking an Order requiring the Board of Education of the Township of Hamilton to admit petitioner's child to the District's schools; and

The Commissioner having directed the Board by notices dated December 22, 2004, via facsimile and regular mail, and January 19, 2005, via certified and regular mail, to file an Answer to the petition; and

K. Loffrodo having acknowledged receipt of service of the January 19, 2005 notice by signing the certified delivery receipt on behalf of the Board; and

As of this date, neither the Board nor any attorney on its behalf has filed an Answer to the petition and, therefore, each count of the petition is deemed to be admitted; and

The Board's failure to Answer the petition is deemed to be a removal of its opposition to N. DeV.'s claim of entitlement to attend its schools; now therefore

IT IS ORDERED on this _____day of March 2005 that summary decision shall be granted to petitioner. Petitioner's daughter, N. DeV. is deemed to be domiciled in the Hamilton Township School District and, therefore, for as long as circumstances remain unchanged, is entitled to attend school free of charge in that District pursuant to *N.J.S.A.* 18A:38-1.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/05

Date of Mailing: 3/16/05

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

#95-05

95-05

OAL DKT. NO. EDU 9840-04
AGENCY DKT. NO. 246-7/04

PETER VERGA	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement (terms of which are recited in the Resolution of Roselle Public Schools, dated January 25, 2005), and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/05

Date of Mailing: 3/17/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09840-04

AGENCY REF.NO.246-7/04

PETER VERGA,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner (La Rocca, Feeley & Smith, LLC, attorneys)

Allen C. Roth, Esq., for respondent

Record Closed: February 2, 2005 Decided: February 3, 2005

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on October 1, 2004 for determination as a contested case. A telephone prehearing conference scheduled for December 7, 2004 was adjourned upon notification that the matter had been settled.

On February 2, 2005 the parties were able to resolve the matter and submitted the attached Board Resolution and letter from counsel for petitioner confirming that the Board Resolution accurately reflects the terms of the settlement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the Board Resolution and letter from counsel for petitioner.

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

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

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

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

February 3, 2005
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

2-8-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

LAW OFFICES OF
LA ROCCA, FEELEY, SMITH & ROSELLINI, L.L.C.
76 SOUTH ORANGE AVENUE
SUITE 211
SOUTH ORANGE, NEW JERSEY 07079

◆◆◆

PHONE: (973) 763-6100
FAX: (973) 763-5600
Tax ID: 223804878
www.laroccafeeleysmith.com

Union County Office
25 ½ Wavecrest Avenue
Winfield, NJ 07036
Phone: (908) 486-3003
Fax: (908) 486-3010

TONY F. LA ROCCA
JOHN D. FEELEY^
TIMOTHY R. SMITH^
^Admitted in NJ and DC
KENNETH J. ROSELLINI *
EDWARD J. HESKETH*
**Admitted in NJ and NY*
PABLO N. BLANCO+
+Admitted in NJ, CT, and CO
NICHOLAS J. FANO
Of Counsel
GEORGE W. CONK
Certified Civil Trial Attorney
Of Counsel
GLENN L. CAVANAGH
Of Counsel

Respond to: South Orange

January 31, 2005

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 FEB -2 A 8:55

Via Facsimile 973.648.6124 & Regular Mail

Honorable Jesse H. Strauss, A.L.J.
New Jersey Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RE: Peter Verga v Roselle Board of Education
OAL Docket No.: EDUOR 9840-2004N

Dear Judge Strauss:

Pursuant to Your Honor's request, this is to confirm that I am in receipt of a January 25, 2005 Roselle Board of Education Resolution indicating that the above captioned matter has been settled in the amount of $5,012.50. The terms of the Resolution in their entirety, including the aforementioned dollar amount, are consistent with my understanding of the agreement reached between my client, Petitioner Peter Verga, and Respondent Roselle Board of Education.

Thank you for your consideration in this regard. If you have any further questions pertaining to this matter, please do not hesitate to contact me.

Very truly yours,
LA ROCCA, FEELEY, SMITH & ROSELLINI, L.L.C.

BY: _____
TIMOTHY R. SMITH, ESQ.

TRS/jk
Cc: Allan C. Roth, (via fax: 973.258.0478 & regular mail)

Darlene M. Roberto
Superintendent of Schools
(908) 298-2040 x16
Supt.'s Office Fax (908) 298-3353

John D'Angelo
Business Administrator/BoardSecretary
(908) 298-2039 x10
Fax (908) 298-8794

Roselle Public Schools

710 Locust Street
Roselle, New Jersey 07203

Paul Greben
Administrative Assistant/Director
(908) 298-1501 x21
Fax (908) 298-1852

Jo Ann Reddick Guest
Supervisor of Curriculum K-12
(908) 298-2046 x18
Fax (908) 298-6928

RESOLUTION

MOVED by Mr. Munn, seconded by Mr. Esposito to approve the following resolution:

WHEREAS Peter Verga, a teacher in this District was charged with criminal violations by the Union County Prosecutor's Office during in and regards to the performance of his duties in Complaint No.: W415376; and

WHEREAS the Union County Prosecutor's Office dismissed the Complaint in its entirety without any further proceedings against Mr. Verga; and

WHEREAS Mr. Verga's attorney has requested legal fees for the above captioned matter pursuant to N.J.S.A. 18A:16-6.1 Mr. Verga is entitled to have his reasonable attorneys fees paid in the above referenced matter; and

WHEREAS Timothy Smith, Esq., of La Rocca, Feeley, Smith & Rosellini has petitioned the Commissioner of Education in OAL Docket No.: EDUOR 9840-2004N for payment of his legal fees; and

WHEREAS Mr. Smith has agreed to be paid at the rate paid by this Board for legal fees.

NOW THEREFORE BE IT RESOLVED that this Board shall settle Petition OAL Docket No.: EDUOR 9840-2004N in the amount of $5,012.50 upon the satisfactory completion of all settlement documents, releases and the approval of the Commissioner of the Department of Education.

Motion approved unanimously by roll call vote.

Certified to be a true copy of a Resolution adopted by the Roselle Board of Education at its Meeting held on Monday, December 20, 2004..

Certified by Board Secretary

JD:gr

DATED: January 25, 2005

#96-05

C.P., on behalf of minor child, C.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's residency determination that her nephew, C.A., was not eligible for a free education in the Borough of South Plainfield School District.

The ALJ found that the petitioner did not meet her burden of demonstrating that C.A. is entitled to attend school in respondent's district, pursuant to either the provisions of N.J.S.A. 18A:38-1(a) or those of 18A:38-1(b) regarding family or economic hardship. The ALJ cited as disqualifiers the petitioner's statements at the hearing and on the district's residency application that C.A.'s parents: 1) provide financial support; 2) visit him several times a year; and 3) placed him with petitioner for education. The ALJ concluded that the Board was correct in determining that C.A. is ineligible to enroll in the district's schools.

The Commissioner concurs with the findings of the ALJ in this matter. Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Commissioner notes that no tuition was ordered because C.A. did not attend respondent's schools during the pendency of the appeal.

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, 2005

OAL DKT. NO. EDU 8785-04
AGENCY DKT. NO. 326-9/04

C.P., on behalf of minor child, C.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that petitioner has not met her burden of demonstrating that C.A. is entitled to attend school in respondent's district, pursuant to either the provisions of N.J.S.A. 18A:38-1(a) or those of 18A:38-1(b).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein.

IT IS SO ORDERED. [1] [2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/95
Date of Mailing: 3/18/95

[1] The Commissioner notes that no tuition was ordered in this matter because C.A. did not attend respondent's schools during the pendency of the appeal.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8785-04

AGENCY DKT. NO. 326-9/04

C.P. O/B/O C.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

Respondent.

C.P., petitioner, *pro se*

Mark Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorney)

Record Closed: January 25, 2005 Decided: February 7, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By letter dated August 31, 2004, Respondent, the South Plainfield Board of Education, advised Petitioner that it determined C.A. ineligible to attend schools of the District. Petitioner appealed this determination and the matter was transmitted to the Office of Administrative Law,

where it was filed on October 22, 2004. A hearing was held on January 25, 2005, and the record closed on that date.

ANALYSIS

C.A. is currently 11 years old. He moved to the United States from Haiti in 2000. He moved to a suburb of Philadelphia with his father. His mother stayed in Haiti because she owned her own business there. In June 2004, C.A.'s father had an accident at work. The accident resulted in C.A.'s father becoming unemployed. C.A.'s father sent C.A. to live with his sister, Petitioner, C.P. in South Plainfield in the July 2004.

Petitioner sought to enroll C.A. in the South Plainfield Public Schools. Because Petitioner was not the parent or legal guardian of C.A., she was asked to complete a Residency Affidavit. Dr. Robert Rosado, Superintendent, reviewed the affidavit (R-2) and concluded that C.A. did not meet the requirements of the statute and regulations. Of particular concern to Rosado were the Petitioner's answers to Question 11 that stated they would receive clothing and recreational expenses from the parents, Question 13 that C.A. will be visiting his parents at the end of the school year, and Question 15 that C.A. is living with Petitioner for education. Rosado was also concerned with the answers provided by the parents on R-2. In particular, Question 11 in which the parents stated they are capable of providing for the care of C.A., Question 12 regarding the reason why they are not providing for C.A., and Question 13 in which the parents state they contribute clothing and recreation.

Rosado viewed these answers, among others, as disqualifiers under the statute, *N.J.S.A.* 18A:38-1. Rosado, by letter dated August 31, 2004, notified Petitioner that C.A. is ineligible to enroll in the District because the residency affidavit stated he was living in South Plainfield for the sole purpose of receiving an education and because C.A.'s parents are both capable of providing for his care and support.

Based on Rosado's letter, Petitioner did not enroll C.A. in the District. Instead, C.A. was enrolled in a private school. Petitioner's answers to interrogatories state that C.A.'s father is

paying for the private school, which is $380 per month. Petitioner's father moved back to Haiti in December 2004 and still resides there.

C.A. and Petitioner testified. They provided P-1, which is a document titled "Temporary Guardianship". They claim this document shows the C.A. is domiciled in the District and, therefore, the requirements of *N.J.S.A.* 18A:38-1(b) do not need to be satisfied. However, I find and conclude that P-1 does not establish that Petitioner is C.A.'s guardian. First, the document, dated September 20, 2004, is for only temporary guardianship. Second, there is no indication that the guardianship has been approved by a court.

C.A. and Petitioner testified that C.A.'s father is not employed in Haiti due to the political unrest. They claim he is a mechanic, but that his shop in Haiti burned down. They testified that the father does make some contributions to C.A.'s private school. They said that C.A.'s brothers, sisters and other family members also contribute. They both testified that C.A.'s mother owns her own business in Haiti and, until recently, made about $50,000 per year. They said that her business is slower now due to the political unrest in Haiti. Both admitted that C.A.'s parents sometimes pay for his clothes. Both said that his parents, as well as his other family members, help with C.A.'s expenses. They also testified that C.A.'s parents visit him in the United States about 3 to 4 times per year.

Based on the evidence provided, it is clear that Petitioner has not satisfied the standards in *N.J.S.A.* 18A:38-1(b) by a preponderance of the evidence. First, she admitted at the hearing and on the residency application that C.A.'s parents do provide some financial support. Moreover, the evidence did not demonstrate that C.A.'s reasons for being with Petitioner are due to his parent's financial or family hardship. Although C.A.'s father is allegedly unemployed and his mother is struggling with her business, the evidence also demonstrated that the father was paying, in part, for C.A.'s private school and that the mother, at least until recently, owned a successful business and had a salary of $50,000 per year. Even today, both parents provide support and visit C.A. 3 to 4 times per year – both are indicators that there is no financial hardship.

There is no question that the Board made the correct decision in August 2004 to declare C.A. ineligible to enroll in the District's schools. The residency application on its face contained

numerous disqualifiers. The evidence, as presented during the hearing, confirmed that the Board continues to act appropriately in concluding that Petitioner's application does not meet the requirements of *N.J.S.A.* 18A:38-1(b).

ORDER

Based on the foregoing, I hereby **ORDER** that Petitioner's appeal be **DISMISSED** and hat the Board of Education's decision 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

2-7-05

DATE

DOUGLAS H. HURD, ALJ

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

2-7-05

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 14 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For Petitioner:

C.A.

C.P.

For Respondent:

Dr. Robert Rosado, Superintendent

EVIDENCE

For Petitioner:

P-1 Temporary Guardianship

For Respondent:

R-1 Application for Enrollment

R-2 Sworn Statements

R-3 Letter from Rosado, dated August 31, 2004

R-4 Interrogatory Answers

R-5 Deed

#97-05

97-05

OAL DKT. NO. EDU 8099-01
AGENCY DKT. NO. 401-10/01

D.J., on behalf of minor child, D.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was transmitted to the Commissioner by the Office of Administrative Law (OAL) on March 2, 2005 for consideration of petitioner's withdrawal of the petition in this matter.

Upon review, the Commissioner notes that, notwithstanding petitioner's letter of February 4, 2005 indicating his withdrawal of the within petition, the Board's Answer in this residency matter contains a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner does not contain an affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's nephew in its schools, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/05

Date of Mailing: 3/18/05

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

98-05

OAL DKT. NO. EDU 398-05
AGENCY DKT. NO. 23-1/05

K.J., on behalf of minor child, K.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL) and the Initial Decision issued by the OAL pursuant to *N.J.A.C.* 1:1-19.1, memorializing the parties' stipulation of settlement as agreed orally at hearing, have been reviewed.

Upon review, to the extent that the settlement terms fall within his jurisdiction, the Commissioner approves the settlement and adopts it as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/05

Date of Mailing: 3/21/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

APPROVING SETTLEMENT

OAL DKT. NO. EDU 398-05

AGENCY DKT. NO. #23-1/05

K.J. ON BEHALF OF K.W.,

Petitioners,

v.

BOARD OF EDUCATION

OF THE BOROUGH OF LINDENWOLD,

Respondent.

K.J. on behalf of K.W., petitioners, *pro se*

John D. Wade, Esq., for respondents (Wade, Long, Wood & Kennedy, LLC, attorneys)

Record Closed: February 2, 2005 Decided: February 3, 2005

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

STATEMENT OF THE CASE

This case concerns discipline imposed on petitioner K.W., a sixth grade student in the school system operated by the respondent Board of Education (BOE) of the Borough of

Lindenwold. As detailed below, on the record made in the Office of Administrative Law (OAL), the parties entered into a settlement agreement resolving the case.

PROCEDURAL HISTORY

On January 28, 2005, the petitioners' letter requesting relief was filed with the Department of Education. *N.J.S.A.* 18A:6-9. The Department treated the letter as a petition and transmitted the contested case to the OAL where it was filed on January 31, 2005, and scheduled for a hearing. *N.J.S.A.* 52:14B-2(b). On February 1, 2005, the BOE filed its papers in answer to the petition. On February 2, 2005, in the OAL, Trenton, the parties appeared and on a taped record, stipulated to certain facts and entered into a settlement agreement resolving the case. The facts and terms of the settlement agreement are set forth below.

FINDINGS OF FACT

Background Facts

K.J. and K.S., who were not married, are the parents of K.W., who was born on April 21, 1992, and they resided together in Irvington. K.W. and K.S. had a good relationship and K.W. regularly saw K.S.'s family, by whom he was well loved. K.J. and K.S. separated, but, after the separation, K.W. continued to regularly see K.S. and his family.

When K.W. was in the fourth grade, K.J. began to reside with K.Wat., to whom she was not married. K.W. is capable of average or better than average academic performance, but, at about that time, he began to engage in misconduct and his grades fell.

K.J., K.W. and K.Wat. moved to Lindenwold. Given the distance between K.W. in his new home and K.S. and K.S.'s family, K.W. saw them less frequently and, during the 2003-04 school year, K.W. was a fifth grade student in the BOE's school system. K.J. is a Department of Corrections employee, temporarily disabled as a result of a fall. School records show that K.W.'s misconduct in school increased in frequency and severity, including incidents such as refusing to go to class, disrupting class, striking other students, and pushing a teacher. BOE-B.

His grades also continued to be poor. The school system reported the matters to K.J.; held mediation sessions; and, consistent with the BOE's Code of Conduct of Offenses and Range of Consequences, suspended K.W. several times for fighting. BOE-C. The BOE's Child Study Team conducted evaluations, but determined that K.W. should not be classified for Special Education and related services. Prior to the 2004-05 school year, K.W. was seen by physicians, one of whom diagnosed attention deficit hyperactivity disorder and prescribed medication, but K.J. determined that the medication was adversely affecting him and discontinued it.

During the 2004-05 school year, K.W. has been in the sixth grade. The school system created a (Rehabilitation Act of 1973) Section 504 Student Accommodation Plan for K.W., which K.J. signed and which included preferential seating within the classroom, so K.W. could be close to the teacher; implementation of a student planner; appropriate modification of assignments; and permitted K.W. to see a counselor to allow him a "cooling off" period to avoid another problematic incident. However, school records show that, in late September, October and November 2004, K.W. again engaged in misconduct, including disrupting class and fighting. School officials met with K.J. to discuss these matters and, consistent with the BOE's Code of Conduct of Offenses and Range of Consequences, suspended K.W. BOE-B. K.W.'s grades also continued to be poor.

The January 28, 2005 Incident

On January 28, 2005, in the school auditorium, K.W. and D.E., another student, argued over a seat and engaged in a fight just outside of the auditorium. Ms. Stolzer, a school staff member, attempted to break up the fight. Richard Bulicki, another school staff member assisted and they separated the students. Mr. Bulicki reported that the students admitted that they agreed to fight once they left the auditorium and this was consistent with the location of the fight, which was less than three feet from the auditorium's exit. BOE-A. This is at least K.W.'s fourth fight and, consistent with the BOE's Code of Conduct of Offenses and Range of Consequences, the school system suspended him for ten days. K.W. had served two days of the suspension when, based on petitioners' bringing this case, the school stayed the suspension.

The Settlement Terms

The parties recognize that, given K.W.'s background and circumstances, the consequences for his January 28, 2005, misconduct should be adapted to allow him to modify his behavior and to allow him an opportunity to take advantage of the educational opportunities afforded by the BOE.

On the record made February 2, 2005 in the OAL, the parties agreed to settle this case on the following terms:

I. Petitioners acknowledge that K.W. is subject to the BOE's Code of Conduct of Offenses and Range of Consequences.

II. The above-described Section 504 Student Accommodation Plan for K.W. continues and includes the following terms:

1. K.W. will receive preferential seating within the classroom, so that he is close to the teacher.
2. A student planner will be implemented for K.W.
3. K.W.'s assignments will be modified appropriately.
4. K.W. will be permitted to see a counselor to allow him a "cooling off" period to avoid another problematic incident.

III. The above-described Section 504 Student Accommodation Plan for K.W. is amended to include the following additional terms:

1. K.W. will participate in an Anger Management Group program provided by the school system.
2. K.W. will be assigned to and will cooperate with a teacher mentor who will assist him in avoiding misconduct and in academic performance.
3. K.W. will participate in the Lion's Pride proactive behavioral group, a school-wide program, which rewards good conduct.
4. K.W. will continue to participate in the school system's Extended Day Program to improve his academic performance.

IV. The school system will permit K.W. to make up all academic work lost during the period of his suspension.

V. Petitioners will schedule an appointment for K.W. to be examined by a neurologist who will prepare a report relative to his or her findings, diagnoses, etc. Petitioners will provide a copy of that report to school system officials. If necessary to comply with this term, petitioners will execute a waiver and release of confidentiality of information and such a report. If the neurologist recommends and/or prescribes medication for K.W., petitioners will notify the school system officials of that recommendation and/or prescription.

VI. The suspension for the January 28, 2005 fight is amended to provide that K.W. will serve a five-day suspension and he will receive credit for two days already served.

VII. If K.W. engages in additional serious misconduct, including fighting or any misconduct involving violence, petitioners agree that he will be referred to the school system's CST and that he will submit to evaluations to determine whether he should be classified for Special Education and related services.

Findings Relative to the Settlement

1. The parties understood the settlement agreement and voluntarily entered into it.

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

The case involved substantial issues of fact. The settlement agreement avoids the time and expense of full hearing and further litigation. The terms of the settlement agreement are reasonable and in the public interest.

CONCLUSIONS OF LAW

The settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-1.3 and should be approved.

In any future action related to Special Education and possible suspension or expulsion, the parties retain their usual rights and duties under applicable laws. *See N.J. Const.*, Art. VIII, § 4, ¶ 1; *N.J.S.A.* 18A:37-1 to -5; 20 *U.S.C.A.* § 1400 *et seq.*; *N.J.A.C.* 6A:14-1.1 *et seq.; Tibbs v. Franklin Bd. of Educ.*, 59 *N.J.* 506 (1971); *Chess v. Board of Educ. of Bergenfield v. Hespe, Commissioner of Education and State of New Jersey*, No. A-6566-01T3 (App. Div. January 12, 2005); *R.R. v. Shore Regional High Sch. Bd. of Educ.*, 109 *N.J. Super.* 337 (Ch. Div. 1970).

ORDER

The parties agree that there are no further issues to be decided; therefore, I **ORDER** that the parties comply with the settlement agreement and that these proceedings be concluded.

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

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

February 3, 2005

DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2-9-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

99-05

#99-05SEC

AGENCY DKT. NO. 36-2/05

IN THE MATTER OF CAROL ANN KOUPIARIS, :
BOUND BROOK BOROUGH BOARD OF :
EDUCATION, SOMERSET COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission determined that Bound Brook Borough Board of Education member Carol Ann Koupiaris violated the School Ethics Act, *N.J.S.A.* 18A:12-24.1(c), when she voted on the reappointment of a principal who supervised and evaluated her husband, a member of the teaching staff. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Carol Ann Koupiaris be reprimanded as a school official found to have violated the School Ethics Act.

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

March 18, 2005

AGENCY DKT NO. 36-2/05

IN THE MATTER OF CAROL ANN KOUPIARIS, BOUND BROOK BOROUGH BOARD OF EDUCATION, SOMERSET COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Bound Brook Borough Board of Education member Carol Ann Koupiaris violated the School Ethics Act, *N.J.S.A.* 18A:12-24(c), when she voted on the reappointment of a principal who supervised and evaluated her husband, a member of the teaching staff, and recommending a penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, Ms. Koupiaris was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were filed by or on behalf of Ms. Koupiaris.

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

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violation it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/05

Date of Mailing: 3/21/05

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

101-05

#101-05

S.B., on behalf of minor child, J.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal Form, challenging the Board's decision to disenroll his son, J.B., from the Nutley School District subsequent to its determination that J.B. is not domiciled within the Township of Nutley. The residency determination was based upon information provided by the District's investigator that J.B. has not resided in Nutley during the current school year, and upon the admission of the petitioner that his son lived with him in New York City.

Petitioner based his residency appeal upon his claim that a change of schools would be detrimental to J.B.'s health, as he suffers from Crohn's disease and needs to be near his doctor in New Jersey. Respondent Board asserted that J.B. was not entitled to a free public education in the Nutley School District in that petitioner had not met the burden of proof of legal residency or domicile in the Township of Nutley, pursuant to *N.J.S. A.* 18A:38-1, and counterclaimed for tuition in the amount of $54.46 per day for the period of J.B.'s ineligible attendance during the 2004-05 school year.

The Commissioner found that there are no material facts in dispute in this matter, in that petitioner acknowledged that he and his son are residents of New York City, and that *N.J.S.A.* 18A:38-1, the statute delineating those persons who are entitled to attend school within a district, contains no provision granting entitlement to attend school in a New Jersey school district to a student who is domiciled in another state. Accordingly, the Commissioner found that the petitioner failed to carry his burden of proof that J.B. is entitled to a free education in the Nutley School District, and dismissed the petition with prejudice. The Commissioner granted the Board's counterclaim for tuition in the amount of $5,936.14 for the 109 days of J.B.'s ineligible attendance from the beginning of the 2004-05 school year through March 3, 2005, plus $54.46 per day for any additional days of J.B.'s ineligible attendance between March 3, 2005 and the date of his removal pursuant to this decision.

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

March 22, 2005

AGENCY DKT. NO. 16-1/05

S.B., on behalf of minor child, J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, S.B., *Pro Se*

For Respondent, Mark A. Wencel, Esq. (Gaccione, Pomaco & Malanga)

This matter was initiated by a December 28, 2004 letter from petitioner wherein he indicated that he wished to appeal the decision of the Nutley Board of Education (Board) to disenroll his son, J.B., subsequent to his move to New York City to live with petitioner. (Petitioner's Letter of December 28, 2004 at 1) Petitioner stated that J.B. had moved to New York City to live with him in December 2002 as a result of J.B.'s mother deciding "she did not want him" and that his appeal was based on the fact that J.B. has Crohn's disease, which necessitates his being near his doctor for treatment in case of a problem. (*Ibid.*) In support thereof, petitioner attached an undated letter from Francis Sunaryo, M.D., Director of Pediatric Gastroenterology, stating, in pertinent part:

> [J.B.] is a 14 year old male with Crohn's disease. His primary care physician and the GI specialist both are in New Jersey. His mother lives in New Jersey. Because of his disease [J.B.] requires frequent doctor visits. I recommend he attend school in the New Jersey area.

In response, the Director of the Bureau of Controversies and Disputes, by letter dated December 28, 2004, advised petitioner that "[a]lthough the communications attached to your letter suggest that you wish to file a 'residency' appeal, pursuant to *N.J.S.A.* 18A:38-1, you have not included a signed attestation as to the truth of your allegations and your understanding of responsibility for payment of tuition should your appeal not be successful." (Letter of December 28, 2004 from the Director, Bureau of Controversies and Disputes at 1) A copy of the *Pro Se* Residency Appeal Form was enclosed to facilitate petitioner's filing of the required information for the matter to proceed as a residency appeal. (*Ibid.*) Additionally, petitioner was provided detailed information and a copy of the applicable regulations, *N.J.A.C.* 6A:3 *et seq.*, with respect to the filing of a Petition of Appeal through the contested case process in the event he was not claiming that his son was entitled by law to a free education in the Nutley School District, but, instead, was seeking to appeal the Board's discretionary determination not to permit his son to remain in the district as a nonresident student. (*Id.* at 1-2)

On January 21, 2005, petitioner filed a completed *Pro Se* Residency Appeal Form, stating that "[m]y son has Crohn's disease and is sick life threatity (sic) his doctor insists he stays in NJ." In its Answer, filed on January 28, 2005, the Board asserted that petitioner's son was not entitled to the education provided by the Nutley School District in that petitioner had not met the burden of proof of legal residency or domicile in the Township of Nutley, pursuant to *N.J.S.A.* 18A:38-1. (Answer at 2) Additionally, the Board counterclaimed for tuition in the amount of $54.46 per day for the days of J.B.'s ineligible attendance in the 2004-05 school year. (*Id.* at 3)

By letter from the Director of the Bureau of Controversies and Disputes, sent January 31, 2005 via certified[1] and regular mail, petitioner was advised that:

> Upon review of the Petition of Appeal and Answer in the above-titled residency appeal, it is noted that you do not dispute that your son lives with you in New York City. Notwithstanding your claim that a change of schools will be detrimental to your son's health in that he suffers from Crohn's disease, therefore, since you concede that you and your son, J.B., do not reside within the Nutley School District so as to entitle J.B. to a free public education with that District, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, there *appears* to be no basis upon which the Commissioner can grant the relief sought and no grounds on which the Commissioner may direct further proceedings.
>
> Entitlement to a free public education is strictly established by State statute, *N.J.S.A.* 18A:38-1, which delineates those persons who are entitled to attend school within a district. These laws are based on domicile and residency. Such entitlement is basically limited to persons who are domiciled in the district (for minor children, this is linked to the domicile of the parent or guardian) or who are living with a district resident other than a parent or guardian for reasons not related to school attendance and who additionally meet the specific criteria listed in section (b) of the law. In other cases, the decision to admit non-resident students, and whether or not to charge tuition for such attendance, is generally left to the discretion of the local board of education.
>
> Accordingly, given your acknowledgement that you and your son do not reside within the Nutley School District, you are hereby requested to submit a letter brief or memorandum of law, within ten (10) days of receipt of this letter, setting forth your reasons as to why the Commissioner should not exercise his discretionary authority under *N.J.A.C.* 6A:3-1.10 and *N.J.A.C.* 6A:3-1.12 to dismiss the within petition and to grant the Board's counterclaim for tuition in the amount of $54.46 per day for the period of J.B.'s ineligible attendance in the Nutley School District since the beginning of the 2004-05 school year. The Board may submit its response within ten (10) days of receipt of petitioner's submission; whereupon it will be determined what further proceedings, if any, will occur in this matter. ((Letter of January 31, 2005 from Director, Bureau of Controversies and Disputes at 1-2)

[1] The "green card, marked "unclaimed," was returned on February 18, 2005. The letter sent via regular mail was not returned and was, thus, presumed received.

Because petitioner failed to respond to the January 31 letter, by letter of February 14, 2005, sent via certified[2] and regular mail, petitioner was provided a final opportunity to set forth his arguments as to why the within residency petition should not be dismissed and the Board's counterclaim for tuition be granted. (Letter of February 14, 2005 from the Director, Bureau of Controversies and Disputes at 1) Petitioner responded by letter, filed on March 1, 2005, reiterating his assertion that his son needs to be near his doctor in New Jersey for treatment of Crohn's disease, noting that J.B. had been abandoned by his mother and claiming that moving his son to another school would affect him mentally and physically, particularly since the school term is three-fourths over. (Petitioner's Response at 1-2) Petitioner did not address the Board's counterclaim for tuition, except to indicate that "[m]y finances do not permit any tuition for his education on a private basis." (*Id.* at 2)

In its reply, filed on March 7, 2005, the Board submitted a motion for summary decision and dismissal of the petition, claiming that, "[a]s Petitioner acknowledges residing in New York City with his son, the Commissioner has no authority under *N.J.S.A.* 18A:38-1 to compel the district to permit J.B. to remain in the ninth grade of the Nutley High School for the balance of the school year," and urging the Commissioner "to grant the Board's counterclaim for tuition in the amount of $54.46 per day for the period of J.B.'s ineligible attendance in the Nutley School District, *i.e.*, $5,936.14 through March 3, 2005 (108 days x $54.46)," pursuant to the attached certification of James S. Vivinetto, Ed.D., Assistant Superintendent of the Nutley Public Schools. (Letter Brief in Support of Motion at 1-2 and Certification of James S. Vivinetto, Ed.D.)

Upon a thorough review of the parties' submissions, the Commissioner has determined, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-1.2 and

[2] The signed "green card' indicates that this second notice was received on February 22, 2005.

N.J.A.C. 6A:3-1.10, to grant summary decision to the Board and to dismiss the within petition. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In that petitioner freely acknowledges that he and his son have been residents of New York City since November 2002, and in that entitlement to a free public education is strictly established by State statute, *N.J.S.A.* 18A:38-1, which delineates those persons who are entitled to attend school within a district, the Commissioner finds that there are no material facts in dispute in this matter and that the Board is entitled to prevail as a matter of law.

In so determining, the Commissioner emphasizes that entitlement to attend school within a specified school district in New Jersey is basically limited to persons who are domiciled in the district (for minor children, this is linked to the domicile of the parent or guardian) or who are living with a district resident other than a parent or guardian for reasons not related to school attendance and who additionally meet the specific criteria listed in section (b) of the law. There is no provision in the statute granting entitlement to attend school in a New Jersey school district to a student who is domiciled in another state under any circumstances. Notwithstanding petitioner's concerns for his son's health, therefore, since petitioner concedes that he and his son live in New York City, there is no basis upon which the Commissioner may conclude that J.B. is entitled to a free public education with the Nutley School District, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

Accordingly, the Commissioner finds that petitioner has failed to carry his burden of proof that J.B. is entitled to a free education in the Nutley School District and, thus, dismisses

the petition in this matter, with prejudice. The Board's counterclaim for tuition in the amount of $5,936.14 for the 109 days of J.B.'s ineligible attendance in school in the Nutley Township School District from the beginning of the 2004-05 school year through March 3, 2005, plus $54.46 per day for any additional days of J.B.'s ineligible attendance between March 3, 2005 and the date of his removal pursuant to this decision, is granted.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/22/05

Date of Mailing: 3/22/05

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

107-05

#107-05

OAL DKT. NO. EDU 4425-04
AGENCY DKT. NO. 107-3/04

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
YOLANDA VAN FLEET AND WILLIE RUSSELL, SR.,	:	DECISION
RESPONDENTS.	:	

The record, Stipulation of Settlement 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/05

Date of Mailing: 3/23/05

TARGET
3-17-05
DNS
4-1-05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4425-04
AGENCY DKT. NO. 107-3/04

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Petitioner,
v.
YOLANDA VAN FLEET AND WILLIE RUSSELL, SR.,
Respondents.

Marc H. Zitomer, Esq., for petitioner (Schwartz, Simon, Edelstein, Celseo & Kessler, attorneys)
Yolanda Van Fleet and **Willie Russell, Sr.,** respondents, *pro se*

Record Closed: February 2, 2005 Decided: February 14, 2005

BEFORE **JOSEPH LAVERY**, ALJ t/a:

This matter was transmitted to the Office of Administrative Law on June 4, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

February 14, 2005

DATE

JOSEPH LAVERY, ALJ/a

Receipt Acknowledged:

2/15/05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
FAX (973) 301-0203
Attorneys for Petitioner,
South Plainfield Board of Education

RECEIVED
2005 FEB -2 A 8:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SOUTH PLAINFIELD BOARD OF EDUCATION, Petitioner, vs. YOLANDA VANFLEET and WILLIE RUSSELL, SR., Respondents.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOS 04425-20045 Agency Dkt. No. 107-3/04 **STIPULATION OF SETTLMENT AND RELEASE**

This Stipulation of Settlement is made by and between the South Plainfield Board of Education ("Board"), with administrative offices located at 125 Jackson Avenue, South Plainfield, New Jersey 07080 and Yolanda VanFleet, 22 Andover Avenue, South Plainfield, New Jersey and Willie Russell, Sr., ~~233 Joan Street, South Plainfield~~, New Jersey ~~07080~~. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

16 Carlton Club Dr. Piscataway (Lyllie) 08854

WHEREAS, the Board has filed a Petition of Appeal with the Commissioner of Education against Ms. VanFleet and Mr. Russell, jointly and severally, seeking $56,717.08 in back-tuition, plus interest, costs and counsel fees for the alleged ineligible attendance of Ms. VanFleet's children, B.V. and J.V., in the South Plainfield School District; and

WHEREAS, Mr. Russell, the father of Ms. VanFleet, also was named as a respondent in this action for allowing his address to be used for the purpose of enrolling Ms. VanFleet's children in the District; and

WHEREAS, a hearing in this matter has been scheduled for January 18 & 20, 2005; and

WHEREAS, the parties desire amicably to resolve the matter without the necessity of further litigation;

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

1. Ms. VanFleet and/or Mr. Russell will pay the Board back-tuition in the amount of $20,948.08 which represents tuition for B.V. and J.V. during the 2002-03 school year ($18,294.00) plus 52 days of attendance for ~~J.V.~~ B.V. during the 2003-04 school year at $51.04 per day ($2654.08).

2. This $20,948.08 tuition amount will be paid in consecutive installments of $349.13 per month, for sixty (60) months, with the first payment to be made on February 15, 2005. Each installment thereafter will be due no later than the 15th day of the month until the entire tuition amount is paid in full.

3. Ms. VanFleet and Mr. Russell understand that if they fail to remit the agreed-upon tuition payments in a consistently timely fashion (*i.e.*, not later than five (5) business days after the fifteenth of each month), the aforesaid payment schedule will become null and void and the entire balance will immediately become due and owing. If the entire balance is not paid, the Board will take whatever legal action is necessary to enforce this Agreement and collect the entire tuition amount set forth herein.

4. Ms. VanFleet and Mr. Russell agree to pay the Board's attorney's fees and costs, in addition to all collection fees, in the event that the Board must take action to collect the tuition if they stop making the agreed-upon payments.

5. Ms. VanFleet and Mr. Russell, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to B.V. and J.V.'s attendance and subsequent removal/withdrawal from the District, now and forever.

6. Ms. Van Fleet and Mr. Russell acknowledge that they have been apprised of their right to review this agreement with independent legal counsel and that they enter into it without duress, and of their own free will and volition. They further acknowledge that they fully understand the terms of this Agreement and the duties and obligations enumerated herein.

7. The Board, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraws, without prejudice, the above-docketed Petition of Appeal.

8. Nothing contained in this agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

9. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

SOUTH PLAINFIELD BOARD OF EDUCATION

By: _____
Pio Pennisi, Board President

By: _____
Robert Davis, Int. Bd. Sec./Bus. Admin.

_____
Yolanda Van Fleet

_____
Willie Russell, Sr.

Sworn and subscribed before me this
4th day of January, 2005

ASTRID J. FISCO
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/27/2008

Sworn and subscribed before me this
_____ day of _____, 200__

_____

XIV. FINANCE

1. Accept FY 2005 Special Purpose Grant – World Language Program

RESOLVED, upon recommendation of the Superintendent of Schools, that the Board of Education approve and accept the FY 2005 Special Purpose Grant in amount of $120,00 for the World Language Program from the New Jersey Department of Treasury (February 2005 – June 2006).

MOTION: SECOND: VOTE:

2. Approval to Apply for FY2004 No Child Left Behind (NCLB) Carryover Funds

RESOLVED, upon recommendation of the Superintendent of Schools, that the Board of Education grant approval to apply for FY2004 No Child Left Behind (NCLB) Carryover Funds, in the following amounts:

Title I	$32,359
Title IIA	$ 2,778
Title IID	$ 3,103
Title IV	$ 9,464
Title V	$ 2,646

MOTION: SECOND: VOTE:

3. Approval of Settlement Agreement in the Matter of South Plainfield Board of Education vs. Yolanda Van Fleet and Willie Russell, Sr.

RESOLVED, that the Board hereby approves the settlement in the matter of South Plainfield Board of Education vs. Yolanda Van Fleet and Willie Russell, Sr., OAK Docket No. EDUOS 04425-2004S, Agency Docket No: 107-3/04 in accordance with the terms and conditions set forth in the Stipulation of Settlement and Release between the parties dated January 4, 2005, a copy of which shall be included in the permanent minutes of the meeting; and

BE IT FURTHER RESOLVED, that the Board President and Interim Board Secretary/Business Administrator are hereby authorized to execute this Agreement on behalf of the Board.

MOTION: SECOND: VOTE:

106-05

#106-05SEC

AGENCY DKT. NO. 35-2/05

IN THE MATTER OF EILEEN QUINN,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF WINFIELD, UNION COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that Township of Winfield Board of Education member Eileen Quinn violated the School Ethics Act, *N.J.S.A.* 18A:12-24.1(e), when she printed and distributed a flier during her reelection campaign which contained incomplete fiscal information regarding the board's budget, thus compromising the board's ability to pass its budget. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure because the public should be aware that Ms. Quinn provided incomplete information regarding the potential tax increase of the board's proposed budget.

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

March 23, 2005

AGENCY DKT. NO. 35-2/05

IN THE MATTER OF EILEEN QUINN,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF WINFIELD, UNION COUNTY.	:	DECISION
	:	

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

This matter comes before the Commissioner to impose a sanction upon Respondent Eileen Quinn, member of the Winfield Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24.1(e) of the School Ethics Act when she printed and distributed a flier during her reelection campaign which contained incomplete fiscal information regarding the board's budget, thus compromising the board's ability to pass its budget.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were filed.

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

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner notes that, in recommending the penalty of censure, the Commission had the opportunity to fully investigate the facts presented and, thus, was in the optimum position to determine whether respondent violated the School Ethics Act, and to weigh the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/05

Date of Mailing: 3/23/05

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

103-05

#103-05

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The Board of Education of the Borough of Lincoln Park filed a petition challenging the Board of Education of the Town of Boonton's classification of work performed at the respondent's high school parking lot as a "repair" rather than a "capital expenditure," and subsequent attempt to include a *pro rata* share of this expenditure in the tuition costs charged to Lincoln Park under the parties' Sending-Receiving Agreement.

Based on review and consideration of the evidence and testimony submitted in this matter, the ALJ found that the facts support the position of the petitioning Board that the parking lot work constituted a capital improvement. Moreover, the ALJ found that the Sending-Receiving Agreement between the parties reflects clear intent that Lincoln Park not be required to bear financial responsibility for "major capital undertakings" at Boonton High School. Accordingly, the ALJ found that the respondent's effort to include a *pro rata* portion of the related expenditure in Lincoln Park's tuition rate is improper.

The Commissioner concurs with the ALJ in finding that the scope of work undertaken by Boonton constitutes a capital improvement, and expands upon the ALJ's opinion by citing the rubric for "extensive improvement" found within the Department of Education's school facilities systems maintenance chart. The Commissioner emphasizes that the negotiated tuition agreement between the parties specifically protects Lincoln Park against payment for capital improvements to structures owned exclusively by Boonton without express written consent, and that this specific contractual provision controls over the standard "boilerplate" language included in the contract. Moreover, the underlying statute and the rules for the setting of sending-receiving tuition rates clearly provide for tuition to be charged not in excess of the calculated "actual cost per student". Accordingly, the Commissioner concurs that the disputed expenditure was improperly included in the tuition rate charged to Lincoln Park, and the ALJ's Initial Decision is adopted as the final decision in this matter.

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

March 23, 2005

OAL DKT. NO. EDU 3066-03
AGENCY DKT. NO. 93-3/03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Boonton) filed exceptions to the OAL decision, to which the petitioning Board of Education (Lincoln Park) duly replied.

In its exceptions, Boonton substantially reiterates arguments made in its post-hearing submissions and contends that the Administrative Law Judge (ALJ) misunderstood the central issue in this matter. In Boonton's view, the ALJ focused on inapplicable law in a misguided attempt to differentiate "capital expenditure" from "current expense," a distinction which has no meaning in the current context, where the real issue is the effect of the parties' contract on a properly budgeted and allocated facility maintenance expenditure. Boonton opines that the ALJ should have found in its favor because: 1) the disputed expenditure was correctly budgeted and allocated under school law; 2) the work it represents falls squarely within the "required maintenance"

category of the Department of Education's school facilities systems maintenance chart (P-9); and 3) the parties' contract expressly states that where regulations differ from contractual provisions, the regulations will control. (Boonton's Exceptions at 1-10)

In reply, Lincoln Park urges adoption of the Initial Decision, contending that the ALJ did, indeed, understand the central issue, which was whether the expense in question constituted required maintenance or a capital expenditure, and that, having correctly concluded it was the latter, he properly applied the contractual provision exempting it from the tuition calculation. Lincoln Park proffers that the ALJ did not ignore the Department's chart of categories, but rather recognized its lack of precision and made an (accurate) assessment of whether the work in question more appropriately belonged in the "maintenance" or the "capital" category. The district also counters that Boonton's argument to the effect that contractual exclusion of an expense from the calculation of tuition is automatically void if regulation permits its inclusion, ignores the reality that parties to a contract are free to agree to whatever terms they wish so long as such terms do not violate the law. In this instance, according to Lincoln Park, because its students constitute approximately 50% of Boonton's high school enrollment, it sought and secured protection, in § (H) of the negotiated tuition agreement, against payment for capital improvements to structures owned exclusively by Boonton. Thus, Lincoln Park concludes, the ALJ correctly found that this specific contractual provision controls over the general "boilerplate" language of § (P), which is intended to do nothing more than preclude violations of law within the terms of the contract. (Lincoln Park's Reply Exceptions at 1-8)

Upon consideration, the Commissioner finds that, regardless of how this matter is characterized, Boonton cannot prevail in its defense to Lincoln Park's claim, either by arguing that the expenditure at issue was a properly allocated capital expenditure for required maintenance[1] or by contending that exclusion of the expenditure from tuition charged to Lincoln Park constitutes a "discrepancy" with rule such that § (P) of the contract mandates its payment.

With respect to the "required maintenance" argument, review of Department of Education's school facilities systems maintenance chart (P-9), upon which Boonton places heavy reliance, reveals that the line of demarcation between the "required maintenance" and "capital" categories for Item 36, Site Improvements, is fluid, with the difference in regard to parking lots being more of degree than kind: While "required maintenance" includes "repair or replacement of uneven or cracked parking areas," "new parking areas *or extensive improvements to same*" (emphasis supplied) is included within "capital," in addition to the provision emphasized by Boonton, that of "replacement of an entire driveway and [associated parking areas] due to end of useful life." In this instance, the Commissioner finds that the scope of the work undertaken by Boonton falls well within the rubric of "extensive improvement" as opposed to "area repair/replacement," so that it is accurate even under the standard advocated by Boonton to characterize it as a "capital" project for purposes of § (H) of the parties' contract.

Moreover, even if Boonton is correct that the disputed expenditure was properly budgeted and allocated under applicable school law,[2] that fact does not mandate

---

[1] See Note 2 below.

[2] In its exceptions, Boonton states that it has never disputed that the amount at issue was a "capital expenditure" in these terms. (Boonton's Exceptions at 3, *inter alia*)

its inclusion in the tuition rate negotiated between the parties. The underlying statute and the rules for the setting of sending-receiving tuition rates, both at the time of the contract and currently, clearly provide for tuition to be charged *not in excess* of the calculated "actual cost per student" (*N.J.S.A.* 18A:38-19; *N.J.A.C.* 6:20-3.1, now 6A:23-3.1), so that the exclusion provided by § (H) of the contract presents no "discrepancy" with the law, let alone any violation, that would cause it to be superseded by § (P).

Accordingly, the Commissioner concurs that the disputed expenditure was improperly included in the tuition rate charged by Boonton to Lincoln Park. The Initial Decision of the Office of Administrative Law, as clarified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/05

Date of Mailing: 3/23/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3066-03
AGENCY DKT. NO. 93-3/03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON,

Respondent.

Nathanya G. Simon, Esq., for petitioner
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

Dennis A. Collins, Esq., for respondent

Record Closed: December 17, 2004 Decided: January 24, 2005

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education, Bureau of Controversies and Disputes, as a contested case on March 18, 2003. The transmittal was accompanied by a request that an application for emergent relief be addressed. The matter initially was assigned to Administrative Law Judge Leslie Z. Celentano.

The underlying issue is whether work performed at the respondent's high school parking lot constituted a "capital expenditure" and therefore not to be included in tuition

costs under the parties Sending-Receiving Agreement; or whether, to the contrary it constituted a "repair" and therefore the Lincoln Park Board's *pro rata* share should be included in the cost of tuition.

Following oral argument by telephone on March 19, 2003, Judge Celentano found that no adequate basis for emergency relief had been demonstrated by petitioner. Thereafter, the matter was reassigned to the undersigned Administrative Law Judge since, at the time, I was hearing an application to sever the Sending-Receiving relationship between the two school districts.

After following several adjournments were granted due to a variety of reasons, a plenary hearing was conducted on November 15, 2004. Proposed findings of fact and conclusions of law were then submitted and the record closed on December 17, 2004.

TESTIMONY

Only one witness testified in the matter, Steven Gallo, a certified public accountant and a member of the accounting firm engaged by Lincoln Park in 2002 to review the financial aspects of its Sending-Receiving arrangement with Boonton. Although Gallo is also a public school accountant, his firm was not hired to conduct an annual audit. Rather, he was asked specifically to make sure that the tuition rate being charged to his client by the Boonton Board had been calculated properly. Gallo was qualified as an expert witness and reviewed some of the history of the tuition arrangement.

With regard to the current Sending-Receiving Agreement, dated April 14, 1999 (Exh. P-1), he noted that § (H)(3) specifically referred to "capital expenditures" and provided that those expenditures were not to be attributable to Lincoln Park in terms of a tuition calculation unless Lincoln Park expressly consented to do so in writing. The provision specifically listed several potential activities which would fall into the category of capital expenditures, but carefully noted that those examples only included, but were not limited to, the specific items mentioned. In Gallo's opinion, whether an expenditure can be considered to be "capital" rather than a "maintenance" or "repair" item depends

primarily upon: (1) the cost or value attached to it; and (2), equally important, the "useful life" of the item.

On December 6, 2002, Gallo's firm issued a report to the members of the Lincoln Park Board relating the results of the procedures his firm had followed with respect to the calculation of tuition charged by Boonton (Exh. P-5). According to Gallo, that document was intended to be an original "draft" to be shared with both districts in advance of issuance of a final report. That final report (Exh. P-7), dated February 19, 2003, reflected Gallo's opinion that the cost of repair of the parking lot at Boonton High School should be allocated as a capital expenditure, not as a repair, and therefore could not be charged against Lincoln Park's tuition obligation without written consent. This conclusion coincided with a comment made on January 28, 2003 at a Lincoln Park Finance Committee meeting attended by Gallo and four Lincoln Park Board members at which one of those members raised a question concerning allocation of those paving costs. He took the position it was a capital improvement for which written approval had to be given. The minutes of the meeting further reflect that Gallo then responded that he would recheck the item and revise his report accordingly, which he did (Exh. P-6). He explained at the hearing that upon a "second look" this position was taken because of the substantial amount involved ($86,000); as well as the fact that a five year guarantee had been given by the paving contractor, thereby providing an identifiable, significant "useful life". He also commented that "useful life" was a criterion that the Internal Revenue Service looked at in terms of whether or not an expenditure was "capital" or "maintenance". Gallo also noted, in particular, that in his mind the guarantee was probably "the most significant factor" with regard to his ultimate conclusion. The reason the cost had been treated as part of the tuition calculation earlier was due to Gallo's belief that Lincoln Park had agreed to include the expenditure. Apparently, that did not take place. Thus, even though the item was not considered a capital expenditure in the draft report in December (Ex. P-5), having learned that Lincoln Park, in fact, had never consented, the change was made. However, the witness said it was always his opinion that the item constituted a capital expenditure.

Gallo also referred to an "instruction sheet" published by the Department of Education related to capital assets in which it was noted that as of July 1, 2001, a "capitalization threshold" used by school districts in the State should be increased to

$2000 (Exh. P-8). Thus, according to Gallo, it was arguable that literally no expenditure in excess of that amount should be treated as anything other than capital. Although he did not, and would not, rely exclusively on that "bright line" figure, he felt it was to be considered.

On cross-examination, Gallo recalled that the Boonton Superintendent of Schools was the person who earlier had informed him that Lincoln Park had consented to inclusion of the expenditure. He, himself, entertained no doubt that based upon his own experience and the applicable regulations, the repaving project was a capital project. Again, given the cost and the useful life elements, he was sure it was not simply a maintenance or repair item.

DISCUSSION

No witnesses were presented by the respondent Boonton Board. It takes the position that given Gallo's own testimony, together with a consideration of the undisputed facts, the parking lot repair was not and could not be considered a capital expenditure requiring written consent from Lincoln Park. First, it points out school accounting regulations require that any repair cost which exceed $2000 should be placed in a segregated "Fund 12" and be designated a "Capital Expenditure". The fact that it was not in this case reveals how the parties treated the cost (Exh. P-3).

Boonton also stresses that in Gallo's "draft" report, dated December 6, 2002 (Exh. P-5), he and his firm specifically noted that all of the items, including the parking lot repair, were "found to be properly allocated or to be allowable per the agreement". The final report (Exh. P-7) represents, in Boonton's opinion, a "180° shift" in Gallo's opinion and is based on the same information available to him prior to his December report. The change from the "draft" to the "final" was simply due, according to the Boonton Board to Gallo's effort to accommodate a result which the client preferred to have.

With regard to the fact that § H of the Sending-Receiving Agreement leaves open the possibility of expenditures other than those specifically listed to be considered "capital", Boonton agrees. However, it argues that the regulation in effect both at the time of the Agreement and now (*N.J.A.C.* 6:23-3.1(e)(2)(5), formerly *N.J.A.C.* 6:20-3.1) specifically set forth that facilities acquisition and construction services are to be included

in the budget approved by the County Superintendent and certified for taxes. Thus, no consent by Lincoln Park was needed, nor would it have been appropriate. Since the regulation "trumps" the Agreement, as specifically provided in § (P) the case can be disposed of as a matter of law.

Lincoln Park, in response, maintains that in fact the language of the regulation in effect at the time the Agreement was entered (*.J.A.C.* 6:20-3.1(d)7)left room to permissively charge for special building use under certain circumstances. However, Lincoln Park, it says, "negotiated out of the permissive charging for those special building uses and any capital expenditures". Thus, the specific intent of the parties was to allow Lincoln Park to do precisely what it has done in this case. Here, the parties negotiated at arm's length and their contract included a procedure for determining how tuition was to be calculated. Further, it reflects a clear intent that Lincoln park not be required to bear financial responsibility for "major capital undertakings" at Boonton High School. Although at first blush it might appear that § (P) must control, and the language of the Sending-Receiving Agreement superceded, Lincoln Park argues that § (P) is simply common "boiler plate" and should not nullify the clear language and intent of the parties. Lincoln Park points out, for example, that had the parties wished to do so they could specifically have provided that in determining tuition anything in the contract could be superseded by statute or regulation. This was not done. Thus, according to Lincoln Park, the resurfacing of the parking lot at Boonton High School was intended to be, and is, a capital expenditure which under the Sending-Receiving Agreement could not be included in the calculation of tuition costs without Lincoln Park's written consent.

In my view, even though the resurfacing of the parking lot was not an item specifically included in § (H) of the contract; nevertheless, it does fall into the category of a "capital expenditure" for the following reasons, at least: (1) the cost of the work far exceeds that of spot repairs or maintenance and includes a substantial project at the parking lot site; (2) the contractor guaranteed the work for a five-year period which indicates that it was not done as a regular, recurring repair or maintenance item; (3) based upon Generally Accepted Accounting Principles, (GAAP) this type of work normally would be characterized as an improvement to property because it increases the life of the asset and the value of the property; (4) the Sending-Receiving Agreement does not exclude this type of project from the capital expenditure category; and (5) there is nothing

in the school accounting statutes or regulations which would specifically include or exclude this project from the capital expenditure category.

The Supreme Court of the United States has commented that distinguishing between current expenses and capital expenditures involves questions which are "of degree and not of kind" and that each case turns on its "special facts". *See, INDOPCO, Inc. v. Commissioner*, 503 U.S. 79 (1992). The distinction between a repair which is deductible as a current expense, and a capital expenditure, has been noted to be "a fine one". *See, Fairmont Homes, Inc. v. Commissioner*, 45 *T.C.M.* (CC) 1340 (1983). Thus, the applicable Federal Income Tax Regulations provide that incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, shall either be capitalized and depreciated or charged against a depreciation reserve if one is kept. *See, Tres. Reg.* (§ 1.162-4). While the IRS Code and Regulation do not square perfectly with school accounting, they are useful references.

Of course, nearly any properly performed repair normally will add to the value of property and/or appreciably prolong its life. Thus, nearly sixty years ago, a Federal District Court in Connecticut pertinently observed:

> [T]he distinction between the terms . . . 'repair' and 'replacement' is one of degree rather than of kind. We must draw the line without too much help from the definition of the two terms. Most repair would necessarily involve substitution of new parts or ingredients for old. If the substitution is of a major unit or structural part of the nature of a floor, wall or roof, or a large part thereof, so that the building as a whole may be considered to have gained appreciably in expectancy of useful life, it is a substitution so great in degree that we may well place it on the 'replacement' side of the line.
>
> . . . .
>
> Where the substitutions, though numerous, are of relatively minor proportions of the physical structure and of any of its major parts, even though high in cost, where the building as a whole may not be considered to have gained appreciably

> in expectancy of useful life over its expectancy when built, it falls more naturally on the 'repair' side of the line . . .. (*Buckland v. United States*, 66 *F. Supp.* 681,683 (D.C. Conn. 1946).

Finally, in *Stark v. Commissioner*, 77 *T.C.M.* (CCH) 1181 (1999), the Tax Court determined that replacement of a roof and addition of a new drain constituted a capital expenditure since the old roof essentially was beyond repair and the replacement would last for twenty years. Although not identical to the instant case I believe that result is analogous to the situation here. In terms of change, the remilling and resurfacing of the entire parking lot clearly created, in effect, a new surface for that sort of facility. The cost was substantial and value clearly was added. When added to that mix is the fact there is a five-year guarantee from the contractor, I believe the determination that this project constituted a capital expense rather than a repair or maintenance is a proper one.

Accordingly, based upon my review and consideration of the evidence and the testimony, I **FIND** that the position taken by the petitioner, the Lincoln Park Board, is the correct one and that the respondent's effort to include in its tuition rate a *pro rata* portion for Lincoln Park, is improper.

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

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

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

January 24, 2005
DATE

STEPHEN G. WEISS, ALJ

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

January 24, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 26 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Witnesses:

For Petitioner: Steven Gallo

For Respondent: None

Exhibit List:

P-1 Sending-Receiving Agreement, April 14, 1999
P-2 Minutes, Boonton Board of Education meeting, March 29, 2000
P-3 Boonton School District Budge Statement for 2000-2001
P-4 Boonton Annual School District Budget Statement supporting documents - Capital Outlay Projects
P-5 Agreed Upon Procedures report to Lincoln Park from Gallo firm
P-6 Minutes, Lincoln Park Finance Committee meeting, January 28, 2003
P-7 Revised Agreed Upon Procedures report, February 19, 2003
P-8 New Jersey Department of Education Audit Program extract
P-9 New Jersey Department of Education – School Facilities System Maintenance Categories
P-10 Morris County Cooperative Pricing Council – Bid Specifications
P-11 Proposal and Contract between Boonton and Riverview Paving Company, July 13, 2000
P-12 Morris County Cooperative Pricing Council – Notification of Award sheet
P-13 Morris County Cooperative Pricing Council – Notification of Award sheet
P-14 Description of paving project
P-15 Estimate and invoice from contractor for line painting
P-16 Certified payroll records of Riverview Paving, Inc.
P-17 Certified payroll records of Mt. Hope Rock Products, Inc.
P-18 Photocopy of check from Boonton Board of Education to Riverview Paving, Inc.
P-19 Photocopy of check from Boonton Board of Education to Mount Hope Rock Products, Inc.
P-20 Photocopy of check from Boonton Board of Education to RJR & Sons

110-05

OAL DKT. NO. EDU 10129-03
AGENCY DKT. NO. 469-12/03

D.M. and T.M., on behalf of minor child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4. Prior to the issuance of a Commissioner's determination in this matter, however, the parties submitted a proposed settlement for the Commissioner's approval.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/28/05

Date of Mailing: 3/28/05

RECEIVED BY
CONTROVERSIES
05 MAR 23 AM 10:52

FULL AND FINAL SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made and entered into as of this 22nd day of March, 2005, among and between Petitioners D.M. and T.M., on behalf of their minor child A.M., ("Petitioners") and Respondent Washington Township Board of Education (the "Board").

WHEREAS, Petitioners commenced an action ("the Action") known as D.M. and T.M., on Behalf of Minor Child A.M. v. Board of Education of the Township of Washington, Mercer County, OAL Docket No.: EDU 10129-03, Agency Docket No.: 469-12/03, currently pending before the Commissioner of Education of the State of New Jersey (the "Commissioner"); and,

WHEREAS, Petitioners alleged in the Action that the Board arbitrarily and capriciously adopted a resolution enforcing a 2% limitation on the number of students per grade level, per year, from the Washington Township School District ("District") permitted to apply to Allentown High School under the auspices of the Interdistrict Public School Choice Program ("Program"), and by not offering siblings of District students already in the Program preference in admissions; and,

WHEREAS, Petitioners sought, *inter alia*, relief that would permit A.M. to apply to Allentown High School under the Program, notwithstanding that A.M. had not been selected in a lottery conducted by the Board to enforce the 2% limitation; and,

WHEREAS, Petitioners further alleged that although A.M. had not been selected in the lottery, and her parents and legal counsel were present for the lottery drawing, nonetheless A.M. was entitled to apply to the Program because the Board had failed to deliver written notification to Petitioners in accordance with the provisions of N.J.A.C. 6A:12-4.3(c); and,

WHEREAS, this matter was transferred to the Office of Administrative Law by the Commissioner and assigned to Administrative Law Judge Israel Dubin, whereupon both parties filed cross-motions for summary decision; and,

WHEREAS, Judge Dubin issued a summary decision on January 3, 2005, concluding that the Board's actions in (1) adopting a resolution limiting participation in the School Choice program to 2% per grade level, per year, of the District's students enrolled in grades K through 9; and (2) refusing to apply a sibling preference in the selection of students eligible to participate, were neither arbitrary, capricious, unreasonable nor induced by improper motives, and determining that the Board's actions should be fully affirmed and approved by the Commissioner; and,

WHEREAS, Judge Dubin further concluded that Petitioners did have sufficient notice that A.M. was not selected in the lottery, because they were present for the lottery drawing and were given personal notification of the lottery results from the Board's business administrator; and,

WHEREAS, Petitioners timely filed exceptions to Judge Dubin's decision with the Commissioner; and,

WHEREAS, notwithstanding that A.M. was not selected to participate in the Program, A.M. applied to Allentown High School based upon Petitioners' contention that they had not received the requisite written notice pursuant to N.J.A.C. 6A:12-4.3(c), and was permitted by the administration of the Upper Freehold Regional School District ("Upper Freehold") to attend Allentown High School for the 2004-2005 school year, along with two other District students not selected in the lottery who also received similar personal notification of their non-selection, despite the Board's numerous and vigorous protests to Upper Freehold that the admission of these students was legally improper; and,

WHEREAS, the State Board of Education has recently revised and readopted the regulations governing the Program, eliminating the previous ability of sending districts to limit the number of students attending choice schools, where the choice district offers a specialized educational program, such as Allentown High School's agricultural science program, that is not offered in the sending district, and the Board does not currently offer such an agricultural science program; and,

WHEREAS, these newly adopted regulations would permit A.M. and other similarly situated students to reapply to Allentown High School under the Program for the 2005-2006 school year, subject only to Upper Freehold's ability and willingness to accept such students; and,

WHEREAS, both Petitioners and the Board agree that it is in the best interests of A.M. that A.M. be permitted to remain at Allentown High School, if desired, considering that A.M. has already completed a significant portion of the 2004-2005 school year and would be allowed to re-apply for the 2005-2006 school year, and;

WHEREAS, the Parties hereto have agreed that it is in their mutual interest to resolve all disputes, and the aforementioned pending administrative action upon the terms and conditions more fully set forth hereinafter; and,

WHEREAS, neither Petitioners nor the Board admit any liability by entering into this Settlement Agreement ("Agreement");

NOW, THEREFORE, in consideration of the mutual promises of the Parties to this Agreement, the receipt and sufficiency of which is hereby acknowledged, the Parties jointly agree as follows:

(1) The Parties agree that, upon the approval of the Commissioner, A.M. shall be permitted to attend and remain at Allentown High School for the entirety of A.M.'s high school education, if desired, notwithstanding that A.M. was not selected in the Board's lottery to determine District students eligible to attend Allentown High School under the Program.

(2) The Parties agree that they will jointly seek permission from the Commissioner to approve this agreement as the full and final settlement of the Action, and to execute all documents and take any additional actions necessary to give full force and effect to the terms of this Agreement

necessary to accomplish this settlement, provided, however, that the terms and conditions of such documents are acceptable to the Parties.

(3) In consideration for the settlement as set forth in this Agreement, Petitioners hereby release and forever discharge the Board, together with its current and former members, officers, employees and attorneys, from any and all claims existing as of the date of this Agreement first written above on page one, whether known or unknown, which were or could have been raised in connection with the facts alleged in the Action.

(4) The Parties shall bear their own costs and attorney fees incurred in prosecuting or defending the Action.

(5) This Agreement shall be construed under the laws of the State of New Jersey, without regard to its conflict of law or choice of law rules.

(6) The provisions of this Agreement are severable and if any part is found to be unenforceable, the other portion(s) shall remain fully valid and enforceable. This Agreement shall survive the terminations of any arrangements contained herein.

(7) This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto respecting the subject matter hereof and supersedes and cancels all previous negotiations, agreements, commitments and writings in connection herewith. Further, the terms hereof are contractual and not by way of recital. This Agreement cannot be released, discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise, except by an instrument in writing of concurrent or subsequent date signed by a duly authorized officer or representative of each of the Parties hereto.

(8) Except to the extent necessary to enforce the Agreement, it is further agreed that neither this Agreement nor any part thereof is to be construed or used or admitted into evidence in any proceeding of any character, judicial, administrative or otherwise, now pending or otherwise instituted, except as required by law, to enforce this Agreement or pursuant to the prior written consent of the other Parties. It is understood and agreed by all Parties that this Agreement is a settlement of disputed claims and that neither this writing nor the fact of settlement constitutes an admission of liability or wrongdoing or breach of duty by any Party. This Agreement is purely an offer in compromise and by executing this Agreement, the Board is not admitting acts as alleged by Petitioners.

(9) All Parties to this Agreement represent and agree that they have had the opportunity to discuss all aspects of this Agreement with counsel or other personal advisor of their choice and that they have carefully read and fully understand all of the provisions of this Agreement, and that they are voluntarily entering into this Agreement.

(10) Each Party has participated in the drafting of this Agreement after consulting with counsel. Therefore, no Party shall maintain that the language of this Agreement should be construed against any other Parties by virtue of that Party's putative role as drafter.

(11) This Agreement may be executed in any number of counterparts with the same effect as if the signature and seals thereto and hereto were upon the same document.

(12) This Agreement shall be immediately transmitted upon execution by the Parties to the Commissioner, and shall take effect immediately upon approval of the Commissioner. In the event that this Agreement is not approved by the Commissioner, it shall be null and void.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT AND WITH THE APPROPRIATE LEGAL AUTHORITY.

D.M. AND T.M. ON BEHALF OF MINOR CHILD A.M.

By:_____

DATE:

WASHINGTON TOWNSHIP BOARD OF EDUCATION

By: Matthew J. Giacobbe

MATTHEW J. GIACOBBE
Counsel to the Board of Education

DATE: 3-22-05

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT AND WITH THE APPROPRIATE LEGAL AUTHORITY.

D.M. AND T.M. ON BEHALF OF MINOR CHILD A.M.

By:_____
KEVIN H. MAIN, ESQ.

DATE: March 22, 2005

WASHINGTON TOWNSHIP BOARD OF EDUCATION

By:_____
MATTHEW J. GIACOBBE
Counsel to the Board of Education

DATE:

108-05

#108-05

OAL DKT. NO. EDU 11152-04
AGENCY DKT. NO. 348-9/04

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHLEEN DESAI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MORRIS,	:	DECISION
MORRIS COUNTY.	:	

SYNOPSIS

The Board filed tenure charges against the teaching staff member for incapacity, unbecoming conduct, and other just cause; these charges stemming from an incident in which the Board alleged that the respondent came to school under the influence of alcohol. Subsequent to the transmittal of the matter to the OAL and the scheduling of a hearing as a contested case, settlement discussions between the parties were held and a settlement reached.

The ALJ reviewed the record and the terms of settlement; found that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1; and ordered that the parties comply with the terms of the settlement agreement, and that the proceedings be concluded. The ALJ's initial decision was filed with the Commissioner of Education for consideration.

The Commissioner found that the proposed settlement does not address the standards set forth in the matter entitled *In re Cardonick,* 1990 *S.L.D.* 842, 846. Specifically, the parties failed to set forth the nature of the charges and the circumstances justifying the proposed settlement, and there is no indication in the proposed agreement that the teaching staff member was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners where the teaching staff member has resigned subsequent to the filing of tenure charges.

Accordingly, the Commissioner rejected the proposed settlement agreement and remanded the matter to the OAL for further expansion of the record and revision of the documents 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.

March 24, 2005

OAL DKT. NO. EDU 11152-04
AGENCY DKT. NO. 348-9/04

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHLEEN DESAI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MORRIS,	:	DECISION
MORRIS COUNTY.	:	

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

Initially, the Commissioner points out that, pursuant to *N.J.A.C.* 6A:3-5.6(a), once tenure charges are certified to him, such charges may be settled only with his approval; any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, the proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C.* 6A:3-5.6. Because the proposed agreement does not comport with these standards, the Commissioner is compelled to reject it and remand this matter, as specified below.

First, it is noted that the parties fail to set forth the nature of the charges and the circumstances justifying the proposed settlement. It is well-established that, having once taken up the burden of tenure charges, the agency may not lay it down without spreading forth on the record a

reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County,* decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 420; *affirmed with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489; *affirmed* N.J. Superior Court, Appellate Division, January 30, 1986.)

Moreover, there is no indication in the proposed agreement that the within teaching staff member was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of her certificate, where the teaching staff member has resigned subsequent to the filing of tenure charges. *N.J.A.C.* 6A:9-17.6(a)1[1]

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further expansion of the record and revision of the documents, 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 a hearing on the merits.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/24/05

Date of Mailing: 3/24/05

[1] Formerly codified at *N.J.A.C.* 6:11-3.6.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11152-04

AGENCY DKT. NO. 348-9/04

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN DESAI, SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY.

John M. Iaciofano, Esq., for petitioner Kathleen Desai
(Iaciofano, Flamingo & Perrone, attorneys)

John G. Geppert, Jr., Esq., for respondent School District of Morris
(Wiley, Malehorn & Sirota, attorneys)

Record Closed and Decided: February 16, 2005

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 20, 2004, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for January 19, 20 & 21, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein as well as the extract minutes by the Board approving said settlement that was held on January 24, 2005.

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

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

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

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

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

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

February 16, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

2-18-05
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

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

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 FEB 16 A 11: 54

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, January 24, 2005 at 6:30 p.m.** at the Morris Museum, Normandy Heights Road, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Mr. William Fainglas, Mrs. Marie Fornaro, Dr. Peter Gallerstein, Ms. Lisa Pollak, Mr. Leonard Posey, Mrs. Ann Rhines, Dr Angela Rieck, Mr. John Schafer**

The following members of the Board of Education were absent: **Mrs. Phyllis Grant**

The following Resolution was offered by **Mr. Schafer** seconded by **Dr. Rieck** and adopted by the Board of Education by the following roll call vote:

Roll Call:	***AYES:***	Mrs. Bangiola, Mr. Fainglas, Mrs. Fornaro, Dr. Gallerstein, Ms. Pollak, Mr. Posey, Mrs. Rhines, Dr. Rieck, Mr. Schafer,
	NOES:	None
	ABSENT:	Mrs. Grant

RESOLVED:
Motion #3 that upon the recommendation of the Superintendent, the Board of Education approve the following settlement involving Employee #0764

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, **Susan Young, Business Administrator/Board Secretary** of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, January 24, 2005**, compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **27th day of January 2005.**

(Seal)

Business Administrator/Board Secretary

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(973) 539-1313
Attorneys for Morris School District Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 FEB 16 A 11:54

IN THE MATTER OF
KATHLEEN DESAI

OFFICE OF ADMINISTRATIVE LAW
Docket No. EDUTH 11152-2004N

COMMISSIONER OF EDUCATION
Agency Reference #348-9/04

STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the Commissioner of Education through the filing of tenure charges by the Morris School District Board of Education ("Board") and the parties have agreed to enter into a settlement of the above matter, and the parties intending to fully and finally resolve all issues, matters, claims, potential claims, disputes, and potential disputes between them, except for the enforcement of the terms hereof; and

WHEREAS, the parties in good faith have engaged in negotiations concerning this matter and the parties have amicably settled and resolved the above dispute.

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained in the agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Respondent, Kathleen Desai irrevocably and permanently resigns her employment with the Morris School District effective February 14, 2005 and will submit a letter to that effect in the form attached hereto as Exhibit A. Notice of the said resignation shall be deemed given as

of December 14, 2004. The Board will act to accept the resignation of Kathleen Desai at the time the Board approves this settlement.

2. The Morris School District shall pay to Kathleen Desai all salary/wages for the period September 7, 2004 through February 14, 2005. Ms. Desai shall not receive any withheld increments. Payment in full shall be made within ten (10) days of approval of this Stipulation of Settlement by the Commissioner of Education.

3. The Morris School District shall continue to provide to Kathleen Desai and pay for all normal and applicable benefits, including but not limited to, health insurance through March 31, 2005. Subsequent to that Kathleen Desai, at her option, may purchase health insurance through the Morris School District pursuant to the provisions of C.O.B.R.A. or other applicable law. In the event of such an election by Kathleen Desai, the Morris School District shall cooperate with her obtaining coverage in all respects.

4. The Morris School District agrees that its response to all inquiries regarding Ms. Desai's employment will be limited to the information required to be provided by law, which includes upon request providing the following information pursuant to Order No. 11 (1974): name, title, position, salary, payroll record, length of government services, amount and type of pension, if any, date of separation and reason for separation. The reason for separation shall be stated as "resignation."

5. The District will not disclose the documents related to this action except as required by law. The District will notify Kathleen Desai of any disclosures made.

6. The Board makes no representations regarding Kathleen Desai's future pension status and this Agreement shall in no way be contingent upon Ms. Desai receiving pension benefits.

7. The parties agree that this Stipulation of Settlement is contingent upon the approval of the Commissioner of Education, and that, upon the approval of the Commissioner of Education, the Tenure Charges presently pending before the Office of Administrative Law and the Commissioner of Education shall be deemed to be dismissed with prejudice.

8. The parties agree that neither party is responsible for the payment of the other party's attorneys' fees in connection with this matter.

9. Through this Settlement Agreement, Kathleen Desai releases and waives any and all claims that she has or may have against the Morris School District accrued to date.

10. This Settlement Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

11. Each party acknowledges that she/it has consulted with an attorney or representative of her/its choosing prior to the signing of this Settlement Agreement, and that each party signs this Agreement as her/its own voluntary act and deed, and that each party fully understands the duties and obligations enumerated herein.

12. Nothing in this Settlement Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Kathleen Desai.

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

Date: 1/18/05

Kathleen T. Desai

Kathleen Desai

IACIOFANO, FIAMINGO & PERRONE
Attorneys for the Respondent

Date: 1/18/05 By: _____
John Iaciofano, Esq.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT

Date: 2/10/05 By: _____
Dr. Angela Rieck
School Board President

WILEY, MALEHORN AND SIROTA
Attorneys for the Petitioner

Date: 2/15/05 By: _____
John G. Geppert, Jr., Esq.

Ms. Kathleen Desai
259 Henry Street
Paramus, NJ 07652

January 18, 2005

John G. Geppert, Jr., Esq.
Wiley, Malehorn & Sirota, Esqs.
250 Madison Ave.
Morristown, NJ 07960

Re: Kathleen Desai/Morris School District

Dear Mr. Geppert:

In accordance with the Stipulation of Settlement signed by me on this date and contingent upon the final acceptance of the Stipulation of Settlement by the Morris School District and the Commissioner of Education, I hereby submit my irrevocable resignation as a teacher employed by the Morris School District effective February 14, 2005.

Very truly yours,

Kathleen T. Desai

Kathleen Desai

#109-05

109-05

OAL DKT. NO. EDU 1586-05
(ON REMAND EDU 7593-04)
AGENCY DKT. NO. 241-7/04

S.A., on behalf of minor child, C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/24/05

Date of Mailing: 3/24/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1586-05

AGENCY DKT. NO. 241-7/04

(**Remand** OAL DKT. NO. EDU 7593-04)

S.A., o/b/o MINOR CHILD, C.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY,

Respondent.

John Geppert, Esq., for petitioner
(Wiley, Malehorn & Sirota, attorneys)

Nicholas Celso, III, Esq., for respondent
(Schwartz, Simon, Edelstein & Celso & Kessler, attorneys)

Record Closed and Decided: February 14, 2005

BEFORE **BARRY N. FRANK**, ALJ:

This matter was remanded to the Office of Administrative Law (OAL) from the Department of Education on February 9, 2005, because the agreement was not signed by the Board attorney but rather by the President of Respondent.

The extract from the minutes of the November 15, 2004, meeting of Chathams Board of Education signed by the Board Secretary approving the Settlement Agreement, who was authorized to execute the settlement, is attached and fully incorporated herein as well as the said Settlement Agreement.

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

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

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

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

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

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

February 14, 2005
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Receipt Acknowledged:

2-18-05
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

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

The Board of Education of the School District of the Chathams in the County of Morris, New Jersey, convened in Public Meeting on Monday, November 15, 2004 at 7:30 PM, Chatham, New Jersey.

The following members of the Board of Education were present:
Richard Ford, Jean Gajano, John Merwin, Eileen Miele Coppola, Gordon Redgate
Luana Alesio, Gerald Helfrich

The following member of the Board of Education was absent:
Frank DeVito, Janis Joseph

The following resolution was introduced by Mr. Ford, seconded by Mrs. Alesio and unanimously adopted.

B. Approval of Agreement

The following resolution was introduced by Mr. Redgate, seconded by Mrs. Miele Coppola and unanimously adopted.

WHEREAS, the School District of the Chathams Board of Education ("Board") is a party to an appeal to the Commissioner of Education, entitled: S.A. on behalf of C.M. v. School District of the Chathams Board of Education (Docket No. EDUOS 07593-2004N); and

WHEREAS, the parties wish to resolve this matter without the need for further litigation and expense; and

WHEREAS, the Board, with the assistance of Counsel, has determined that a mutual resolution of this matter is in the best interest of the Board; and

WHEREAS, the parties, through their respective Counsel, have negotiated a mutually acceptable settlement;

NOW, THEREFORE, BE IT RESOLVED that the Board approves settlement of the matter of S.A. o/b/o C.M. v. School District of the Chathams Board of Education (EDUOS 07593-2004N), pursuant to the terms of the Settlement Agreement and General Release between the parties, and further that the appropriate Board Officers are hereby directed to execute the Settlement Agreement on behalf of the Board.

Ayes: 7
Nayes: 0

I, Vincent D. Yaniro, Board Secretary of the School District of the Chathams in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on November 15, 2004 has been compared by me with the original minutes as officially recorded in my office in the minute book of said School District of the Chathams and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 14th day of January, 2005.

AFFIX SEAL

Vincent D. Yaniro, Board Secretary

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between S.A. and C.M. ("Petitioners"), and the School District of the Chathams ("District"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, on or about July 16, 2004, Petitioners filed a Petition of Appeal ("Petition") with the Commissioner of Education against the District captioned, S.A. o/b/o C.M. vs. School District of the Chathams, which Petition was transmitted by the Commissioner to the Office of Administrative Law and docketed as EDUOS 07593-2004N; and

WHEREAS, the parties have worked cooperatively in an effort to reach an amicable resolution of the subject matter of said Petition; and

WHEREAS, the resolution reached by the parties was entered into the record during a hearing conducted by Administrative Law Judge Barry Frank on October 26, 2004; and

WHEREAS, the parties wish to memorialize the terms of their resolution in a formal writing to be signed by both parties;

NOW, THEREFORE, IT IS on this 26th day of October 2004, agreed that:

1. The final grade received by C.M. on the Honors English 11 assignment at issue herein, which was calculated by averaging the zero received on the initial assignment with the grade received on the substitute assignment, shall remain on his record unchanged.

2. The grade of zero received by C.M. for the A.P. U.S. History test which he missed due to cutting the class shall remain on his record unchanged.

3. C.M. shall not be permitted to complete any make up work of any kind to improve his final grades in either Honors English 11 or A.P. U.S. History, and the final grades for those respective courses shall remain on his record unchanged.

4. Except as explicitly set forth herein, no records pertaining to C.M. shall be expunged or modified in any way.

5. C.M. shall be permitted to submit a new application to the National Honor Society Committee of Chatham High School. C.M. shall not be required to check the box under the portion of the application (ART. VI (a)) pertaining to involvement in cheating incidents. Rather, in lieu of checking the box, C.M. shall write the words "See Below". On the lines available for further comment under that section of the application, C.M. shall write, "I failed to follow a teacher's directions not to consult an outside source during the completion of an assignment."

6. Petitioners understand and accept the fact that there are no guarantees that the new application to the National Honor Society Committee of Chatham High School submitted by C.M. will be recommended by the Committee for admission into the National Honor Society. Petitioners agree to be bound by the determination of the National Honor Society Committee of Chatham High School and hereby waive their right to appeal that determination and file any action of any kind against Respondent and its employees in any forum for any reason whatsoever associated with said decision. The National Honor Society Committee is to be comprised of the same members who consider all other applications to the National Honor Society and are to have no input outside the Committee or the application.

7. Petitioners agree that within five days following the Board's formal approval of this Agreement, C.M. shall submit a letter of apology to teaching staff member Howard Glatt.

The letter of apology shall state that C.M. expresses his remorse for "failing to follow Mr. Glatt's directions not to consult an outside source during the completion of an assignment."

8. By signing a separate Release, Petitioners shall release the Board, its trustees, officers, employees, agents, servants, representatives, attorneys, successors and assigns from liability for any action relating in any way to the subject matter of the within matter and shall abandon, waive, and remise all claims they may have against the foregoing, including but not limited to withdrawal with prejudice of the instant Petition of Appeal. Additionally, Petitioners shall immediately withdraw their Notice of Tort Claim dated August 25, 2004, with prejudice.

9. Petitioners acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement and the associated Release, and that they sign the said Agreement and Release as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein; and

10. The terms and conditions set forth herein constitute the entire understanding of the parties.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the date and year aforesaid.

WITNESS:

John Gegnet

John Gegnet

S.A. 11/5/04 (date)

C.M. 11/5/04 (date)

WITNESS:

Vincent D. Yaniro, Board Secretary

School District of the Chathams

Gerald Helfrich, Board President (date)

112-05

OAL DKT. NO. EDU 8593-03
AGENCY DKT. NO. 378-10/03

MARGARET EDWARDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/05

Date of Mailing: 3/29/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8593-03

AGENCY DKT. NO. 378-10/03

MARGARET EDWARDS,

Petitioner,

v.

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

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Harold W. George, Esq., for respondent (Sumners George, attorneys)

Record Closed: February 16, 2005 Decided: February 17, 2005

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 19, 2003, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties 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 thereof and I **FIND**:

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

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

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

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

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

2-17-05
DATE

RICHARD F. WELLS, ALJ

Receipt Acknowledged:

2-18-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

RECEIVED

2005 FEB 16 A 10:51

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
(856) 778-6056
Attorneys for Petitioner Margaret Edwards

MARGARET EDWARDS,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE STATE OF
NEW JERSEY
OAL Docket No. EDU 8593- 03
Agency Ref No. 378-10/03

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Petitioner Margaret Edwards ("Edwards") and the Respondent Camden City Board of Education ("Board").

WHEREAS, on or about October 15, 2003, Edwards filed a Petition of Appeal captioned *Margaret Edwards v. Camden City Board of Education*, Docket No. EDU 8593-03, seeking the return of certain sick days pursuant to *N.J.S.A.* 18A:30-2.1 in connection with a work injury occurring on September 2, 2003; and,

WHEREAS, the Board filed an Answer to the Petition dated November 5, 2003 denying the allegations; and,

WHEREAS, the parties having conducted a full and complete investigation of all the evidence, and the parties having had an opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, this Agreement is the end product of the investigation conducted and discussions with the parties and is intended to dispose of the issues in controversy based upon the mutual understandings set forth below;

NOW THEREFORE, it is agreed as follows:

1. The Board agrees to restore to Edwards' sick leave bank the number of sick days utilized by her beginning September 2, 2003 through September 17, 2003, September 25, 2003 through September 30, 2003 and October 1, 2003 through October 21, 2003. Salary payments made to her during that time shall be considered as having been made pursuant to N.J.S.A. 18A:30-2.1;

2. The Petitioner Edwards, in return for the Board's promises set forth in ¶1 above, hereby agrees to dismiss with prejudice the Petition of Appeal, OAL Docket No. EDU 8593-03 and hereby fully and completely releases the Board from any and all claims pertaining to that return of sick leave issue;

3. This Agreement shall be final and binding upon Edwards and the Board on final approval of the Commissioner of Education;

4. Both parties have read the terms of this Agreement and have had the opportunity to discuss it with counsel, and acknowledge that they are executing this Agreement of their own volition, with the full understanding of its terms, and without coercion. By signing this Agreement, each signatory represents that she or he is a party to or has been duly authorized by a party to sign on the party's behalf. 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;

5. The parties hereto agree that they and their officers, agents, and administrators are bound by a covenant of good faith and fair dealing with respect to this Agreement;

6. The parties recognize the right to a trial before the Office of Administrative Law and independent consideration of the case by the Commissioner of Education. The parties are waiving their right to a trial and agree to the settlement as set forth above. Edwards recognizes that the dismissal of the Petition of Appeal through settlement is final and that the case cannot be litigated. The parties have made the decision to resolve this case knowingly and voluntarily in recognition that this proposed settlement is subject to the approval of the Commissioner of Education.

Intending to be legally bound hereby, Edwards and the Board through its authorized representative execute the foregoing Agreement on the date(s) indicated below.

MARGARET EDWARDS
DATED: 12/26/07

SELIKOFF AND COHEN, P.A.

MICHAEL C. DAMM, ESQ.
ATTORNEY FOR MARGARET EDWARDS
DATED: 12-30-07

CAMDEN CITY BOARD OF EDUCATION

DATED: 1/31/08

SUMNERS AND GEORGE, P.C.

HAROLD W. GEORGE, ESQ.
ATTORNEY FOR CAMDEN CITY BOARD OF EDUCATION
DATED: 1/31/08

RECEIVED

2005 FEB 16 A 10:51

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
(856) 778-6056
Attorneys for Petitioner Margaret Edwards

MARGARET EDWARDS,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
OAL Docket No. EDU 8593- 03
Agency Ref No. 378-10/03

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Petitioner Margaret Edwards ("Edwards") and the Respondent Camden City Board of Education ("Board").

WHEREAS, on or about October 15, 2003, Edwards filed a Petition of Appeal captioned *Margaret Edwards v. Camden City Board of Education*, Docket No. EDU 8593-03, seeking the return of certain sick days pursuant to *N.J.S.A.* 18A:30-2.1 in connection with a work injury occurring on September 2, 2003; and,

WHEREAS, the Board filed an Answer to the Petition dated November 5, 2003 denying the allegations; and,

WHEREAS, the parties having conducted a full and complete investigation of all the evidence, and the parties having had an opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, this Agreement is the end product of the investigation conducted and discussions with the parties and is intended to dispose of the issues in controversy based upon the mutual understandings set forth below;

NOW THEREFORE, it is agreed as follows:

1. The Board agrees to restore to Edwards' sick leave bank the number of sick days utilized by her beginning September 2, 2003 through September 17, 2003, September 25, 2003 through September 30, 2003 and October 1, 2003 through October 21, 2003. Salary payments made to her during that time shall be considered as having been made pursuant to N.J.S.A. 18A:30-2.1;

2. The Petitioner Edwards, in return for the Board's promises set forth in ¶1 above, hereby agrees to dismiss with prejudice the Petition of Appeal, OAL Docket No. EDU 8593-03 and hereby fully and completely releases the Board from any and all claims pertaining to that return of sick leave issue;

3. This Agreement shall be final and binding upon Edwards and the Board on final approval of the Commissioner of Education;

4. Both parties have read the terms of this Agreement and have had the opportunity to discuss it with counsel, and acknowledge that they are executing this Agreement of their own volition, with the full understanding of its terms, and without coercion. By signing this Agreement, each signatory represents that she or he is a party to or has been duly authorized by a party to sign on the party's behalf. 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;

5. The parties hereto agree that they and their officers, agents, and administrators are bound by a covenant of good faith and fair dealing with respect to this Agreement;

6. The parties recognize the right to a trial before the Office of Administrative Law and independent consideration of the case by the Commissioner of Education. The parties are waiving their right to a trial and agree to the settlement as set forth above. Edwards recognizes that the dismissal of the Petition of Appeal through settlement is final and that the case cannot be litigated. The parties have made the decision to resolve this case knowingly and voluntarily in recognition that this proposed settlement is subject to the approval of the Commissioner of Education.

Intending to be legally bound hereby, Edwards and the Board through its authorized representative execute the foregoing Agreement on the date(s) indicated below.

MARGARET EDWARDS
DATED: 12/26/04

SELIKOFF AND COHEN, P.A.

MICHAEL C. DAMM, ESQ.
ATTORNEY FOR MARGARET EDWARDS
DATED: 12-30-04

CAMDEN CITY BOARD OF EDUCATION

DATED: 1/31/05

SUMNERS AND GEORGE, P.C.

HAROLD W. GEORGE, ESQ.
ATTORNEY FOR CAMDEN CITY BOARD OF EDUCATION
DATED: 1/31/05

113-05

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF :

MARY ELIZABETH FARRAN, SCHOOL : COMMISSIONER OF EDUCATION

DISTRICT OF THE CHATHAMS, : DECISION

MORRIS COUNTY. :

SYNOPSIS

The Board sought to suspend the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of her resignation from her position as a teacher at Chatham Middle School.

The Board submitted that there were no material facts in dispute, and that the Board was entitled to summary judgment pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Respondent claimed she understood from a telephone conversation with the superintendent that the superintendent did not want her to return at the beginning of the school year to fulfill the 60 day notice obligation of her contract because it would be disruptive to her students, and further claimed that she was not told of the district's intent to apply for suspension of her certificate and therefore did not make arrangements to commute for the month of September in order to fulfill her contractual obligations. The superintendent denies that he told her that he did not want her to return to work.

Upon review of the parties' submissions, the Commissioner determined, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-1.12, to grant summary decision to the Board, finding that respondent is guilty of unprofessional conduct in putting her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board. In so determining, the Commissioner noted that even assuming, *arguendo*, that the content of the telephone conversation between respondent and the superintendent was as certified by respondent, which the superintendent strongly disputes, respondent's assertions are not material to a determination in this matter in that it cannot be concluded that respondent relied on this conversation in giving less than 60 days notice because such conversation occurred after respondent submitted her resignation letter giving less than the required notice. Therefore, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner ordered that respondent's instructional certificate be suspended for a period of one year commencing as of the date of the decision, and forwarded the matter to the State Board of Examiners for the purpose of effectuating this order.

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

March 29, 2005

AGENCY DKT. NO. 415-11/04

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
MARY ELIZABETH FARRAN, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE CHATHAMS, : DECISION
MORRIS COUNTY. :

For Petitioner, Nicholas Celso, III, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

For Respondent, Gail Oxfeld Kanef, Esq. (Oxfeld Cohen, P.C.)

On November 22, 2004, the School District of the Chathams Board of Education (Board) filed before the Commissioner of Education a Certification of Service, said certification confirming that Mary Elizabeth Farran had been served with an Order to Show Cause (Order), signed by the Commissioner on November 17, 2004, and an accompanying affidavit. The Order notified respondent that she had 20 days to submit a written answer addressing why an Order should not be entered suspending her certificate for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. On December 7, 2004, respondent filed a Letter Brief and Certification in Opposition to the Board's Order to Show Cause. On December 10, 2004, the Board filed a brief with Certification by Superintendent James F. O'Neill in response to respondent's submission. By letter of December 23, 2004, the parties were advised that it appeared that the material facts in this matter were not in dispute, thus rendering the matter ripe for summary judgment. The Board was, therefore, requested to

submit a Motion for Summary Decision and letter brief or memorandum of law addressing the appropriateness of summary decision in this matter and in support of its claim that respondent's teaching certificate should be suspended for her failure to give the requisite notice of her resignation, pursuant to *N.J.S.A.* 18A:26-10. Respondent was then accorded 20 days from receipt of the Board's submission to reply to same. On January 13, 2005, the Board filed a Motion for Summary Decision and on February 17, 2005, respondent filed a letter stating that she would rely on her brief and certification in opposition to the Order and the Board's accompanying affidavit.

BACKGOUND FACTS

The following facts are found to be undisputed, based on the record. On May 14, 2004, respondent signed a contract accepting employment with the School District of the Chathams Board of Education as a Language Arts Teacher for the 2004-05 school year. (Certification of Superintendent James F. O'Neill, No. 3, dated November 10, 2004, attached to the Order to Show Cause; Board's Exhibit A, Memorandum Agreement, attached to the Order to Show Cause; Respondent's Brief in Opposition to Order to Show Cause at 1; and Respondent's Certification No. 2, undated, attached to Respondent's Brief in Opposition to Show Cause) The employment contract included a provision that indicated that the contract could be terminated by either party with 60 days' written notice. (Certification of Superintendent James F. O'Neill, No. 4, dated November 10, 2004, attached to the Order to Show Cause and *Ibid.*)

By letter of July 28, 2004, respondent tendered her resignation from her teaching position. Respondent's letter states, in full:

> I hope you are enjoying your summer. I am writing to you with both excitement and regret. Unfortunately I was unable to notify

> you any sooner than now that I will not be able to return to Chatham Middle School this fall (sic). My family and I have recently completed construction on our first new home in Marshall's Creek, Pennsylvania. We were faced with many difficult decisions about this move and have come to the conclusion that it will be the best place for our growing family and our future.
>
> I sincerely apologize for this late notification to you. I have truly enjoyed my years of teaching at Chatham Middle School. I have been so lucky to work with so many gifted professionals and great Chatham kids. The distance between our new home and the school and care for the baby would prove to be too much of a hardship for us. I will be happy to do what ever (sic) I can to help the school in any way possible.
>
> Again, thank you for everything you have done for me in Chatham, (sic) I truly will miss the school and teaching. Best of luck for a successful 2004-2005 school year. (Board's Exhibit B, Letter from Respondent, dated July 28, 2005, attached to the Order to Show Cause)

Respondent did not report to school at the beginning of the 2004-05 school year. (Certification of Superintendent James F. O'Neill, No. 7, dated November 10, 2004, attached to the Order to Show Cause and Board's Motion for Summary Decision at 2) Thus, the notice she provided was less than the required 60 days under her contract, *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. (Board's Motion for Summary Decision at 2 and Respondent's Brief in Opposition to Order to Show Cause at 1) The Board did not consent to respondent's resignation on less than 60 days' notice. (Board's Motion for Summary Judgment at 2 and 4)

RESPONDENT'S POSITION

In her certification, respondent points out that she resigned her teaching position because she believed it would be difficult to commute from her new home in Pennsylvania and notes that she will not be teaching anywhere this school year. (Respondent's Certification No. 6) Respondent claims that, shortly after she submitted her resignation, she received a call from

Mr. O'Neill, the superintendent of schools, in which he indicated "that he did not believe it would be fair to the students in the district nor to the parents if I worked for the first few weeks of September, attended back to school night, and then left the district." (*Id.* at 5) Petitioner contends that it was her understanding from this conversation that the superintendent did not want her to return at the beginning of the school year for a few weeks to honor her obligation. (*Ibid.*) Moreover, petitioner avers that Mr. O'Neill never communicated to her that if she did not report to work to fulfill the 60-day notice obligation, he would apply to the Commissioner for suspension of her certificate. (*Id.* at 5) Because the District failed to put her on notice that it would be filing to have her certificate suspended, respondent contends that it is not appropriate to suspend her teaching certificate in that, if the superintendent had informed her of his intent, she "likely would have" made arrangements to commute for the first few weeks of school. (*Id.* at 5)

Additionally, if the District had wanted her to work the month of September, petitioner maintains, then Mr. O'Neill could have suggested it to her, but he never did so. (*Id.* at No. 7) Respondent also claims that Mr. O'Neill declined her offer to assist the new teaching staff member in the transition to his/her new position. (*Ibid.*)

Respondent points to *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano*, decided by the Commissioner June 11, 2001, wherein the Administrative Law Judge (ALJ), citing to *Bd. of Educ. of the Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810, 814, adopted by Comm'r, 1984, *S.L.D.* 821, concludes that "neither the statute nor the regulations impose an automatic one year suspension," that "the Commissioner's authority to suspend a teaching certificate has been deemed discretionary," and that, "by using the term 'may' as opposed to 'shall' in the statute it appears the legislature did not intend the suspension of a teacher's certificate to be automatic, even if the Board's consent is not

obtained prior to the cessation of duties." (Respondent's Brief in Opposition to Order to Show Cause at 3) Additionally, respondent also points out that, in *Mooney, supra*, in rejecting the Board's application to suspend Mooney's teaching certificates, the Commissioner noted the full purpose of *N.J.S. A.* 18A:26-10, stating:

> Not to prevent a teaching staff member from leaving his or her teaching position; rather it is to provide the local Board of Education with a reasonable opportunity to obtain a replacement and to acquaint the replacement with the background of the students and the duties and responsibilities of that particular teaching position. (*Id.* at 3-4)

Moreover, in evaluating the appropriateness of suspending Mooney's certificate, the ALJ noted that Mooney: 1) provided compelling reasons for needing the early release; 2) immediately notified the Board and assisted in the development of a program for the class through the end of the year; 3) met with the successor teacher to discuss grades and lesson plans; 4) did not seek an early release to obtain employment elsewhere in New Jersey; and 5) had an above average annual performance evaluation for the final year of employment. (*Id* at 4) Respondent argues that, based on the factors set forth in *Mooney,* her certificate should not be suspended in that: 1) she did not resign to accept employment elsewhere and, in fact, will not be teaching in the current school year; 2) the District found a replacement for her; 3) she offered any assistance she could provide, but such assistance was never requested; 4) her evaluations are excellent; and 5) the District never advised her that it would seek to suspend her certificate. (*Ibid.*)

Respondent further maintains that, unlike *Montalbano, supra*, where the Board's resolution accepting Montalbano's resignation made clear that the early resignation would not be accepted, in this matter, respondent was never notified that her early resignation would not be accepted, and, to the contrary, the superintendent led her to believe that he did not want her to

work in September. (*Id.* at 5) Moreover, respondent submits, if there was difficulty in hiring a replacement for her, she was never contacted and asked to work. (*Ibid.*) In conclusion, respondent contends that, given the mitigating factors in this matter as described in *Mooney* and given the Board's failure to warn her that the within application would be filed if she failed to report to work, the Commissioner should exercise his discretionary authority and deny the Board's application to suspend her teaching certificate. (*Ibid.*)

BOARD'S POSITION

Initially, the Board, relying on *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995), submits that the within matter is ripe for summary judgment in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. In support thereof, the Board argues that, "[u]nder *N.J.S.A.* 18A:28-8 and *N.J.S.A.* 18A:26-10, resignation on less than 60 days' notice without consent from the local board of education to a lesser notice period, constitutes unbecoming conduct *per se.*" (Board's Brief in Support of Motion for Summary Decision at 3-4) In that it is undisputed that respondent did not provide 60 days' notice, nor did the Board approve respondent's early release from her teaching duties, the Board asserts that respondent has violated the applicable statutes and is guilty of unprofessional conduct, warranting the penalty of a one year-suspension of her teaching certificate. (*Ibid.*)

In arguing the appropriateness of a one-year suspension, the Board points to *Bd. of Ed. of Penns Grove-Carneys Point Reg. Sch. Dist. v. Leinen*, 94 *N.J.A.R.*2d (EDU) 405, 407 wherein the ALJ cited numerous cases in observing that "[m]ost cases have resulted in the suspension of any and all teaching certificates for the maximum, one year permitted if the Commissioner finds the teacher guilty of violating *N.J.S.A.* 18A:26-10." (*Id.* at 5) The Board

contends that the within matter is analogous to *East Amwell Twp. Bd. of Ed v. Acken*, 86 *S.L.D.* 2816, and *Montalbano, supra*. (*Id.* at 6) In *Acken*, the Commissioner ordered a one-year suspension of Acken's teaching certificate, finding that the teacher, who had moved to Florida during the summer and had only given 11 days' notice prior to the opening of school, failed to give adequate notice of her resignation for purely personal reasons related to her uncertain future, given that her husband was unemployed and her house in New Jersey had not sold. (*Id.* at 5) In *Montalbano*, the Commissioner also ordered a one-year suspension of Montalbano's teaching certificate, finding that the teacher, who had given 12 days' notice of his resignation, failed to give adequate notice of his resignation for purely personal reasons, *e.g.*, his securing of alternate employment as a police officer in New Jersey. (*Id.* at 6) The Board posits that the respondent in this matter, as in *Acken* and *Montalba*no, failed to give adequate notice of her resignation for purely personal reasons, *e.*g., allowing the maximum time for the completion of her home in Pennsylvania before advising the Board of her resignation. (*Ibid.*)

The Board also submits that there are no mitigating circumstances in this matter which would warrant a penalty of less than a one-year suspension of respondent's teaching certificate. (*Id.* at 7) In support of this contention, the Board avers that the Commissioner rarely declines to impose a one-year suspension in matters of this type and cites three examples where a lesser penalty was imposed due to mitigating factors, claiming that none of these factors is present in the instant matter. (*Ibid.*) In this regard, in *IMO Suspension of the Teaching Certificate of Rogers*, 1989 *S.L.D.* 1962, adopted by Comm'r, 1989 *S.L.D.* 1968, the Board points out that the Commissioner imposed a three-month suspension where the teacher failed to give adequate notice of resignation, but demonstrated a "noble" purpose in resigning in order to take a position working with the severely handicapped students in a State Development Center.

(Id. at 7-8) In *IMO Suspension of the Teaching Certificate of Robert J. Burgess, Sch. Dist. Of Twp. of Clinton,* 1983 *S.L.D.* 183, adopted by Comm'r, 1989 *S.L.D.* 1968, the Board notes that the Commissioner declined to impose a suspension of any length because the board in that matter made promises about a possible early release date, but did not fulfill its promises, a situation not analogous to this matter, the Board asserts, because the Board herein made no promises of any kind to respondent. *(Ibid.)* Additionally, in *Mooney, supra*, the Board claims that the Commissioner declined to impose a suspension in that case because the employee had gone to extraordinary lengths to insure her successor's smooth transition. (*Id.* at 7) In the instant matter, the Board asserts, respondent "did not do a single thing to assist the Board." (*Id.* at 8) Thus, the Board asks the Commissioner to grant its Motion for Summary Decision and impose a one-year suspension of respondent's teaching certificate, commencing no earlier than the date of the Commissioner's decision. (*Ibid.*)

Additionally, a Supplemental Affidavit of Superintendent of Schools James F. O'Neill was submitted by the Board to address the portion of respondent's certification relating to a telephone conversation that occurred between respondent and Superintendent O'Neill subsequent to respondent's resignation, certifying, in pertinent part:

* * * * *

> 2. As set forth in Respondent's Certification, I contacted her by telephone shortly after she tendered her resignation letter. However, Respondent's Certification does not accurately reflect the substance of our telephone conversation.
>
> 3. During our telephone conversation, I advised Respondent that her abrupt resignation was putting the District in a bad position. Her response to me was that she simply could not fulfill her obligation to the District. She stated that she had driven from her new home in Pennsylvania once or twice and that she just couldn't do it. She also mentioned having child care issues.

4 I told her that I could file an application with the Commissioner to suspend her certificate for failing to give appropriate notice. Her response was that she hoped I wouldn't do that. Respondent clearly was aware of my concerns and the possibility that her certificates could be suspended. Nevertheless, she never came back to work.

5. During my telephone conversation with Respondent, I never told her that I did not want her to return to work.

6. At no point during our telephone conversation did Respondent offer to assist the District in any way.
(Supplemental Affidavit of James F. O'Neill at 1-2)

COMMISSIONER'S DETERMINATION

Upon a thorough review of the parties' submissions, the Commissioner has determined, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-1.12, to grant summary decision to the Board, finding that respondent is guilty of unprofessional conduct and suspending her teaching certification for a period of one year. Pursuant to *N.J.A.C.* 1:1-12.5(b) and Contini v. *Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill, supra*), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law.

In this regard, the Commissioner finds that the relevant and material facts in this matter are those stated, *supra,* as "Background Facts." (*See Collingswood Borough Board of Education v. Edward J. Cashel*, 1988 *S.L.D.* 898.) These facts are not disputed. Notwithstanding respondent's claims that the superintendent indicated to her in a telephone conversation occurring subsequent to her submission of a resignation letter that: 1) he didn't want her to return to her teaching duties at the beginning of the school year; 2) he failed to inform her that he would apply to suspend her certificate if she did not return to work to fulfill

her 60-day notice obligation; and 3) he declined her offer to assist her successor's transition, the Commissioner finds these assertions are not material to a determination in this matter. Even assuming, *arguendo*, that the content of the telephone conversation between respondent and Mr. O'Neill was as certified by respondent, which Mr. O'Neill strongly disputes, such conversation occurred *after* respondent submitted her resignation letter in which she gave less than the required 60 days' notice. Thus, it cannot be concluded that respondent relied on this conversation when she failed to provide less than 60 days' notice in resigning from her teaching position in the District. Moreover, respondent acknowledges that she was aware of the 60-day notice requirement, and there is nothing in the applicable statutes that requires a District to notify a teacher of its intent to seek suspension of the teacher's certification if the 60-day notice requirement is not fulfilled.

N.J.S.A. 18A:28-8 establishes the procedure by which a teaching staff member must provide notice of resignation to a board of education and authorizes the Commissioner to suspend a teacher's certificate if that teacher fails to comply, as follows:

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

Additionally, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for ceasing to perform her duties before the expiration of her employment obligations. *N.J.S.A.* 18A:26-10 provides that:

> Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his

> duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

In the instant matter it is undisputed that respondent resigned without proper notice to the Board. Additionally, respondent admits that she was aware of her obligation to give 60 days' notice of her resignation. Accordingly, the Commissioner finds that respondent is guilty of unprofessional conduct for her failure to provide the 60-day notice required by her contract, *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Moreover, the Commissioner is unable to conclude that there are factors which would mitigate the imposition of a one-year suspension of respondent's teaching certificate. In so concluding, the Commissioner rejects respondent's claim that her failure to give the required notice is mitigated by factors similar to those applied in *Mooney*. The situation herein is substantially different. Unlike *Mooney,* respondent does not provide compelling reasons for needing early release. Instead, respondent's desire for an early release from her professional obligations is based solely on personal convenience. Additionally, respondent does not make any claim that she attempted to communicate with the Board to negotiate a mutually beneficial and agreeable earlier release date than the required 60 days' notice, but, instead, respondent clearly made a unilateral decision to resign with full knowledge that her notice did not satisfy the notice requirement. Moreover, the actions taken by respondent to insure that her successor made a smooth transition were, at best, minimal. In the telephone conversation between the superintendent and respondent where it is undisputed that this issue was discussed, although the content of that conversation is disputed, both parties acknowledge that it was the superintendent, not respondent, who initiated the contact.

Additionally, although the Commissioner recognizes that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school so that a suitable replacement can be

hired without adversely impacting students***" (*Penns Grove, supra,* at 407, citations omitted), even if the Board were able to find a replacement quickly, such replacement would not negate respondent's unprofessional conduct. (*See In the Matter of the Suspension of the Teaching Certificate of Patricia Aiken, School District of the Township of East Amwell, Hunterdon County*, 1986 *S.L.D.* 2816, 2821)

The Commissioner, therefore, agrees with the Board that, in resigning abruptly, respondent put her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board. Accordingly, summary decision is granted to the Board in this matter. Pursuant to *N.J.S.A.* 18A:26-10, Mary Elizabeth Farran is, therefore, deemed guilty of unprofessional conduct and her teaching certificate is hereby suspended for a period of one year, which period shall commence upon the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/05

Date of Mailing: 3/29/05

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

114-05

OAL DKT. NO. EDU 113-02
AGENCY DKT. NO. 492-11/01 AND PERC DKT. NO. CO-2002-237

PINE HILL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Dismissal With Prejudice and Without Costs, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 1:1-17.8(b), have been reviewed. Upon such review, the Commissioner of Education accepts the parties' Stipulation of Dismissal With Prejudice and Without Costs on those issues within the scope of his jurisdiction and the matter is hereby dismissed as to its education law claims. Pursuant to *N.J.A.C.* 1:1-17.8(b) and (c), therefore, the Initial Decision and the full record herein shall be transmitted to the Public Employment Relations Commission, which may subsequently render a final decision on any remaining issues within its statutory grant of authority.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/05

Date of Mailing: 3/29/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ACCEPTING STIPULATION OF DISMISSAL
OAL DKT. NO. EDU 113-02
AGENCY DKT. NO. 492-11/01

PINE HILL EDUCATION ASSOCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff and Cohen, attorneys)

Vito A. Gagliardi, Jr., Esq. for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: February 23, 2005 Decided: February 23, 2005

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Pine Hill Education Association, the petitioner herein, as well as the Lindenwold Education Association, and the Winslow Township Education Association (the Education Associations), each filed petitions in which they challenged the alleged refusal of respondents Boards of Education to honor and recognize the rights of petitioners' affected members as established by contract or past practice and enjoyed by them in their former school district. Each of the petitioners alleged that these actions and failures to act violated the education laws and, in particular, *N.J.S.A.* 18A:13-64, and the administrative regulations promulgated thereunder. Each of the petitioners sought a determination restoring to the affected members all of the terms and conditions of employment formerly enjoyed by them as employees of the former regional school district, and requesting the restoration of all back pay, benefits and emoluments of employment which they have lost to date as a result of respondents' actions and failures to act. Each of these matters, including the within matter, were transmitted to the Office of Administrative Law (OAL) on January 9, 2002, for hearing as contested cases. On April 30, 2002, these three matters were consolidated.

On March 1, 2002, each of the petitioners filed unfair practice charges with the Public Employment Relations Commission (PERC) against the same three respondents. The unfair practice charges are captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, *Lindenwold Ed. Association and Lindenwold Board of Ed.*, PERC Dkt. No. C0-2002-236; and *Pine Hill Ed. Association and Pine Hill Board of Education*, PERC Dkt. No. C0-2002-237.

By Order of Consolidation and Predominant Interest entered on October 21, 2002, I recommended that the three PERC matters be consolidated with the consolidated OAL matters. By an Order entered by the Chair of the Public Employment Relations Commission on November 25, 2002, and by the Commissioner of Education on December 5, 2002, this recommendation was accepted.

Following numerous discussions between the parties and a number of telephone conferences with the ALJ, the matters originally captioned *Winslow Township Education Association v. Board of Education of the Township of Winslow,* OAL Dkt. No. EDU 114-02, Agency Dkt No. 491-11/01 and the unfair practice charge captioned *Winslow Township Ed. Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, *Lindenwold Education Association v. Board of Education of the Borough of Lindenwold,* OAL Dkt. No. EDU 112-02, Agency Dkt No. 489-11/01 and the unfair practice charge captioned *Lindenwold Ed. Association and Lindenwold Board of Education*, PERC Dkt. No. C0-2002-236, were settled and resolved by and between the parties as the product of contract negotiations, and they submitted Joint Stipulations of Dismissal in those matters. In order to effectuate the dismissals it was necessary to sever these two matters from the remaining ongoing matters. Accordingly, an Initial Decision Severing the *Winslow Township* case and accepting the Stipulation of Dismissal was issued on September 18, 2003, and an Initial Decision Severing the *Lindenwold Township* case and accepting the Stipulation of Dismissal was issued on June 28, 2004.

On February 23, 2005, the parties filed with the OAL a Stipulation of Dismissal as to this remaining matter. Therefore, it is **ORDERED** that the Stipulation of Dismissal filed herein by the parties in the contested case captioned *Pine Hill Education Association v. Board of Education of the Borough of Pine Hill,* OAL Dkt. No. EDU 113-02, Agency Dkt No. 492-11/01 and the unfair practice charge captioned *Pine Hill Ed. Association and Pine Hill Borough Board of Education*, PERC Dkt. No. C0-2002-237, is hereby accepted, and this matter is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMSSIONER 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 on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering its final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSIO**N who may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSIO**N within forty-five (45) days of the predominant agency decision. If the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSIO**N does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

February 23, 2005
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

2-25-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

115-05

OAL DKT. NO EDU 6025-04
AGENCY DKT. NO. 229-6/04

IN THE MATTER OF THE TENURE	:	
HEARING OF PETER SCUTTI,	:	
DEPARTMENT OF LAW & PUBLIC	:	COMMISSIONER OF EDUCATION
SAFETY, JUVENILE JUSTICE	:	DECISION
COMMISSION, OFFICE OF EDUCATION.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/05

Date of Mailing: 3/29/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6025-04

AGENCY DKT. NO. 229-6/04

DEPARTMENT OF LAW &
PUBLIC SAFETY, JUVENILE
JUSTICE COMMISSION,
OFFICE OF EDUCATION,

Petitioner,

v.

PETER SCUTTI,

Respondent.

John Franzini, Deputy Attorney General, for petitioner (Peter C. Harvey, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: February 16, 2005 Decided: February 17, 2005

BEFORE **DONALD J. STEIN**, ALJ:

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

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-1.3, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

2-17-05
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

2-22-05
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

RICHARD J. CODEY
Acting 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 08625-0112

PETER C. HARVEY
Attorney General

February 15, 2005

RECEIVED
2005 FEB 16 A 10:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Hand Delivered
The Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza - Bldg. 9
P.O. Box 049
Trenton, New Jersey 08625

Re: In the Matter of the Tenure Hearing of Peter Scutti
OAL Docket No.: EDUTH06025-2004S
CWA Case No.: 1J-04-140

Dear Judge Stein:

Enclosed please find a fully executed amended Stipulation of Settlement in the above captioned matter. The Stipulation reflects the form required by the provisions of N.J.A.C. 6A:3-5.6. We request that you render an Initial Decision incorporating the Settlement Agreement for final approval by the Commissioner of Education.

Thank you for your attention to this matter.

Very truly yours,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: _____
John Franzini
Deputy Attorney General

JF:aw
Enc.
C: Rosemarie Cipparulo, Esq. (w/encl.)

Howard L. Beyer, Exec. Director, JJC
Jack Amberg, Director, OOE, JJC (w/encl.)

JUVENILE JUSTICE COMMISSION
1001 Spruce Street, Suite 202
P.O. Box 107
Trenton, New Jersey 08625-0107

By: John Franzini
Deputy Attorney General
(609)292-8582

RECEIVED
2005 FEB 16 A 10:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the Matter of the Tenure Hearing of Peter Scutti, Office of Education, Juvenile Justice Commission	:	OAL Dkt. No.: EDUTH 06025-2004S
	:	Agency Docket No.: 229-6/04
	:	STIPULATION OF SETTLEMENT
	:	

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 1001 Spruce Street, Suite 202, Trenton, New Jersey 08625, represented by Peter C. Harvey, Attorney General of New Jersey, John Franzini, Deputy Attorney General, appearing; and Peter Scutti, a tenured employee of the JJC represented by Weissman & Mintz, LLC, Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Agreement say:

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Scutti having filed the charges with the Commissioner of Education on or about June 23, 2004; and

WHEREAS, Mr. Scutti was charged with both Corporal Punishment and Unjustified Physical Contact constituting Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the charges alleged that on November 26, 2003, Peter Scutti, a Teacher 1 within the Juvenile Justice Commission assigned to the Life Skills and Leadership Academy, while supervising a physical accountability exercise, grabbed Cadet K.B. on the wrist and attempted to twist his arm on two separate occasions and then grabbed him around the neck, all without justification; and further, that as a result of the unjustified use of physical force by Mr. Scutti, Cadet K.B. needed to be restrained by custody staff and sustained mild reddening of his left cheek; and

WHEREAS, the JJC sought the suspension of Mr. Scutti on the above charges for a period of ninety (90) days without pay; and

WHEREAS, Mr. Scutti disputed the charges; and

WHEREAS, the matter was referred to the Office of Administrative Law for a hearing on or about July 13, 2004; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Scutti prior to a hearing; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Scutti pleads guilty to the charge of Unjustified Physical Contact Constituting Conduct Unbecoming a Public Employee and Other Just Cause as described above.

2. The Juvenile Justice Commission withdraws the Charge of Corporal Punishment Constituting Conduct Unbecoming a Public Employee or Other Just Cause.

3. As the penalty for pleading guilty to the charge as described above, Mr. Scutti shall be suspended for fifteen (15) days without pay to be served at the convenience of the JJC. He shall also attend and satisfactorily complete anger management training selected by the JJC.

4. The JJC shall not schedule any suspension day on a day before a holiday.

5. The JJC shall schedule the suspension days based on the operational needs of the facility at which Mr. Scutti is employed.

6. This Agreement shall be part of Mr. Scutti's official personnel file and Mr. Scutti's admission of guilt and the penalty imposed by way of settlement may be presented and considered in any subsequent disciplinary action against him.

7. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Scutti agrees not to appeal the tenure

action or the terms of this Agreement in any administrative, arbitral or judicial forum.

8. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. With regard to the penalty, Mr. Scutti has been employed by the Juvenile Justice Commission for over 14 years and has had one other minor disciplinary infraction, an official written reprimand dated June 18, 2003, for conduct unbecoming a public employee. The reduction in the length of the suspension without pay from proposed to agreed and the requirement for anger management training is equitable in exchange for eliminating the expense and uncertainty connected with a contested tenure hearing.

9. This Agreement shall not constitute a precedent in any other matter involving Mr. Scutti or any other employee.

10. Mr. Scutti has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate (N.J.A.C. 6A:3-5.6(a)6).

11. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Peter Scutti

Dated: 2-8-05

Rosemarie Cipparulo, Esq.
Weissman & Mintz, LLC
Attorneys for Peter Scutti

Dated: 2/9/05

For the Juvenile Justice Commission:

Jack Amberg
Director of Education, JJC

Dated: 2/14/05

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: John Franzini
Deputy Attorney General

Dated: 2/14/05

116-05

OAL DKT. NO. EDU 11348-04
AGENCY DKT. NO. 336-9/04

R.M., on behalf of minor child, Y.McD.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/30/05

Date of Mailing: 3/30/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT AGREEMENT
OAL DKT. NO. EDU 11348-04
AGENCY DKT. NO. 336-9/04

R.M. ON BEHALF OF MINOR CHILD Y. McD.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE,
ESSEX COUNTY,
Respondent.

Renee Marsett, *pro se*

Chandra L. Rainey Cole, Esq., for respondent (Love and Randall, attorneys)

Record Closed: February 24, 2005 Decided: February 25, 2005

BEFORE **ROBERT J. GIORDANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 27, 2004, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

A hearing was scheduled on February 24, 2005. On the date of hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by 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** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

2/25/05
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

3-2-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR - 3 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

lrs

Settlement Agreement

Re: R.M. o/b/o Y. McD. v. Orange Board of Ed
EDU 11348-2004N

On this 24th day of February 2005, the parties wishing to amicably resolve the above captioned matter by way of settlement agree to the following:

1. Student Y. McD. is no longer enrolled in the school district, and there is no intent to re-enroll the student either by R.M. or Wydick McDonald, the child's legal guardian and parent, or anyone else on the child's behalf;

2. Based upon the circumstances herein, the Board takes the position that Y. McD. is not entitled to a free and appropriate education in the Orange School District, inasmuch as he is not domiciled there, and was not during the 2003-2004 or 2004-2005 school years within the intendment of N.J.S.A. 18A:38-1.

3. Based upon the Notice of Trial Ineligibility R.M. has filed a Residency Appeal now pending before the Commissioner of Education with the Docket No. EDU 11348-2004N.

4. R.M. hereby agrees to a withdrawal of the Residency Appeal

with prejudice.

5. The Orange Board of Education hereby agrees to waive ~~the~~ its right to recoup tuition of approximately $12,286.00

Orange Board of Education
Chandra L. Ramey Cole, Esq.
Attorney for the Orange Board of Education

Renee Marsett
Renee, Marsette, Grandmother

Wydian Mc Donald, Mother / Legal Guardian

Settlement Agreement

Re: R.M. o/b/o Y. McD. v. Orange Board of Ed.
EDU 11348-2004N

On this 24th day of February 2005, the parties wishing to amicably resolve the above captioned matter by way of settlement agree to the following:

1. Student Y. McD. is no longer enrolled in the school district, and there is no intent to re-enroll the student either by R.M. or Wydiah McDonald, the child's legal guardian and parent, or anyone else on the child's behalf;

2. Based upon the circumstances herein, the Board takes the position that Y. McD. is not entitled to a free and appropriate education in the Orange School District, inasmuch as he is not domiciled there, and was not during the 2003-2004 or 2004-2005 school years within the intendment of N.J.S.A. 18A:38-1.

3. Based upon the Notice of Final Ineligibility R.M. has filed a Residency Appeal now pending before the Commissioner of Education with the Docket No. EDU 11348-2004N.

4. R.M. hereby agrees to a withdrawal of the Residency Appeal

with prejudice.

5. The Orange Board of Education hereby agrees to waive ~~the~~ its right to recoupment of approximately $12,286.00

Orange Board of Education
Chandra L. Ramey Cole, Esq.
Attorney for the Orange Board of Education

Renee Marsett
Renee, Marsette, Grandmother

Wydiah Mc Donald, Mother / Legal Guardian

122-05

#122-05

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board, an Abbott District, filed a petition challenging the Department's denial of funding for certain items in their revised 2005-2006 Preschool Operational Plan, which the Board asserts are necessary to provide a well-planned, high quality preschool program for New Brunswick's children. Specifically, the Board challenged denial of funding for: 1) 3.5 vacant positions in the preschool intervention and referral team; 2) district-wide computers, office printers, and software; 3) the summer enrichment program; 4) an executive, fiscal and administrative support staff for the Puerto Rican Action Board (PRAB), a private preschool provider to the district; 5) an additional cook's assistant for the PRAB; 6) a security system for the PRAB; 7) fringe benefits in excess of 12.5% for non-teaching staff of the PRAB; and 8) a cleaning service contract for the PRAB. The Department transmitted the matter to the OAL as a contested case.

Prior to commencement of the hearing in this matter, the parties resolved several issues, resulting in the petitioning Board's withdrawal of challenges regarding items number 1 through 3 above. Upon consideration of the evidence presented and the arguments of the parties, the ALJ found that the Department's reasons for denying the PRAB's special requests were well-grounded in the applicable Provider Guidance or otherwise clearly rational and directly related to the mandated standard of provision of high quality preschool programs in Abbott districts. The ALJ concluded that the petitioning Board failed to meet its burden to establish that any of the PRAB's denied special requests are necessary to adequately and efficiently fund a high quality preschool educational program, and further concluded that the appeal should be dismissed.

Upon a full and independent review of this matter, the Assistant Commissioner, to whom this matter was delegated pursuant to *N.J.S.A* 18A:4-34, agreed with the ALJ's conclusion that petitioner failed to sustain its burden of establishing that the special requests made by the Board on behalf of PRAB are essential to an effective and efficient education in the provider's program. Accordingly, the Initial Decision was adopted for the reasons stated therein 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.

April 6, 2005

OAL DKT. NO. EDU 565-05
AGENCY DKT. NO. 29-2/05

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were filed in accordance with the necessarily abbreviated exception period for Early Childhood Program appeal matters specified in the Initial Decision.

Petitioner's exceptions charge that the Administrative Law Judge's (ALJ) findings of fact and conclusions are contrary to the Provider Guidance,[1] and that "[t]he denial of the Special Requests of the Puerto Rican Action Board [PRAB] will impair the provision of a high-quality preschool education program." (Petitioner's Exceptions at 1) To support this contention, petitioner relies on its post hearing brief, contending that this document comprehensively presents the justifying rationale for each of these requests.

In reply, respondent submits that after two days of hearing, where he was able to assess the credibility of the witnesses, and fully consider all of the parties' arguments, the ALJ

[1] It is noted that to assist districts in their preparation of budgets, during the summer of 2004 the Department provided them with the District One Year Budget Instruction and Guidance School Year 2005-2006 "District Guidance" (R-80) and Private Providers One Year Budget Instruction and Guidance School Year 2005-2006 "Provider Guidance" (Exhibit R-79).

correctly determined that petitioner had failed to sustain its burden of demonstrating that the PRAB special requests were "warranted or necessary for the provision of a high quality preschool program." (Respondent's Reply Exceptions at 1-2). As to petitioner's claim that the ALJ's findings of fact and conclusions of law are inconsistent with the Provider Guidance, respondent advances that such allegation is without foundation. (*Id.* at 2) In support of its position, respondent urges that consideration be taken of its post-hearing and reply briefs.

The Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, has conducted a full and independent review and consideration of the record herein. Upon such review, and noting that the parties' exceptions raise no new arguments but, rather, rely on those set forth in their post hearing materials, which were comprehensively presented and evaluated in the Initial Decision, the Assistant Commissioner agrees with the ALJ's conclusion that petitioner has failed to sustain its burden of establishing that any of the Special Requests made by the District on behalf of the PRAB at issue here,[2] "is essential to an effective and efficient education in the provider's program." *See* Provider Guidance, Exhibit R-79, at 15.

Accordingly, the Initial Decision is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Isaac R. Bryant

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/6/05

Date of Mailing: 4/6/05

---

[2] Specifically, 1) Funding for Proportional Administrative Expenses (Exhibit R-37); 2) Funding for a Cleaning Service Contract (Exhibit R-38); 3) Funding for an Additional Cook's Assistant (Exhibit R-39); 4) Funding for Fringe Benefits in Excess of 12.5% of Salary (Exhibit R-42); and 5) Funding for a Security System (Exhibit R-43).

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 565-05
AGENCY DKT. NO. 29-2/05

BOARD OF EDUCATION OF
THE CITY OF NEW BRUNSWICK,
MIDDLESEX COUNTY,
Petitioner,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION,
Respondent.

George F. Hendricks, Esq., for petitioner (Hendricks & Hendricks, attorneys)
Allison Colsey Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 9, 2005 Decided: March 15, 2005
BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The City of New Brunswick School District is an Abbott District, as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. On January 14, 2005, the New Jersey Department of Education notified the district superintendent that it had reviewed the district's 2005-2006

revised Preschool Operational Plan for three and four year olds. The Department approved a total budget in the amount of $13,589,175. On February 3, 2005, the district Board of Education filed a Verified Petition with the Commissioner of Education challenging the Department's denial of funding for certain items the district asserts are necessary to provide a well-planned, high quality preschool program for New Brunswick's children. Specifically, the district challenged the Department's denial of funding for: 1) 3.5 vacant positions in the preschool intervention and referral team; 2) district-wide office computers, office printers, and software; 3) the summer enrichment program; 4) an executive, fiscal and administrative support staff for the Puerto Rican Action Board, which is one of New Brunswick's private preschool providers; 5) an additional cook's assistant for the Puerto Rican Action Board; 6) a security system for the Puerto Rican Action Board; 7) fringe benefits in excess of 12.5% for non-teaching staff of the Puerto Rican Action Board; and 8) a cleaning service contract for the Puerto Rican Action Board.

The Department transmitted the contested case to the Office of Administrative Law on February 4, 2005. On February 8, 2005, the Department's answer was filed with the OAL, pursuant to *N.J.A.C.* 6a:10a-9.7(c). There was a telephone prehearing conference on February 16, 2005, and the hearing was held on February 24 and 25, 2005. The record remained open following the hearing to permit the parties to submit post-hearing briefs. The last of these was received on March 9, 2005, and the record closed on that date.

DISCUSSION

At commencement of the hearing, counsel for petitioner district announced that the parties had resolved several issues through discussion, resulting in the district withdrawing its challenges as to the 3.5 vacant PIRT positions, the district-wide office computer, office printers and software, and the summer enrichment program. The hearing then focused on the district's remaining challenges regarding the denied special requests of the Puerto Rican Action Board ("PRAB"). Petitioner district went forward with its proofs, presenting the testimony of its Business Administrator Richard Jannarone, PRAB Fiscal Manager Jose Figueroa, PRAB Director of Education Joyce Chase, and PRAB Executive Director Guillermo Beytagh-Maldonado. The Department presented the testimony of Program Specialist Susan

Bruder, Office of Early Childhood Education, and Robert Goertz, Director, Budget and Accounting. Many of the relevant documents were admitted at the joint request of the parties.

The Department's determination letter of January 14, 2005, advised that its review had included the district's 2005-2006 revised Preschool Operational Plan for three and four-year old children residing in the district. The budget approvals and plan review were based on the Abbott Preschool Program Implementation Guidelines, Three-Year Operational Plan instructions, and the information collected from the Self Assessment Validation System. The district and the Department worked together to address issues and make revisions to the operational plan. In addition, the district was required to submit a comprehensive professional development plan and transition plan. The Department approved a total budget of $13,589,175 for the district to implement its approved Abbott Preschool Program in 2005-2006. This budget covers the six hour, 180 day minimum education program, but does not include funding for extended day or summer wrap-around, which is provided separately by the Department of Human Services.

The district plans to contract with 13 private providers in 2005-2006 to implement its Abbott Preschool Program. As one of petitioner school district's private preschool providers, PRAB operates 15 Abbott preschool classrooms at three locations. There are eleven classrooms at 18 Drift Street, two classrooms at 287 Townsend Street, and two classrooms at 74 Drift Street. PRAB also serves 40 non-Abbott preschool students in two classrooms located at 287 Townsend Street. PRAB provides other community programs and services in addition to the preschool program.

The Department reviewed each private provider budget individually and made modifications as it deemed appropriate. For PRAB, the Department corrected some calculation errors and noted that the amounts approved for office equipment and repair, building and grounds maintenance and repair, telecommunications, insurance, and staff transportation were based on reasonable and customary verified costs. The amount approved for field trips was based on the field trip plan submitted, and the amount approved for substitute teacher and substitute assistant teacher stipends was based on district policy. The amount approved for janitor benefits was based on the salaried position. The approved per pupil allocation for PRAB's projected enrollment of 225 pupils is $10,834.

The Department's determination letter also stated its reasons for not approving PRAB's special requests for additional funding. The reason given for not approving the special request for funding executive, fiscal, and administrative staff was that there is no basis for costs such as administrative staff beyond a director. The special request for an additional cook's assistant was not approved because cook's assistants are already allocated through a budget formula developed from the quantity of personnel required under a family-style model of food service. The special request for a security system was not approved because the documentation submitted by PRAB did not demonstrate a high incidence of crime in the neighborhood that poses an imminent threat to the staff, children, and property of the center.

PRAB's special request for fringe benefits in excess of 12.5 percent of the non-teaching staff salaries was not approved because the Department's budget guidance benefit allocation for provider's non-teaching positions is 12.5 percent of approved salaries. Benefits offered by a provider are not restricted by the Abbott preschool program allotment. Finally, the special request for a cleaning service contract was not approved because the provider was allocated a 2.8 janitorial function, based on Department guidance. The approved budget actually included funding for the cleaning service, but included the funding on the budget line for janitor rather than listing it as a separate item.

Funding for executive, fiscal and administrative support staff for PRAB

It is undisputed that the Department approved administrative support and indirect costs for PRAB totaling $629,638. This includes the salary and benefits for three directors, three clerical staff, and a janitor. The benefits are not to exceed 12.5 percent of salary, pursuant to the Private Provider One Year Budget Instructions and Guidance for School Year 2005-2006 (Exhibit R-79, page 13). Also included in the support cost for a janitor was the cost of a cleaning service contract. Included in the indirect costs are the cost of office equipment, office materials, food-related paper supplies, cleaning supplies, food for meetings, rent, mortgage and other costs for space, building and grounds maintenance and repairs, utilities, telecommunications services, security equipment, insurance, accounting fees, payroll preparation fees, advertising, and staff transportation. Pursuant to the Private Provider Guidance, the Department will approve

administrative support and indirect costs that total up to 37 percent of the total cost of the private provider's approved Abbot Educational Costs (Exhibit R-79, page 12). The average administrative cost for all of the preschool providers in the State of New Jersey is approximately 30 percent.

With the exception of requests for security guard costs, special requests are not to be used for administrative support and indirect costs (Exhibit R-79, page 15). Nevertheless, PRAB submitted a special request in the amount of $182,995 for executive, fiscal, and administrative staff (Exhibit J-1, pages 14-15). By this request, PRAB sought to charge 60 percent of the salaries and benefits of its executive director, deputy director, fiscal manager, senior bookkeeper, part-time bookkeeper, executive administrative assistant, aide to the administrative assistant, and human resources person to the Abbott preschool program.

Petitioner district's business administrator, Richard Jannarone, testified that PRAB is different from many other private preschool providers because it also devotes efforts to other programs. He approved PRAB's special request for funding for its executive, fiscal, and administrative support staff because PRAB satisfied him that a portion of the personnel's time would be attributed to running and managing the early childhood program. Mr. Jannarone noted that PRAB has always been fiscally responsible and undergoes an annual audit. He acknowledged that the early childhood funding the district receives is called State Aid, but he considers the money a grant for accounting purposes because it is restricted in use to the early childhood programs and any part not used is returned to the Department.

Jose Figueroa, Fiscal Manager for PRAB, testified that he prepares the entity's budgets and reports to the Board on a quarterly basis. He is licensed in New York as a certified public accountant and has worked in the non-profit sector since 1974. Mr. Figueroa noted that PRAB conducts home weatherization activities using federal funds. It also provides assistance with home utility bills with federal funds. The New Jersey Department of Community Affairs funds PRAB's youth program, with the services of tutor and mentors from Rutgers University donated. PRAB also does immigration referral work with federal funding received through the Department of Human Services and the Division of Family Development. These are all non-early childhood education programs.

It was Mr. Figueroa who estimated that the eight executive and administrative staff members for whom additional funding is sought spent 60 percent of their time on the early childhood program. Their time sheets were admitted into evidence as Exhibit P-2. He calculated 60 percent of their salaries and benefits as the requested allocation to the early childhood program, for a total of $182,995 (Exhibit J-1, page 15).

Mr. Figueroa testified that PRAB's books must be maintained in accordance with generally accepted accounting principles ("GAAP"), as well as Federal Treasury Circular OMB A-122 (Exhibit P-3) and State of New Jersey Circular 05-12 OMB (Exhibit P-4) and that these require a proportioning of administrative and support expenses among the various federal and State funding sources. Mr. Figueroa stated that he spends many hours of the work day involved with the Abbott preschool program. So, for example, a portion of his salary must be attributed to the preschool program for accounting purposes. Similarly, a portion must be attributed to the Department of Human Services grants for purposes of PRAB's federal budgets. According to Mr. Figueroa, this GAAP apportionment requirement results in a funding deficiency for administrative and staff expenses unless the Department approves this special request, because PRAB is prohibited from shifting allocable costs to other programs.

Guillermo Beytagh-Maldonado has been Executive Director of PRAB since 1984. He agreed with Mr. Figueroa that the nonprofit entity distributes its costs among all its funding sources proportionally for accounting purposes. An independent audit was done in 2003 (Exhibit P-10) which Mr. Beytagh-Maldonado characterized as clean. In his opinion, PRAB's best estimation apportioning costs to the preschool program is accurate. Mr. Beytagh Maldonado also agreed with Mr. Figueroa that GAAP must be followed and that PRAB may not charge a funding source for costs inadequately funded by another source. So, if the Department does not fund its apportioned share, PRAB cannot make it up by charging the costs elsewhere.

Program Specialist Susan Bruder, of the Office of Early Childhood Education, testified that she reviewed the district's 2005-2006 Early Childhood Plan and also met in district with private providers to disseminate information and answer questions. The Private Provider One Year Budget Instructions and Guidance for School Year 2005-2006 (Exhibit R-79) give detailed

instructions to providers on filling out their budgets. The guidance changes annually, based on Court holdings and for various other reasons, such as a change in the consumer price index. According to Ms. Bruder, the Department looks at the initial budget submissions carefully to see if the requested funding represents a solid plan. For example, are the professional development dollars sought for a well-thought out plan?

Ms. Bruder described a special request as an expressed need for the children that does not fit the general guidelines. Under the heading "Special Requests," the Private Provider Guidance (Exhibit R-79, page 15) states:

> The costs contained in the budget guidance do not represent maximum costs, but rather provide budgeting guidance by the DOE as to reasonable and customary costs. Providers may budget for higher amounts under the category of Special Requests. An item that does not fall within a budget worksheet line item may also be considered as a Special Request. **Each Special Request must be accompanied by written justification as to how the request is essential to an effective and efficient education in the provider's program. Request justification must clearly relate to current requirements, long range educational goals of the Abbott Preschool Program, and the *Preschool Teaching and Learning Expectations: Standards of Quality.* Supporting documentation must include at least two written estimates for any requested materials or services. All Special Requests must be reviewed and approved at the district level prior to submission to DOE.**
> [Emphasis in original.]

It was Ms. Bruder's testimony that PRAB's special request for additional funding for executive and administrative staff was not approved because the Department's funding is for an effective and efficient, high quality early education program. No matter how a provider structures itself, the approvable line items are for the early childhood program. An organization's costs beyond those Court mandated early childhood ingredients are up to the provider to pay for if it wants to incur those expenses. It is Ms. Bruder's opinion that the Department's funding of up to 37 percent of a private provider's administrative and support costs, pursuant to the Provider Guidance (Exhibit R-79, page 12), represents funding based on the ingredients necessary for a high quality preschool program.

Robert Goertz, Director, Budget and Accounting, testified that early childhood funding is

included as State aid in New Jersey's appropriations act. In his opinion, Circular 05-12 OMB regarding grant agreements (Exhibit P-4) does not apply to Abbott early childhood providers, and it is his recollection that there are no federal funds supporting the Department's Office of Early Childhood Education.

Mr. Goertz agreed that Circular A-122 (Exhibit P-3) broadly deals with principles for allowable and unallowable costs in federal contracts, and can apply to state grants in aid. More specifically, the circular does have accounting principles that indirectly apply to Abbott preschool funding recipients, and Mr. Goertz agreed that allocating costs in accord with A-122 is in accord with GAAP. So, Department aid to early childhood providers is subject to generally accepted accounting principles for cost allocation. However, there is an important distinction between allocation of expenses, as required by GAAP and the Circular A-122, and the funding of those expenses. Even if PRAB properly allocates its expenses to all of its funding sources, that does not obligate the Department to fund those expenses as part of its early childhood program aid.

Funding for an additional cook's assistant for PRAB

It is undisputed that the Department approved funding for one cook and 1.83 cook's assistants. Funding for a fraction of a position recognizes that private providers employ staff on both a part-time and a full-time basis, and particular employees may share duties. Mr. Jannarone testified that as the district's business administrator, he approved PRAB's special request for an additional cook's assistant. It was his opinion that because PRAB feeds 225 children at three different locations, it was reasonable that the provider needed another cook. Mr. Figueroa testified for PRAB that one of its sites does not have a kitchen and it takes time and effort to prepare and package food and deliver it to all the sites.

PRAB's Director of Education, Joyce Chase, testified that there are five cooks for PRAB's three sites. The travel and delivery to all the classrooms is time consuming. In addition, all of the hot, nutritionally balance meals are cooked from scratch. For many of the students, these are their best meals of the day. PRAB feels the effort to prepare and deliver these meals is

worth the time and effort and thus it is Ms. Chase's opinion that funding for five cooks is necessary.

Ms. Bruder testified that the additional cook issue arose in PRAB's budget last year as well, but it was not approved by the district at that time. She visited PRAB at lunch time to try to understand the special request and discovered that PRAB prepares individual meals rather than family-style meals. Preparation of individual meals requires more labor, and fewer cook staff are required for family-style meals. In any event, the funding for cooks was in accord with budget guidance. Furthermore, the Department prefers family-style meals as an important curricular feature for early childhood because it promotes pupil's conversation, vocabulary, and self-regulation. In Ms. Bruder's opinion, an additional cook was not warranted for provision of a high quality preschool educational program.

Funding for a security system for PRAB

It is undisputed that the Department approved funding for security for PRAB on the basis of $500 per classroom, for a total of $8,500. To be eligible for submitting a special request for a security guard, inclusive of salary, benefits, and employer payroll taxes, a provider must work with the school district to document a high incidence of crime in the neighborhood that poses an imminent threat to the staff, children, and property of the center. This documentation may include official police reports for crimes committed in and around the immediate vicinity of the center (Exhibit R-79, page 15). PRAB submitted one police report that indicated an allegation of property theft, but the investigating officer determined the allegation was unfounded (Exhibit J-1, pages 45-46). PRAB also submitted crime statistics for Middlesex County municipalities, including the City of New Brunswick, but these do not indicate the neighborhoods involved (Exhibit J-1, pages 48-50).

Mr. Jannarone testified for the district that he approved PRAB's special request for a security system because of the nature of the facility locations in the City of New Brunswick. Joyce Chase, PRAB's Director of Education, testified that the provider is located in a low income, high crime area of New Brunswick. Because their buildings are occupied with women and children, she wanted better security, and was thinking of a video taping surveillance system.

In her view, cameras throughout the perimeter and first floor of the buildings would be a good crime deterrent. Ms. Chase acknowledged in regard to the list of times the existing alarm system has gone off (Exhibit P-6) that these events did not result in any police reports being filed.

Ms. Bruder testified for the Department that reasonable funds for enhanced security or a security guard will be provided if an imminent threat in the neighborhood is documented. She noted that the police report submitted by PRAB indicated that the alleged theft was unfounded. The report of alarms being triggered was not supported by filed police reports, and the crime statistics submitted by PRAB also were insufficient support for the requested security system.

Funding for fringe benefits in excess of 12.5 percent for non-teaching staff for PRAB

It is undisputed that the Department will approve funding of up to 12. 5 percent of non-teaching staff salaries for the cost of their benefits, pursuant to the Provider Guidance (Exhibit R-79). It is undisputed that this figure was developed by the Department based upon a review of benefit and salary cost statistics from the United States Department of Labor. The Department has determined that 12.5 percent is a reasonable amount of funding necessary to provide benefits to non-teaching staff.

Mr. Jannarone testified for the district that he approved PRAB's special request for fringe benefits in excess of 12.5 percent for non-teaching staff. The collectively negotiated benefits for district employees are closer to 22 percent of salaries. He acknowledged that private providers may decide for themselves what level of benefits they will pay, if any, but he noted that providers are required to pay their teachers the same amount of money as the district's teachers are paid. Mr. Figueroa testified for PRAB that he feels the 12.5 percent benefit cap for non-teaching staff is unfair. He offered the example of one employee, a cook, who has a benefit cost of $6,000. 12.5 percent of the cook's $20,000 salary does not cover the benefit cost. It is PRAB's policy to cover all employees with fringe benefits, so he views the Department's limitation as unconscionable. He recognizes that it is up to PRAB to determine what benefits it will provide its employees.

Ms. Bruder testified that PRAB's special request submission for fringe benefits stated that provision of fewer benefits to support staff would be deemed discriminatory (Exhibit J-1, page 42). The Department disagreed with this rationale. It is permissible for an employer to have different classes of employees, and they may receive different levels of benefits. If a private provider wishes to pay its employees benefits beyond the 12.5 percent of salary that the Department will fund, it is free to use its own funds to do so. Ms. Bruder noted that some providers do not pay benefits to their employees even though the Department would fund fringe benefits up to 12.5 percent of salary.

Funding for a cleaning service contract for PRAB

It is undisputed that for the 2005-2006 school year, the Department approved the costs for janitors at 2.83 positions and approved the benefits for one full-time janitor. It is undisputed that PRAB has one full time janitor on its staff and that it subcontracts the rest of its cleaning service. The janitor works during the day and the cleaning service cleans all three sites at night. Mr. Jannarone testified for the district that the object of the request for a cleaning service contract was to have the funding appear in a separate line item category in the budget, rather than be included with the janitor funding. Mr. Figueroa testified for PRAB that the Department allowed PRAB to have a line item for janitor and a line item for cleaning contractor in the 2004-2005 school year budget. PRAB wants the same treatment of this expense for the 2005-2006 school year.

Ms. Bruder testified that the Department approved funding for both the janitor and the cleaning service. The Department decided that the funding should all appear on the janitor line in the budget, since the cleaning service performs the janitor function and that is the point of the line item. So the funding for 2.83 janitor positions actually reflects funding for one janitor and the cleaning service. The Department deemed an additional line in the budget to be unnecessary.

Arguments

Petitioner district contends that it has met its burden to establish that all the special requests made by PRAB and approved by the district are necessary to adequately and efficiently

fund the PRAB Early Childhood Program. According to petitioner, the Department's denial of the PRAB special requests was founded on arbitrary formulas and subjective analysis, supported by neither the facts nor a proper analysis of the requirements of GAAP.

Petitioner asserts that the special request for cleaning services funding is reflective of actual expenses rather than a hypothetical formula, and is necessary to adequately support PRAB's Early Childhood Program. Petitioner further contends that the special request for funding for a cook's assistant is supported by the evidence as necessary to adequately support PRAB's Early Childhood food services at its three locations. The district maintains that it reasonably approved the necessity for security cameras based upon the high incidence of crime in the area and the uncontroverted testimony of Ms. Chase. Petitioner contends that the special request for adequate funding of benefits for all non-teaching staff is supported by the testimony of its witnesses. More particularly, it is petitioner's position that the evidence supports the special request of $31,940, rather than a fictional 12.5 percent that cannot provide adequate benefits to non-teaching support personnel.

Finally, petitioner submits that its evidence has established that in order to adequately and effectively provide for the Early Childhood Program at PRAB, a portion of its overall administrative expenses must be funded. The testimony of Messrs. Jannarone, Figueroa, and Beytagh-Maldonado supports the contention that GAAP is the accepted and followed set of standards, principles, and procedures. Further, it is the accepted way of doing accounting as required by State regulations and Abbott regulations. Petitioner contends that there is nothing in Circulars 04-04 or A-133 that excludes the obligation of a district or sub-grantee recipient of funds to properly conform to GAAP. Neither is there any indication in the circulars that the State is released from any obligation to reimburse administrative costs because of the definition of "State Aid." According to petitioner district, the Budget Guidelines document generated by the Department of Education is merely a series of convenient departmental decisions without any regulatory, legal, or policy basis, and they should be rejected.

The Department contends that it has properly disallowed the special requests submitted by PRAB. Pursuant to the Court's directives in the *Abbott v. Burke* litigations, the Department is required to ensure that Abbott districts and their providers develop and implement high quality

preschool programs. In *Abbott VIII*, the Court directed the Department to establish clear guidelines and criteria for a high quality preschool program. *Abbott VIII*, 170 *N.J.* 537, 546-549, 556-559 (2002). It is the Department's position that it consequently has set forth very specific items that it believes are essential to the provision of an Abbott preschool program, while also limiting administrative and support costs and expenditures to those that are customary, reasonable and necessary for the provision of a high quality preschool program. The Department contends that it reviewed PRAB's special requests and properly determined that the requests were not consistent with Department Guidance, were not warranted, and were unnecessary for the provision of its preschool program in petitioner school district.

More specifically, the Department contends that it is not required to fund additional administrative costs merely because PRAB has allocated those costs to the Abbott preschool program. That PRAB may be required to apportion its costs to various programs it oversees, including the Abbott preschool program, to accurately reflect the time its employees have spent does not obligate the Department to reimburse PRAB in accord with that apportionment when the costs are over and above those approved by the Department as necessary for the provision of a high quality preschool program. In determining the educational and administrative elements required, the Department approved three directors and clerical staff for PRAB. The Department also approved funding for janitors, office equipment, office materials, food-related paper supplies, cleaning supplies, food for meetings, rent, mortgage and other costs for space, building and grounds maintenance and repairs, utilities, telecommunications, security, insurance, accounting fees, payroll preparation, advertising, and staff transportation.

PRAB will receive $629,638 in administrative costs, and it is requesting for administrative costs an additional $182,995. While PRAB has been permitted funding for three directors for its 15 classrooms spread over three locations, it seeks to charge to the Abbott preschool program 60 percent of the costs of an executive director and deputy director, fiscal manager, senior bookkeeper, part-time bookkeeper, executive administrative assistant, aide to the administrative assistant, and human resources employee. The Department contends that PRAB did not demonstrate why any of these additional administrative and executive staff members were required to spend any of their time overseeing the preschool program. If an administrative staff member is performing accounting or clerical or supervisory services for the preschool

program, the time could be charged to the appropriate clerical, director, or accounting line items in the budget.

The Department emphasizes that the funds PRAB receives from the school district pursuant to its contract for the provision of educational services should not be characterized as a grant. Rather, early childhood funding is State aid appropriated by the Legislature. *See,* FY2005 Appropriations Act, *L.* 2004, *c.* 71, *N.J.S.A.* 18A:7F-16. The Department awards State aid to the district for the costs of its early childhood program, and the district may enter into contracts with community preschool providers for the provision of the mandated preschool services for the district's children. *N.J.A.C.* 6A:10A-2.2(b). Thus, any funding that the district pays to PRAB pursuant to the terms of its contract is the State aid that the district received from the Department for early childhood education or is from the local tax levy.

The Department does not dispute the assertion that GAAP and the State and Federal OMB circulars that govern PRAB's Federal and State grants require PRAB to allocate its expenses to the programs based upon the amount of time it employees work on each program or service. Further, the Department does not assert that PRAB is able to allocate costs it incurs in the Abbott preschool program to its other programs. However, merely because PRAB is required to allocate its expenses to various programs, including the Abbott preschool program, does not mean that the Department, or any other program, is required to reimburse PRAB for those allocated general and overhead costs. Accounting allocation is an insufficient justification for the additional administrative costs. In other words, there is no legal obligation for the Department to fund those costs over and above the administrative and supportive services determined by the Department to be necessary for the provision of a high quality preschool program.

The Department contends that it properly disallowed PRAB's request for additional cook's assistants. PRAB requested funding for additional cooking staff in the amount of $26,735. Under the Department's Provider Guidelines, the cooking staff deemed necessary for every 180 preschool children is one full-time cook and one full-time cook's assistant. PRAB provides services to 225 Abbott preschool children. Under the guidelines, centers serving more than 180 children should consult with their Office of Early Childhood Education liaison for

guidance in determining the quantity of cooks and cook's helpers. Susan Bruder, the OECE program specialist assigned to petitioner district, consulted with PRAB and determined that in addition to one full-time cook and one full-time cook's assistant, funding for an additional .83 of a cook's assistant's salary was warranted.

The Department based its determination regarding the ratio of cooking staff to students upon its preferred model of a family-style meal service, rather than on cost. PRAB's insistence that it needs additional cooks to properly prepare and serve its meals is likely due to PRAB's provision of individual meals rather than family-style meals. The Department's preference for family-style meals is based upon the view that in a preschool setting, family-style meals serve an important curriculum function by teaching children about sharing, waiting their turn, table manners, and conversational skills. Accordingly, the Department asserts that its determination to deny PRAB's request for funding for additional cooking staff should be affirmed.

The Department contends that PRAB has failed to demonstrate that its special request for additional funding for security is warranted. PRAB was approved for $8,500 for security costs, which it may use to maintain and upgrade its existing security system. This system prompts timely responses from the New Brunswick Police Department when triggered. However, none of the alarm calls signaled to the police station resulted in the filing of a police report. The only alleged crime committed in or around the location of the preschool programs was a claim of theft that the police investigation report identified as unfounded. Pursuant to the Provider Guidelines, to warrant additional funding for security, a provider must document a high incidence of crime that poses an imminent threat to the staff, children and property of the center. It is the Department's position that in the absence of such a showing by PRAB, it properly denied PRAB's special request for additional security funding.

The Department contends that it properly disallowed PRAB's request for additional funding for fringe benefits for non-teaching staff. Funding for non-teaching staff benefits should be limited to 12.5 percent of non-teaching staff salaries, because the Department reviewed United States Department of Labor statistics regarding the cost of fringe benefits and determined that 12.5 percent was a reasonable level to enable private preschool providers to offer benefits to their non-teaching staff. Some providers do not provide benefits to their employees while other

providers choose to provide more than 12.5 percent of salaries, and the Department's determination to fund non-teaching staff benefits up to 12.5 percent of non-teaching staff salaries is not meant to interfere with or prohibit providers from selecting and offering the benefits they wish. There is no legal impediment to an employer providing different benefit plans to different classes of employees.

PRAB does select its own benefit package, and the Department has no control over its terms and costs. The Department asserts that it is unreasonable to suggest that it must fund every provider's benefits package under this circumstance. Given the variety of benefits that a preschool provider may offer its employees, the Department contends that 12.5 percent represents a reasonable threshold to reimburse private providers for their non-teaching staff benefits. By establishing such a threshold, the Department is encouraging private providers to obtain cost effective benefit programs.

The Department argues that it properly denied PRAB's special request in the amount of $30,306 representing the full cost of the provider's contract with its cleaning contractor. It is undisputed that PRAB has one full-time janitor and utilizes an outside cleaning contractor. The Department approved funding for both the janitor and the cleaning contract on the budgetary line for "janitor salary." PRAB contends that an additional line must be used so that the cost of the janitor and the cost of the cleaning contractor are separate. However, this concern was raised last year and the Department advised that the costs are appropriately reflected in the one line item; the Department is aware that the line item "janitor salary" contains costs for both the janitor salary and the cleaning contractor. Since the Department approved the cost for both the janitor salary and the cleaning services, PRAB's special request for an additional $30,306 for cleaning services is unwarranted.

Findings and Conclusions

Having considered the evidence presented and the arguments of the parties, it is my view that the Department's reasons for denying PRAB's special requests were in each instance well-grounded in the applicable Provider Guidance or otherwise clearly rational and directly related to the mandated standard of provision of high quality preschool programs in Abbott

districts. I so **FIND**. For private provider PRAB to receive funding over and above the Provider Guidance, petitioner district must establish that the funding is warranted for provision of a high quality preschool educational program. I **FIND** that the Department's evidence and arguments as to each of the special requests at issue in this matter were more persuasive than the evidence and arguments presented by petitioner district. For this reason, I **CONCLUDE** that petitioner district has failed to meet its burden to establish that any of PRAB's denied special requests are necessary to adequately and efficiently fund a high quality preschool educational program. Thus, I further **CONCLUDE** that this appeal should be **DISMISSED.**

It is so **ORDERED.**

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

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

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Early Childhood Program appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 2005
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

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

3/15/05
DATE

E-mailed Initial Decision to the parties on:

3/15/05
DATE

JF/cad

EXHIBITS

Joint Exhibit J-1

Pages:

1-2 New Brunswick's 2005-2006 Initial Budget Submission

3-8 Puerto Rican Action Board, Inc.'s 2005-2006 Initial Budget Submission

9-10 Puerto Rican Action Board, Inc.'s Approved 2005-2006 Budget

11-12 New Brunswick's Approved 2005-2006 Budget

13-25 Special Requests Summary From and Special Requests for Puerto Rican Action Board Submitted with original budget

26-28 November 17, 2004 correspondence from Department of Education to the New Brunswick School District

29-31 December 2, 2004 correspondence from Department of Education to New Brunswick School District

32-34 December 17, 2004 correspondence from Department of Education to New Brunswick School District

35-36 December 23, 2004 correspondence from New Brunswick School District to Department of Education

37-50 Special Request forms re-submitted on behalf of the Puerto Rican Action Board in November 2004

51-53 quarterly fiscal report for June 30, 2004 for Puerto Rican Action Board's three preschool locations

54-78 Puerto Rican Action Board's 2003 audited Financial Statements

For Petitioner:

P-1 DOE determination letter, dated January 14, 2005

P-2 Time Sheets

P-3 OMB A-122

P-4 N.J. Circular 05-12

P-5 Job Descriptions

P-6 Police Activity

P-7 Cooks' Schedule

P-8 Cooks' Job Description

P-9 Contract Board and PRAB 04-05

P-10 PRAB Budget Audit 03

P-11 Direct Cost Budget Summary for 2005

P-12 3 letters from funding sources

P-13 Previous 2 years, Special Revenue Fund Budget

For Respondent:

R-79 Private Provided One Year Budget Instructions and Guidance School Year 2005-2006

R-80 District One Year Budget Instructions and Guidance School Year 2005-2006

R-81 OMB 04-04 Department of the Treasury Circular

WITNESSES

For Petitioner:

Richard Jannarone

Jose Figueroa

Joyce Chase

Guillermo Beytagh-Maldonado

For Respondent:

Susan Bruder

Robert Goertz

123-05

#123-05

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. JOHN HOWARD, JR.,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	

SYNOPSIS

Petitioner East Orange Board of Education certified tenure charges of unbecoming conduct and/or other just cause for dismissal against superintendent of schools, Dr. John Howard Jr. Respondent was suspended without pay for a period of 120 calendar days in accordance with the tenure employee's hearings law. *N.J.S.A.* 18A:6-10 *et seq.* Subsequently, a second set of tenure charges was filed relating to respondent's lying under oath in a deposition. The petitioning Board suspended respondent for a second period of 120 calendar days without pay. The ALJ refused the Board's application to consolidate these charges with those already pending; a hearing was held on the first set of tenure charges; an Initial Decision was issued by the OAL wherein Respondent was determined to have engaged in conduct unbecoming a superintendent of schools; the Initial Decision was affirmed by the Commissioner and the State Board of Education with some modification; and the penalty of termination was upheld. With regard to the instant set of tenure charges, the Board sought partial summary judgment, and as penalty, the forfeiture of respondent's 120 calendar days pay. Respondent sought dismissal of the second set of tenure charges, arguing, *inter alia,* that his voluntary recanting of his dishonest testimony mitigated his admitted behavior.

Upon consideration of the facts and submissions in this matter, the ALJ found that the respondent engaged in the behavior alleged; that the conduct in which respondent engaged was deceptive and dishonest, and warranted the imposition of the most severe sanction available, which is the forfeiture of 120 days' pay withheld at the time this suspension was imposed. The ALJ granted summary judgment in favor of the petitioning Board.

Upon a thorough and independent review of the record in this matter, including the exception arguments advanced by the parties, the Commissioner concurs with the findings and conclusions of the ALJ as expressed in the Initial Decision, and emphasizes that, despite respondent's efforts to characterize this case otherwise, this matter is first and foremost a tenure proceeding with the underlying issue being whether the respondent engaged in conduct unbecoming. Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons expressed therein. The matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

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

April 1, 2005

OAL DKT. NO. EDU 7442-01
AGENCY DKT. NO. 271-7/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. JOHN HOWARD, JR.,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the East Orange Board of Education's (Board) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

Respondent contends that the Administrative Law Judge's (ALJ) failure to conduct a hearing, "as called for by the Commissioner," to determine whether the Board inequitably and deliberately timed the assertion of a second set of tenure charges against him so as to deprive him of an additional 120 days of salary, denied him the opportunity to conduct discovery to discern when the Board became aware of the facts pertaining to the second set of charges and why the Board delayed in bringing those charges. (Respondent's Exceptions at 1) If the second set of tenure charges had been timely asserted, respondent maintains, there would have been only one 120-day period of withholding, not two as occurred herein. (*Id.* at 2.) Respondent, therefore, claims that because the Board withheld the second set of charges so as to deprive him of an additional 120 days of salary, he is entitled to the 120 days of salary, regardless of whether the second set of charges are founded. (*Ibid.*)

Additionally, respondent argues that: 1) the record is incomplete; 2) the ALJ failed to conduct any inquiry into the "fact sensitive" timing of the Board's filing of a second set of tenure charges; 3) the record does not support the ALJ's conclusion that the earliest the Board knew of respondent's conduct was March 8, 2001; and 4) the ALJ draws an impermissible inference excusing the Board's delay. (*Ibid.*) In this regard, respondent contends that there is no evidence to suggest that the Board was so distracted by pending business that it could not attend to tenure charges and opines that the ALJ's ascription of an innocent motive for the Board's delay, without a hearing, has effectively denied his statutory right to be paid during the pendency of tenure charges. (*Ibid.*)

Moreover, respondent claims that he regrets his failure to disclose his personal romantic relationship in his September 6, 2002 deposition, but notes that he corrected his misleading statements and points to *N.J.S.A.* 2C:28-1(d) in arguing that recantation, or correction of misleading testimony, is an affirmative defense to perjury. (*Id.* at 3) In that he corrected his deposition only a day after he had been suspended by the Board and the misleading testimony had no apparent prejudicial impact on the Board, respondent reasons, the additional suspension of 120 days under these circumstances was not warranted. (*Ibid.*)

In conclusion, respondent asks the Commissioner to remand this matter and direct the ALJ to conduct a hearing, claiming that the Commissioner's decision of December 17, 2001 instructing the ALJ to conduct a hearing into this fact sensitive-matter was patently clear, and that the ALJ herein did not heed this instruction. (*Id.* at 3-4) Claiming that the aftermath of the hearing of the first set of tenure charges affected the ALJ's judgment in this matter, respondent requests that the within matter be assigned to another ALJ on remand. (*Id.* at 3)

In response, the Board avers, *inter alia*, that there is nothing in *N.J.S.A.* 18A:6-10 or the implementing regulations which specifies that tenure charges be certified within a specific period of time. (Board's Reply Brief at 2) Additionally, the Board points out that respondent did not submit his affidavit admitting to the conduct which forms the basis of the second set of tenure charges until March 9, 2001. (*Ibid.*) Given that the first set of tenure charges had been filed in January and tenure charges cannot be amended, the Board asserts, the earliest it could have certified the charges would have been the end of March, a week or so before the first 120 days of unpaid suspension was to expire. (*Ibid.*) The Board, therefore, concludes that respondent's argument that it purposely timed the second set of tenure charges to deprive him of another 120 days' pay is "simply a red herring." (*Id.* at 3)

Moreover, the Board contends, the purpose of a tenure proceeding is to determine whether the teaching staff member engaged in conduct warranting dismissal and, as the ALJ correctly noted, there is nothing in the tenure laws which "requires or permits inquiry into the motive behind the certification of the charges or the timing of certifying them." (*Ibid.*) The Board further points out that respondent admitted to lying under oath and argues that, once the ALJ determined that respondent's action constituted unbecoming conduct, the Board was under no obligation to return the money withheld from respondent's second unpaid suspension since it is only when tenure charges are dismissed that the charged employee is entitled to a return of the pay withheld. (*Ibid.*)

With respect to whether the appropriate penalty was imposed in this matter by the ALJ, the Board avers that, since respondent has already been dismissed from his position, the forfeiture of 120 days' pay is completely justified under the circumstances. (*Id.* at 5) In support thereof, the Board contends that respondent's retraction of his false testimony only three days

before the deposition of Joyce Jackson, when the truth was going to surface, does not exonerate his misconduct, and points to *In re Caruba*, 139 *N.J. Eq.* 404 (Ct. of Chancery, 1947) in maintaining that, based upon well-settled law, there is no excuse for respondent's conduct. (*Ibid.*) Whether or not the Board was harmed by respondent's conduct is irrelevant, the Board argues, because, by lying under oath, respondent abused the public trust. Moreover, the Board points out, respondent fails to realize that he could have been ordered to pay monies beyond the 120 days' pay which was already withheld. (*Ibid.*)

Upon a careful and independent review of the record in this matter, including the exception arguments advanced by the parties, the Commissioner agrees with the findings and conclusions of the ALJ as expressed in the Initial Decision. Initially, the Commissioner notes that, pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. For the reasons that follow, the Commissioner concurs that this matter satisfies the above criteria for grant of summary decision to the Board.

Notwithstanding respondent's efforts to characterize this case as a dispute over whether an additional 120 days' pay was properly withheld when the second set of tenure charges was filed, this matter is first and foremost a tenure proceeding with the underlying issue being whether respondent engaged in the behavior alleged and whether such conduct constitutes conduct unbecoming a teaching staff member. Thus, whether respondent's additional suspension without pay was inequitable under the circumstances is a secondary matter to be resolved within the context of the tenure proceedings. Respondent admits that he lied under oath, thus admitting

that he engaged in the conduct which forms the basis of the tenure charge of unbecoming conduct. In that the material facts in a tenure proceeding consist of those which establish whether the individual engaged in the conduct charged, and in that respondent herein admits that he lied under oath, the Commissioner concludes that there is no material fact in dispute with regard to the tenure charge which would prevent this matter from being decided on a summary basis.

With respect to respondent's claim that the Commissioner's decision of December 17, 2001 required the ALJ to conduct a "hearing," the Commissioner also finds that his prior interlocutory decision does not preclude deciding this matter on a summary basis. The December 17 determination states, in pertinent part:

> Whether, however, the Board's certification of charges in Howard II on July 24, 2001, along with its resultant suspension of respondent without pay, was inequitable under the circumstances, remains a fact-sensitive question to be determined upon hearing. (Commissioner's Decision on Respondent's Request for Interlocutory Review, dated December 17, 2001)

The Commissioner points out that *N.J.A.C.* 1:1-2.1 defines "hearing" as "a proceeding conducted by a judge for the purpose of determining disputed issues of fact, law or disposition" and "plenary hearing" as "a complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witness and to make arguments." The Commissioner emphasizes that he did not specify that a *plenary hearing* was to be conducted in this matter, but, instead, indicated that the ancillary issue of the second suspension without pay was to be determined upon *hearing*. In this matter, the parties were provided a full opportunity to be heard through the submission of legal briefs and certifications. Accordingly, the ALJ provided respondent the due process contemplated by the Commissioner and to which he was entitled.

Turning to whether respondent's admitted conduct constitutes conduct unbecoming a teaching staff member, the Commissioner is not persuaded by respondent's contention that correcting his testimony mitigates his conduct. While recantation may be an affirmative defense to perjury, it does not excuse respondent's deceptive and dishonest conduct in a school setting. In lying under oath about a relationship with a subordinate employee of the school district, respondent not only violated the fundamental principles underlying our system of justice, but also violated the public trust placed in him as superintendent of schools. The Commissioner, therefore, finds respondent guilty of conduct unbecoming a teaching staff member. In so determining, the Commissioner emphasizes that, as noted by the State Board in *In the Matter of the Tenure Hearing of Frank J. Napoli*, 1988 *S.L.D.* 284, 288:

> If the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. As was noted in *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 *S.L.D.* 95, 96, *aff'd* by the State Board, 1980 *S.L.D.* 97, *aff'd,* Docket #A-3967-79A (App. Div. Jan 30, 1981), certif. Denied, 87 *N.J.* 347 (1981): The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.

In assessing the penalty to be imposed, the Commissioner concurs with the reasoning of the ALJ that respondent's conduct warrants the imposition of the most severe sanction available. Given the removal of respondent from his position as a result of the first set of tenure charges, the only available penalty is the forfeiture of the 120 days' pay withheld at the time respondent was suspended for this set of tenure charges. With respect to respondent's argument that the Board deliberately timed this second set of tenure charges so as to deprive him of an additional 120 days of pay, the Commissioner finds this argument specious, given respondent's opposition to the Board's Motion to Consolidate the two sets of tenure charges.

(*See* Respondent's Brief in Opposition to the Board's Motion to Consolidate, dated July 21, 2001) Were it not for respondent's opposition, these two sets of charges may have been consolidated, thus conceivably dictating a different result as to whether respondent would suffer the additional withholding of 120 days' pay. Moreover, whatever the equities may have been with respect to the second 120 days of pay withheld at the time of filing of the within tenure charge, given the conclusion that respondent is guilty of unbecoming conduct as a result of this tenure proceeding, the equities clearly lie with the Board at this juncture. The Commissioner, therefore, concludes that the appropriate penalty, under these particular circumstances, is the forfeiture of the 120 days' pay withheld as the result of the Board's certification of the within tenure charges on July 24, 2001.

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons stated therein and as set forth above. This matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/05

Date of Mailing: 4/6/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7442-01

AGENCY DKT. NO. 271-7/01

IN THE MATTER OF THE TENURE HEARING OF DR. JOHN HOWARD, JR., BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY.

Stephen J. Edelstein, Esq., appearing for Petitioner East Orange Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Robert P. Merenich, appearing for Respondent Dr. John Howard, Jr., (Gemmel, Todd & Merenich, attorneys)

Record Closed: January 11, 2005 Decided: February 18, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner East Orange Board of Education certified tenure charges of unbecoming conduct and/or other just cause for dismissal against superintendent of schools, Dr. John Howard Jr., the Respondent herein. Respondent was suspended without pay for a period of 120 calendar days upon certification of the charges in accordance with a tenure employee's hearings law. *N.J.S.A.* 18A:6-10 *et seq.*

A hearing was conducted on those charges and an Initial Decision was issued wherein Respondent was found to have engaged in conduct unbecoming a superintendent of schools. The Initial Decision was substantially affirmed by the Commissioner and State Board of Education with some modification and the penalty of termination was upheld. This case, hereinafter Howard I, bore OAL Dkt. No. EDU 1528-01. In preparation for the hearing on the charges in Howard I, certified on January 9, 2001, the parties conducted discovery, including the taken of Respondent's deposition. As a result of information obtained during Respondent's deposition, a second set of tenure charges was prepared against Howard consisting of three charges. The Board determined to certify two of those three charges on July 21, 2001. The second set of charges alleged, *inter alia,* Respondent had lied under oath in a disposition conducted on September 6, 2000, in a case brought against the Board, Respondent and others captioned *R. Leonard Moore v. The East Orange Board of Education*, Law Div. – Essex Co., Dkt. #L3985-99. The Board suspended Respondent for a second period of 120 calendar days without pay.

The Board made an application to consolidate these charges with those which were pending before me at the time these were certified. However, since the hearing had commenced and since the charges in this case (Howard II) were separate and distinct from those in Howard I, that application was denied.

Respondent Howard made an application for restoration of his salary withheld for 120 days as a result of the second set of charges. In that application, he asserted the Board could not impose seriatim suspensions without pay. I denied that application by way of written order entered on November 20, 2001; my determination was affirmed by the Commissioner on December 17, 2001.

I issued an Initial Decision on the first set of tenure charges and recommended the dismissal of Respondent from his tenured position with the Petitioner Board. The decision was adopted with modification by the Commissioner, the Commissioner's

decision was affirmed by the State Board of Education. Respondent did not file an appeal with the Appellate Division and the time for so doing has expired.

Respondent has requested the Board voluntarily dismiss the second set of tenure charges as moot and restore the second 120 days pay which had been withheld upon certification of the second set of charges. The Board is not willing to consent to the return of these monies, taking the position that since the issue of the 120 days pay remains in dispute, the second set of tenure charges are not moot and require adjudication on the merits. I concur with the Board's assertion and note Respondent did not dispute the assertion that the charges are not moot.

Accordingly, the Board seeks partial summary decision with regard to Charge II of the second set of tenure charges, wherein it is alleged Respondent engaged, among other things, "in a course of deception, deceit, false swearing and/or perjury which constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal". The Board seeks, as a penalty against Dr. Howard, the forfeiture of his 120 calendar days pay which was withheld upon certification of the second set of tenure charges. In addition, the Board seeks referral of this matter to the State Board of Education for possible certificate revocation.

The decision in Howard I was issued on February 6, 2002 and the parties agreed to place this case on the inactive list during the course of the appeal process; the appropriate orders were issued; the time for filing an appeal in the Appellate Division has expired and the Board has filed this motion for summary decision.

ANALYSIS AND CONCLUSIONS

The rules of this forum provide a party may move for summary decision at any time after a case is determined to be contested. A motion for summary decision shall be rendered if the submissions, including discovery and affidavits, if any, show there is no genuine issue as to a material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to prevail, an adverse party must respond be

setting forth specific facts showing there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(a).

In this case, Count II of the second set of charges against Dr. Howard alleges he provided false and misleading testimony under oath regarding his relationship with Board employee Joyce Jackson. In his verified Answer and Affirmative Defenses, Dr. Howard admits he was deposed on September 6, 2000, in a case brought against the Board and him, wherein he testified he had no knowledge about a particular Board employee, he did not know where she lived, he did not know how old she was or how long she had been employed in the district, could not describe he physically, and he did not ever date her.

Dr. Howard retracted all of these statements as well as interrogatory answers relating to these issues by admitting he did have a "personal relationship" with the employee in a certification dated March 8, 2001, submitted prior to the employee's own deposition in the civil matter. Moreover, in his deposition in the tenure matter known as Howard I, Dr. Howard admitted he had lied in his deposition on September 6, 2000. The Board relies on these uncontroverted facts to seek summary decision.

Respondent, on the other hand, in his response, asserts he corrected any impropriety in his failure to report his personal relationship with a Board employee and notes no charges, civil or criminal flowed from the correction of the record. In addition, he asserts the Board knew or should have known at least as early as March 8, 2001 that Dr. Howard had corrected his deposition testimony given in the civil case against the Board and him, among others. In his deposition, according to Respondent, he lied in order to protect the employee's reputation.

In his response to the application for summary decision, Respondent asserts there is no ". . . validated claim of prejudice due to Dr. Howard's correction of the deposition record, . . . " and, further, notes in the Commissioner's letter of December 17, 2001, then Commissioner Gagliardi noted the determination of "[w]hether the Board's certification of charges in Howard II on July 24, 2001 along with its resultant

suspension without pay, was inequitable under the circumstances, remains a fact-sensitive question to be determined upon hearing.

The material facts in a tenure proceeding consist of those which establish whether the respondent in a tenure matter engaged in specific behavior which rose to the level of conduct unbecoming a member of the teaching staff. I find nothing in the statute which requires the board certifying such charges to do so within a specific period of time.

Here, according to Respondent, the Board should have either certified these charges earlier or moved to amend the earlier charges. He contends that, because "the balance of [the] tenure charges against [Respondent] arise from conduct [the Board] learned from allegations that arose from [the] 1999 lawsuit" it appears the Board deliberately waited to pose the second set of charges until July 2001. Respondent fails to consider, however, that the Board only became aware of the conduct, *i.e.,* that Howard had lied under oath, at the earliest, in March 2001, six months after the deposition had taken place and approximately two months after the first set of charges had been certified. It is a fair inference to be drawn that the business of board elections and reorganization, as well as end of the school year preparations may have caused some delay in certifying these second charges.

The only issue to be determined by the trier of fact in a tenure hearing is, as I noted above, whether the respondent engaged in conduct unbecoming a member of the teaching staff. There is no dispute in this case; in his verified answer to these charges, Respondent admitted he lied under oath. I can find nothing in the tenure statute which requires or permits inquiry into the motive behind the certification of the charges or the timing of certifying them.

Respondent has admitted he engaged in the conduct which forms the predicate for the charges. He asserts, however, that the nature of his behavior is somehow mitigated because he retracted the untruths or because there were no charges following the behavior or because there was "no stated claim of prejudice in Petitioner's

papers due to Dr. Howard's correction of the deposition record . . . ." Although all of these issues may be argued and conclusions drawn from these facts, simply put, none of this is relevant. Nor is it relevant that he retracted his statements only several days before the employee was to be deposed. The only relevant issues are whether Dr. Howard engaged in the behavior which is the basis of this charge; if so, does that behavior constitute conduct unbecoming a member of the teaching staff, and, further, if so, what is the appropriate penalty.

It is undisputed that Dr. Howard engaged in the behavior alleged, and I do so **FIND.** I must now determine if that conduct constitutes conduct unbecoming a member of the teaching staff.

As I noted in the Initial Decision in Howard I, the Commissioner has repeatedly and consistently affirmed the importance of holding teaching staff members to a high standard of honesty, integrity and judgment. The Board cites *In re Tenure Hearing of Ortiz,* 86 *S.L.D., aff'd,* Comm'r of Ed., 86 *S.L.D.* 1004, *aff'd,* St. Bd., 86 *S.L.D.* 1008, where the Commissioner of Education found that a tenured teacher's falsification of an employment application constituted conduct unbecoming as to warrant dismissal and in *In the Matter of Vitacco,* 97 *N.J.A.R.* 2d (EDU) 449, *aff'd,* Comm'r of Ed., 97 *N.J.A.R.* 2d (EDU) 454 where the Commissioner referred to the position of a school superintendent as a person in whom the public is required to place considerable reliance with respect to, among other things, his honesty and integrity. In lying during his deposition, Dr. Howard violated fundamental principles underlying our system of justice in circumstances which, as the Board points out, directly related to his employment. There is no greater breach of the public trust. I **FIND,** therefore, the conduct in which Respondent Howard engaged was deceptive and dishonest.

There is no question that this conduct warrants the imposition of the most severe sanction available. Since dismissal cannot be ordered and, as the Board notes, the only penalty available is forfeiture of the 120 days' pay withheld at the time this suspension was imposed, I **CONCLUDE** that is the penalty to be imposed in this

matter. Further, I **CONCLUDE** this matter should be referred to the State Board for consideration of revoking Respondent's certificates.

Finally, I am cognizant of Commissioner Gagliardi's comment in his letter of December 17, 2001, affirming my determination denying Howard's application for partial summary decision seeking restoration of his salary in connection with this set of tenure charges, that the resolution of whether the certification and the resultant suspension of respondent without pay was inequitable under the circumstances, remains a fact-sensitive question to be determined upon hearing. Considering the short period of time between the discovery of the behavior and the certifying of charges in Howard II, the nature of the charges which I have already found are separate and distinct from those in Howard I,[1] and there is no dispute with regard to the material relevant facts to the issue of whether Respondent engaged in the conduct alleged in light of Dr. Howard's admission that he engaged in the behavior forming the predicate for this charge, I **FIND** the Board acted reasonably under the circumstances; I further **FIND** no inequity in imposing the second suspension without pay.

ORDER

I hereby **ORDER** the Board's application for summary decision be and hereby is **GRANTED**; I further **ORDER** the matter be and hereby is referred to the Stated Board of Education for consideration of the revocation of Respondent's certificates.

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

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

[1] Order Denying Partial Summary Decision, p. 3.

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

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

February 18, 2005
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

February 18, 2005
DATE

Laura Henderson
Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 22 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

124-05

DIANNE GIARDINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the non-renewal of her employment for the 2003-2004 school year by the Pequannock Township Board of Education, claiming violation of petitioner's tenure rights. Petitioner alleged that she had gained tenure in the position of Secretary and/or Office Aide pursuant to *N.J.S.A.* 18A:17-2. The Board controverted petitioner's claim to tenure, and the matter was transmitted to the OAL as a contested case. Prior to the hearing, the Board filed a motion for summary decision. Subsequently, petitioner also filed a motion for summary judgment.

The ALJ found that there were no material facts in dispute, and that the matter was ripe for summary disposition. The ALJ identified the critical debate between the parties to be the issue of whether or not the governing statute permits the petitioner to count or "tack" the time she was employed as an Office Aide to her service time as Secretary for the purpose of determining that she accrued a tenure status. Based upon a review of the certifications submitted by both parties, the exhibits attached to these certifications, the stipulated facts set forth in a supplemental submission, and the oral argument on cross motions, the ALJ found that: 1) petitioner's position as an Office Aide was tenure eligible pursuant to *N.J.S.A.* 18A:17-2, but petitioner did not accrue tenure in either the Office Aide position or the position of Secretary since her service time does not satisfy the precise conditions of the statute; 2) petitioner may not combine the time she was employed in the position of Office Aide with the time she was employed as a Secretary for purposes of accruing tenure in the position of Secretary; and 3) petitioner may not tack the time she was employed as Secretary to the time she was employed as Office Aide for the purpose of accruing tenure in a clerical position. Accordingly, the ALJ granted the Board's motion for summary judgment; denied the petitioner's motion for summary judgment; and dismissed the instant petition with prejudice.

Upon a thorough and independent review of the record in this matter, including the parties' exception arguments, the Commissioner concurs with the findings and conclusions in the Initial Decision. Accordingly, the Initial Decision, granting summary decision to the Board, is adopted 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.

April 1, 2005

OAL DKT. NO. EDU 7677-03
AGENCY DKT. NO. 239-7/03

DIANNE GIARDINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Pequannock Township Board of Education's (Board) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

In her exceptions, petitioner reiterates the arguments expressed before the Administrative Law Judge (ALJ) in support of her contention that she accrued tenure in the position of secretary or, in the alternative, in the position of a clerical employee. In setting forth her position, petitioner relies on numerous cases including, *inter alia: Carlson, supra*; *Carnathan, supra*; *Euell, supra*; and *Sitek, supra*, wherein certificated teaching staff members achieved tenure under similar circumstances, pursuant to *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:28-6, which were considered and rejected by the ALJ as not applicable to the question of whether petitioner herein attained tenure under *N.J.S.A.* 18A:17-2.

Upon a thorough and independent review of the record in this matter, including the parties' exception arguments, the Commissioner concurs with the findings and conclusions in the Initial Decision wherein the ALJ determined that petitioner's position as an office aide is

tenure eligible, pursuant to *N.J.S.A.* 18A:17-2, but that petitioner did not accrue tenure in either the position of secretary or a clerical position since her service time does not satisfy the precise conditions of the statute. The Commissioner also emphasizes in reaching this conclusion his concurrence that petitioner may not combine the time she was employed in the position of office aide to the time she was employed as a ten-month secretary for purposes of accruing tenure in the position of secretary, nor may she tack the time she was employed as a ten-month secretary to the time she was employed as an office aide for the purpose of accruing tenure in a clerical position.

Accordingly, the Initial Decision, granting summary decision to the Board, is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/05

Date of Mailing: 4/6/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7677-03

AGENCY DKT. NO. 239-7/03

DIANNE GIARDINA,

Petitioner,

v.

PEQUANNOCK TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY,

Respondent.

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

Greg K. Vitali, Esq., for respondent (Lindabury, McCormick & Estabrook attorneys)

Record Closed: October 26, 2004 Decided: February 18, 2005

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

STATEMENT OF THE CASE

In this matter, the petitioner, Dianne Giardina, challenges the non-renewal of her employment for the 2003-2004 school year by the respondent, the Pequannock Township Board of Education (the Board). Petitioner alleges that she gained tenure in the position of Secretary and/or Office Aide pursuant to *N.J.S.A.* 18A:17-2 and the Board's decision not to renew her employment violates petitioner's tenure rights. The Board controverts petitioner's claim to tenure.

PROCEDURAL HISTORY

On July 10, 2003, petitioner filed a Verified Petition with the Commissioner of the Department of Education (the Department) alleging violation of her tenure rights and seeking reinstatement to a position of employment within the scope of her tenure status, along with back pay and benefits. The Board filed an Answer to Petition on July 25, 2003. Subsequently, the Department transmitted the matter to the Office of Administrative Law where, on August 19, 2003, it was filed for determination as a contested case. On September 15, 2003, the matter was assigned to the undersigned for disposition. A prehearing conference was held, after which a Prehearing Order was entered on October 21, 2003. The hearing scheduled for May 13 and May 14, 2004 was adjourned at petitioner's request and rescheduled for July 12, July 14, and July 16, 2004. Prior to the hearing, the Board filed a motion for summary decision. Petitioner responded by filing a cross-motion for summary decision in her favor. The undersigned heard oral argument on the cross-motions on August 20, 2004. After the receipt of supplemental submissions, the record was closed on October 26, 2004.[1]

ISSUE PRESENTED

The pivotal issue presented is whether petitioner met the statutory qualifications embodied in *N.J.S.A.* 18A:17-2 necessary to obtain tenure status in the position of Office Aide and/or Secretary.

FINDINGS OF FACT

The relevant facts are not in dispute. Based upon a review of the Certification of Dr. Jacqueline L. Cusack, the Superintendent of Schools for the Board (Cusack Cert.), the Certification of Greg K. Vitali, Esq. (Vitali Cert.), the Certification of Dianne Giardina (Giardina Cert.), the Certification of Gregory T. Syrek, Esq. (Syrek Cert.), the exhibits attached to the aforesaid Certifications and the stipulated facts set forth in a supplemental submission (Vitali letter dated September 13, 2004), I **FIND** the following undisputed **FACTS:**

[1] Orders were requested to extend the time within which to file this Initial Decision.

1. The Board and the Pequannock Township Education Association negotiated and entered into a collective bargaining agreement for the period July 1, 1998 to June 30, 2001 (1998-2001 CBA). (Cusack Cert. at Exhibit 1).

2. The Board and the Pequannock Township Education Association negotiated and entered into a subsequent collective bargaining agreement for the period July 1, 2001 through June 30, 2004 (2001-2004 CBA). (Cusack Cert. at Exhibit 2).

3. Both the 1998-2001 CBA and the 2001-2004 CBA contain separate salary guides for Secretaries and Aides. (Cusack Cert. at Exhibit 1, Schedule E ("Secretarial Employees' Salary Guide") and Schedule G ("Aides' Salary Guide") and Cusack Cert at Exhibit 2 ("Secretary Salary Guides" and "Aides Salary Guides")).

4. Both the 1998-2001 CBA and the 2001-2004 CBA contain separate provisions governing the work year and other matters for Secretaries and Aides. (Cusack Cert. at Exhibits 1 and 2, Article 8, Section K ("Secretarial Personnel") and Section L ("Aides").

5. By letter dated July 15, 1998, petitioner applied for the position of Office Aide with the Board. (Cusack Cert. at Exhibit 3).

6. At its July 20, 1998 meeting, the Board approved the appointment of petitioner to the position of Office Aide for the 1998-1999 school year at Step 11 of the Aides' Guide and at a salary of $19,032. (Cusack Cert. at ¶12 and Exhibit 4).

7. By letter dated July 21, 1998, the Superintendent of Schools informed petitioner that the Board approved her appointment as an Office Aide for the period September 1, 1998 through June 30, 1999 at Step 11 of the Aides' Guide and at an annual salary of $19,032. (Cusack Cert. at Exhibit 5).

8. The Board and petitioner entered into an employment contract for the period September 1, 1998 through June 30, 1999 providing for petitioner's employment in the position of Office Aide at Step 11 on the Aides' Guide and at an annual salary of $19,032. (Cusack Cert. at Exhibit 6).

9. Petitioner's salary of $19,032 is the Step 11 salary depicted on the 1998-2001 CBA's Aides' Salary Guide for the 1998-1999 school year. (Cusack Cert. at Exhibit 1, Schedule G).

10. Petitioner commenced employment with the Board as an Office Aide on September 1, 1998 and continued in this position through June 30, 1999. (Cusack Cert. at ¶2 and ¶3; Giardina Cert. at ¶3).

11. At its May 10, 1999 meeting, the Board approved the reappointment of aides, including petitioner, for the 1999-2000 school year at salaries in accordance with the CBA. (Cusack Cert. at ¶15 and Exhibit 7).

12. By letter dated May 11, 1999, the Superintendent of Schools informed petitioner that the Board approved her appointment as an Office Aide for the 1999-2000 school year at a salary to be in accordance with the CBA. (Cusack Cert. at Exhibit 8).

13. The Board and petitioner entered into an employment contract for the period July 1, 1999 through June 30, 2000 providing for petitioner's employment as an Aide at Step 11 of the negotiated salary guide and at an annual salary of $19,793. (Cusack Cert. at Exhibit 9).

14. Petitioner's salary of $19,793 is the Step 11 salary depicted on the 1998-2001 CBA's Aides' Salary Guide for the 1999-2000 school year. (Cusack Cert. at Exhibit 1, Schedule G).

15. Petitioner was employed as an Office Aide from July 1, 1999 through June 30, 2000 (Giardina Cert. at ¶4).

16. At its June 12, 2000 meeting, the Board approved the reappointment of aides, including petitioner, for the 2000-2001 school year at salaries to be in accordance with the CBA. (Cusack Cert. at ¶18 and Exhibit 10).

17. By letter dated June 13, 2000, the Superintendent of Schools informed petitioner that the Board approved her appointment as an Office Aide for the 2000-2001 school year at a salary to be in accordance with the CBA. (Cusack Cert. at Exhibit 11).

18. The Board and petitioner entered into an employment contract for the period July 1, 2000 through June 30, 2001 providing for petitioner's employment as an Aide at Step 12 of the negotiated salary guide and at an annual salary of $21,597. (Cusack Cert. at Exhibit 12).

19. Petitioner's salary of $21,597 is the Step 12 salary depicted on the 1998-2001 CBA's Aides' Salary Guide for the 2000-2001 school year. (Cusack Cert. at Exhibit 1, Schedule G).

20. Shortly after the Board appointed petitioner to the position of Office Aide for the period July 1, 2000 through June 30, 2001, the Board voted to abolish the position of twelve month school secretary at Hillview School, effective August 31, 2000, for reasons of economy, staffing and in the best interests of efficient operation of the school district. At the same meeting, the Board established the position of ten month school secretary at the Hillview School effective September 1, 2000. (Cusack Cert. at ¶4 and ¶21 and Exhibit 13). At the meeting, the Board also voted to appoint petitioner to the newly created position of ten month Secretary at a salary of $25,096 for the period September 1, 2000 through June 30, 2001. (Cusack Cert. at ¶21 and Exhibit 13).

21. Effective September 1, 2000, petitioner was promoted to the new position of ten month Secretary. (Cusack Cert. at ¶4).

22. Petitioner acknowledges that her new job title and salary increase in the 2000-2001 school year represented a promotion. (Vitali Cert. at Exhibit 4, Answer to Interrogatory Nos. 14 and 15).

23. By letter dated August 22, 2000, the Superintendent of Schools informed petitioner that the Board approved her appointment as a ten month Secretary for the period September 1, 2000 through June 30, 2001 at Step 17 on the Secretarial Guide and at an annual salary of $25,096. (Cusack Cert. at Exhibit 14).

24. The Board and petitioner entered into an employment contract for the period September 1, 2000 through June 30, 2001 providing for petitioner's

employment in the position of ten month Secretary at Step 17 of the negotiated salary guide and at an annual salary of $25,096. (Cusack Cert. at Exhibit 15).

25. Petitioner's salary of $25,096 is set off of the 1998-2001 CBA's Secretarial Employees' Salary Guide for the 2000-2001 school year. (Cusack Cert. at Exhibit 1, Schedule E).[2]

26. Petitioner was employed by the Board in the position of ten month Secretary for the period of September 1, 2000 through June 30, 2001. (Cusack Cert. at ¶5; Giardina Cert. at ¶6).

27. At its May 14, 2001 meeting, the Board reappointed "non-tenured secretaries," including petitioner. The Board reappointed petitioner for the period September 1, 2001 to June 30, 2002 at a salary to be in accordance with the CBA. (Cusack Cert. at ¶24 and Exhibit 16).

28. By letter dated May 15, 2001, the Superintendent of Schools informed petitioner that the Board approved her reappointment as a Secretary for the period September 1, 2001 through June 30, 2002 at a salary to be established by the Board. (Cusack Cert. at Exhibit 17).

29. The Board and petitioner entered into an employment contract for the period September 1, 2001 through June 30, 2002 providing for petitioner's employment as a Secretary at an annual salary of $29,410. (Cusack Cert. at Exhibit 18).

30. The 2001-2004 CBA provides that "Secretarial Employees with a 10 month contract will be paid at .85 of their appropriate step on the 12 month Secretarial Guide." (Cusack Cert. at Exhibit 2, Secretary Salary Guides).

31. Petitioner's salary of $29,410 represents .85 of the Step 18 salary ($34,600) depicted on the 2001-2004 CBA's Secretary Salary Guides for the 2001-2002 school year. (Cusack Cert. at Exhibit 2, Secretary Salary Guides).

---

[2] Although the Board's brief states that the salary reflects .85 of the salary listed in the guide because the guide salaries are for twelve month secretarial positions, .85 of the listed Step 17 salary ($30,115) equals $25,597.75, whereas petitioner's salary was $25,096. The $30,115 Step 17 salary is equal to approximately $2,509.583 a month. Petitioner's salary equals that monthly figure multiplied by ten months (*i.e.*, $2,509.583 x 10 = $25,095.83).

32. At its May 13, 2002 meeting, the Board reappointed "non-tenured secretaries," including petitioner, for the period September 1, 2002 through June 30, 2003. (Cusack Cert. at ¶27 and Exhibit 19).

33. By letter dated May 17, 2002, the Superintendent of Schools informed petitioner that the Board approved her reappointment to the position of ten month Secretary for the period September 1, 2002 through June 30, 2003. (Cusack Cert. at Exhibit 20).

34. The Board and petitioner entered into an employment contract for the period September 1, 2002 through June 30, 2003 providing for petitioner's employment as a Secretary at Step 19 of the negotiated salary guide and at an annual salary of $31,220.50. (Cusack Cert. at Exhibit 21).

35. Petitioner's salary of $31,220.50 represents .85 of the Step 19 salary ($36,730) depicted on the 2001-2004 CBA's Secretary Salary Guides for the 2002-2003 school year. (Cusack Cert. at Exhibit 2, Secretary Salary Guides).

36. The Board did not renew petitioner's appointment to the position of ten month Secretary. (Cusack Cert. at ¶6). Petitioner's employment with the Board ceased on June 30, 2003, after her contract for the period September 1, 2002 through June 30, 2003 was not renewed. (Cusack Cert. at ¶6 and ¶30).

37. Petitioner's service may be summarized as follows:

- September 1, 1998 through June 30, 1999 – Office Aide
- July 1, 1999 through June 30, 2000 – Office Aide[3]
- September 1, 2000 through June 30, 2001 - Secretary
- September 1, 2001 through June 30, 2002 – Secretary
- September 1, 2002 through June 30, 2003 – Secretary

[3] The parties stipulated that petitioner did not work during July and August 2000. (Vitali letter dated September 13, 2004).

38. The Board does not have a Job Description for the position of Office Aide. (Vitali letter dated September 13, 2004).[4]

39. According to petitioner's Certification, while employed as an Office Aide, petitioner's job duties and responsibilities were consistent with those found in the job description for the "Clerical Employee." (Giardina Cert. at ¶5 and Exhibit P-1). Petitioner typed, made copies of documents, engaged in bookkeeping and other office-related tasks. In addition, as directed by her supervisor, petitioner also prepared all state reports (N.J. school report cards, ASSA reports), the Free Milk Program, Insurance reports and documents, budget information, organized and supplemented the Emergency Evacuation Program, took care of petty cash, the substitute teacher payroll, staff attendance, updated student rosters (incoming and outgoing students), ordered supplies and books and organized use of the school facilities by outside groups such as the Boys and Girls Clubs, Boy Scouts and Girl Scouts. As required, petitioner also interacted with parents and students on a regular basis. (*Id.* at ¶5).

40. The Board's Job Description for the title Clerical Employee provides that the duties and responsibilities of the title include the following:

- Duties to include a combination of typing, stenographic, duplicating, bookkeeping, or general office tasks
- Perform assigned clerical tasks in an acceptable manner and to provide necessary support to the smooth operation of school, department, or program
- Perform other related duties which are within the scope of employment responsibilities and which may be assigned by the Building Principal, by the Program Administrator or by their designee (Giardina Cert. at P-1).

[4] Similarly, the 1998-2001 CBA, which was in effect during the years petitioner served as an Office Aide, does not describe an Aide's duties and responsibilities. (Cusack Cert. at Exhibit L). Although the 2001-2004 CBA sets forth duties and responsibilities of an Aide (Cusack Cert. at Exhibit 2, Article 8, Section L), this CBA did not take effect until after petitioner ceased being an Office Aide and was employed as a Secretary.

41. According to petitioner's Certification, when employed as a ten month Secretary, her duties were consistent with the Job Description for the position of "Building or Program Secretary (Secretary I)." (*Id.* at ¶6). The Certification further states that, because petitioner's responsibilities as an Office Aide had been expanding over the two years she was in that job, many of her duties and responsibilities as a Secretary were the same as her job as an Office Aide. (*Ibid.*).

42. The Board's Job Description for the title of Building or Program Secretary[5] provides that the duties and responsibilities of such position includes the following:

- Primary responsibility for meeting the clerical support needs of the school or program as determined by the building principal or appropriate program administrator
- Perform all necessary clerical tasks relating to the smooth operation of the school unit in concert with the overall procedures of the school district
- Distribute the clerical workload among available clerical support staff
- Supervise activities of other clerical support personnel
- Perform other related duties which are within the scope of employment responsibilities and which may be assigned by the building principal or appropriate program administrator

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The Summary Decision Standard

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

[5] A copy of the Job Description is attached to petitioner's brief as P-22.

summary judgment rule embodied in the *New Jersey Court Rules R.* 4:46-2. The summary judgment procedure is designed to provide a "prompt" and "inexpensive" method of disposing of a case, which does present any genuine issue of material fact requiring disposition at a hearing. *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. However, to defeat the motion the non-moving party must "come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 529 (1995) (citations omitted). *See N.J.A.C.* 1:1-12.5(b) Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. *Brill, supra,* 142 *N.J.* at 529 (emphasis in original). In evaluating whether or not summary decision is appropriate, the New Jersey Supreme Court has provided the following guidance:

> [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'. . . . Credibility determinations will continue to be made by jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of *Rule* 4:46-2. . . .
>
> [*Brill, supra,* 142 *N.J.* at 540 (citations omitted).]

Judged against these standards, I **CONCLUDE** that there are no material facts in dispute and the matter is ripe for summary disposition.

The Tenure Statute

N.J.S.A. 18A:17-2 defines the conditions under which secretarial and clerical employees of a board of education are entitled to the security of tenure. In general, the objective of the tenure statutes is to protect competent and qualified employees, after a probationary period, from removal for "unfounded, flimsy, or political reasons."

Zimmerman v. Bd. of Educ. of the City of Newark, 38 *N.J.* 65, 71 (1962), *cert. den.*, 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L. Ed.* 2d 502 (1963). 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 the Borough of Prospect Park,* 5 *N.J. Super.* 215, 218 (App. Div. 1949). The provisions of the statute supercede contractual terms. *Spiewak v. Bd. of Educ. of Rutherford,* 90 *N.J.* 63, 72 (1982).

To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met. *See Picogna v. Bd. of Educ. of the Twp. of Cherry Hill,* 143 *N.J.* 391, 400 (1996); *Kletzkin v. Bd. of Educ. of the Borough of Spotswood,* 136 *N.J.* 275, 278 (1993); *Spiewak, supra,* 90 *N.J.* at 72; *Zimmerman, supra,* 38 *N.J.* at 72; *Ahrensfield v. State Bd. of Educ.*, 126 *N.J.L.* 543, 544 (E & A 1941). Tenure "arises only by passage of time fixed by the statute. . . ." *Canfield v. Bd. of Educ. of the Borough of Pine Hill,* 51 *N.J.* 400 (1968), *rev'g on dissent,* 97 *N.J. Super.* 483, 490 (App. Div. 1967). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. *Id.* at 493.

The within matter is governed by *N.J.S.A.* 18A:17-2. In pertinent part the statute directs:

> Any person holding any secretarial or clerical position or employment under a board of education of any school district . . . , 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,[6] together with employment at the beginning of the next succeeding academic year. . . .
>
> 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

[6] *N.J.S.A.* 18A:17-2b2 defines "an academic year" as "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."

> offense and only in the manner prescribed by . . . [*N.J.S.A.* 18A:6-9, *et seq.*].
>
> [*N.J.S.A.* 18A:17-2b.]

The Parties' Positions

The Board maintains that the positions of Office Aide and Secretary "are two totally independent and separate positions and, in order to accrue tenure in either, an employee . . . must serve the requisite probationary period in each position." The Board contends that, even if petitioner's employment as an Office Aide qualifies as a "clerical" position eligible to accrue tenure under *N.J.S.A.* 18A:17-2, petitioner did not serve the necessary probationary period of time in that position. The Board further asserts that petitioner cannot combine or "tack" the years she was employed as an Office Aide with the time she served as a Secretary for purposes of accruing tenure in either position.

Petitioner avers that her employment as an Office Aide is tenure eligible as a clerical position. Petitioner advocates that she should be able to apply the time she was employed in the position of Office Aide for purposes of accruing tenure as a Secretary. Accordingly, petitioner argues that she accrued tenure in the position of Secretary at the start of her fourth academic year of employment or on the first day of the 2001-2002 school year. In the alternative, petitioner maintains that she should be allowed to apply her time in the "promoted to" Secretary position to the accrual of tenure in the "promoted from" Office Aide position.

Petitioner's Office Aide Position

Initially an issue is raised concerning whether petitioner's employment as an Office Aide qualifies as a "clerical position" eligible for tenure within the intendment of *N.J.S.A.* 18A:17-2. In this regard, it is well settled that "[t]he duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure." *Quinlan v. Bd. of Educ. of North Bergen,* 1959-1960 *S.L.D.* 113, 114 (Comm'r. Feb. 10, 1960), *rev'd on other grounds,* 1960-1961 *S.L.D.* 243 (State Bd. March 1, 1961), *aff'd,* 73 *N.J. Super.* 40 (App. Div. 1962).

In *Barnes v. Bd. of Educ. of Jersey City,* 85 *N.J. Super.* 42 (App. Div. 1964), *certif. den.* 43 *N.J.* 450 (1964), the Appellate Division addressed the intended meaning of the phrase "clerical position" under the predecessor statute (*N.J.S.A.* 18:6-27) which, similar to *N.J.S.A.* 18A:17-2, conferred tenure on all persons "holding any secretarial or clerical position" under any board of education. The board of education appealed the State Board's determination that certain petitioners held "clerical positions" and, therefore, attained tenure under *N.J.S.A.* 18:6-27. In connection therewith, the board argued that "the words 'secretarial' and 'clerical' are synonymous and must be read together to denote office workers with varying skills and responsibilities, and that 'a clerk is one who under direction performs routine, repetitive, non-complex clerical work of a varied nature, as a beginner at the entrance level of employment.'" *Id.* at 44-45. The Appellate Division concluded that substantial credible evidence supported the State Board's determination that six petitioners held "clerical positions" within the meaning of *N.J.S.A.* 18:6-27. *Id.* at 45. *See Barnes, supra,* 1963 *S.L.D.* 240, 245-46 (State Bd. Dec. 4, 1963) (providing a description of the petitioners' duties). In rejecting the board's interpretation of the statute, the Appellate Division stated:

> We cannot agree that the phrase 'clerical position' has the restricted meaning attributed to it by... [the board]. The legislative history of the amendment indicates that, as originally proposed, it would have conferred tenure on 'clerks engaged in a secretarial capacity.' This provision was objected to by the New Jersey Educational Association as being too narrow. As a result a committee substitute was drafted incorporating the language of the present statute. The Association approved the committee substitute which was enacted into law. . . . Thus, it clearly appears that the phrase 'clerical position' was intended to extend the statutory protection coverage beyond secretarial employment. Moreover, since tenure statutes are intended to secure public service by protecting public employees in their employment, 'the widest range should be given to the applicability of the law'.
>
> [*Id.* at 45.] (citation omitted.)

Berardi v. Bd. of Educ. of the School District South Orange and Maplewood, 95 *N.J.A.R.* 2d (EDU) 239, lends further guidance as to the intended reach of the statutory provision. The petitioner in *Berardi* alleged that she was terminated from her position as a full-time "clerical aide" in violation of her tenure rights pursuant to *N.J.S.A.* 18A:17-2. According to the job description for clerical aides, the responsibilities of the position included checking student attendance, contacting parents regarding absences, referring

problems to guidance counselors/administrators, receiving telephone calls and leaving messages for teachers, sorting mail, assisting secretarial staff (filing, Xeroxing) and maintaining appropriate relationships with students, parents and staff. *Id.* at 240. In addition, the petitioner's employment duties included receiving and putting emergency cards in order, mailing results of discipline referral forms to parents, writing out detention forms and providing requested information to school departments. *Id.* at 241.

In determining whether the petitioner's position fell within the scope of *N.J.S.A.* 18A:17-2, the Administrative Law Judge (ALJ) observed that simply because "additional, non-clerical duties are performed does not control." *Id.* at 241. *See Barnes, supra.* Similarly, "the mere fact that an employee performs clerical duties is not controlling." *Id.* at 241-42. *See Rossi v. Bd. of Ed. of Willingboro,* Agency Dkt. No. 294-8/78 (Sept. 24, 1980), *adopted* (Comm'r. Nov. 7, 1980), *aff'd* (State Bd. August 5, 1981) (holding that, although the job duties of a learning resource center aide included clerical duties, the position was a paraprofessional, not a clerical one). As part of her analysis, the ALJ further reviewed the dictionary definition of the word "clerk." *Id.* at 242. The ALJ concluded that, "[t]he use of the word 'aide' in . . . [the petitioner's] job title does not control her tenure status," and "whatever her job title . . ., [petitioner] holds a 'clerical position' within the meaning of *N.J.S.A.* 18A:17-2, because her duties are 'clerical' within the meaning of *Barnes, supra*" and "[m]ost of her job duties are the same or very similar to those of the employees in that matter who were found to hold 'clerical positions.'" *Ibid.* The Commissioner agreed holding that, pursuant to *Barnes*, "petitioner holds a clerical position within the meaning of the statute based on the nature of her job duties and on the broad range of definition afforded in applying this statute." *Ibid. See also Jacobsen v. Bd. of Educ. of Union City,* OAL Dkt. EDU 10340-82 (August 1, 1983), *adopted* (Comm'r. Sept. 16, 1983), *aff'd* (State Bd. Feb. 1, 1984); *Beute v. Bd. of Educ. of North Arlington,* OAL Dkt. EDU 295-80 (July 28, 1981), *adopted* (Comm'r. Sept. 14, 1981), *aff'd* (State Bd. Feb. 3, 1982); *Cummins v. Bd. of Educ. of North Bergen,* 1975 *S.L.D.* 271 (Comm'r. May 1, 1975).

Turning to the within matter, the Board did not dispute, through the submission of an opposing certification, petitioner's description of her job duties as an Office Aide. According to petitioner's Certification, her responsibilities included typing, bookkeeping, copying documents and other office-related tasks (Giardina Cert. at ¶5 and Exhibit P-1).

Among other duties, petitioner also prepared State reports; took care of petty cash; handled substitute teacher payroll, staff attendance and student rosters; ordered supplies and books; organized use of the school facilities by outside groups; and interacted with parents and students on a regular basis. *Ibid.*

Succinctly stated, petitioner's job duties are akin to the employees' duties in *Barnes* and *Berardi*, who were found to hold a "clerical position" within the meaning of the tenure statute. From the evidence, it cannot be said that petitioner was employed in paraprofessional, rather than a clerical, capacity. I **CONCLUDE** that, consistent with the aforesaid decisional law, petitioner held a "clerical position" eligible for tenure pursuant to *N.J.S.A.* 18A:17-2 when she served as an Office Aide since the bulk of her duties was clerical in nature.

The Statutory Requirements

The pivotal issue is whether petitioner attained tenure in the position of Office Aide and/or Secretary pursuant to *N.J.S.A.* 18A:17-2b. The statute confers tenure "after" either "[t]he expiration of a period of employment of three consecutive calendar years" or "[e]mployment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year . . . ." *Ibid.* Considering petitioner's employment in each position separately, the conclusion that her service does not meet the probationary period of time mandated by *N.J.S.A.* 18A:17-2b is inescapable.

Petitioner was employed as an Office Aide from September 1, 1998 through June 30, 1999 and from July 1, 1999 through June 30, 2000. This service of less than three consecutive calendar years, and less than three consecutive academic years, plainly falls short of the statutory requirements.

As a ten month Secretary, petitioner was employed on an academic year basis and worked in the position for three consecutive years (September 1, 2000 through June 30, 2001, September 1, 2001 through June 30, 2002 and September 1, 2002 through June 30, 2003). However, in order to qualify for tenure, the statute unambiguously directs that reemployment at the start of the fourth academic year is required. Petitioner's employment for only three consecutive academic years does not suffice. Indeed, that

petitioner could not have served in the position for longer than three academic years is unassailable inasmuch as the Board created this new position effective September 1, 2000 and, at the same meeting, appointed petitioner to the new position.

The critical debate between the parties is whether or not the statute permits petitioner to count or "tack" the time she was employed as an Office Aide to her service as a Secretary for purposes of determining that she accrued a tenure status.

Petitioner's Claim to Tenure in the Secretary Position

Petitioner contends that she accrued tenure at the beginning of the 2001-2002 school year, after being employed for two academic years as an Office Aide and one academic year plus one day as a ten month Secretary. Petitioner postulates that she gained tenure as a Secretary since it was the position petitioner held when the service requirements of the statute were satisfied. In support of her stance, petitioner principally relies upon the decisions rendered in *Carlson v. Bd. of Educ. of Cranford,* 1981 *S.L.D.,* 57 (Nov. 25, 1980), *aff'd,* 1981 *S.L.D.* 62 (Comm'r. Jan. 16, 1981), *aff'd.,* 1981 *S.L.D.* 63 (State Bd. May 6, 1981), *aff'd.,* 1982 *S.L.D.* 1445 (App. Div. March 24, 1982) and *Carnathan v. Bd. of Educ. of Randolph* OAL Dkt. EDU 7943-83 (May 27, 1983), *mod.* (Comm'r. July 18, 1983). The Board controverts that petitioner may combine or tack her employment as an Office Aide with her service as a Secretary to satisfy the statutory conditions of *N.J.S.A.* 18A:17-2b, citing *Given v. Bd. of Educ. of the East Windsor Regional School District,* 1978 *S.L.D.* 43 (Comm'r. Jan. 30, 1978), *aff'd,* 1978 *S.L.D.* 46 (State Bd. June 7, 1978), *aff'd,* 1979 *S.L.D.* 832 (App. Div. May 18, 1979). Simply put, the undersigned agrees.

In *Given*, the petitioner alleged that her reassignment from the position of secretary to clerk violated the petitioner's tenure rights. The petitioner had served as a twelve month senior clerk for approximately three and one-half years (January 4, 1971 to August 27, 1974), during which she was paid in accordance with the salary guide for clerks in the district. On August 27, 1974, the petitioner was appointed to the position of secretary to the Assistant Superintendent of Schools and served in that capacity through June 15, 1976. During this time frame, the petitioner was paid in accordance with the salary guide for secretaries. After serving in the position of secretary for two years, the petitioner was

reassigned to the position of a twelve month clerk. Although the board of education did not dispute that the petitioner had accrued a tenure status as a clerk in the district, it denied her claim to tenure as a secretary. The petitioner contended that she immediately acquired tenure as a secretary in 1974 when she commenced this employment and no additional probationary period was required to gain tenure upon promotion or transfer.

The Commissioner rejected the petitioner's contention. In holding that the board's action in reassigning the petitioner to the clerical position was legal and proper, the Commissioner explained:

> The Commissioner agrees that there exists a legitimate interest for a local board to have a probationary period for clerical and secretarial employees in its employ who receive a promotion. The Commissioner opines that to hold otherwise would work hardship on both the board and the employee if instant tenure were to accrue to a promotional position made in good faith by the board. A clerk or secretary so promoted would likely be required to demonstrate greater technical skills in order to properly discharge more complex responsibilities and must have a probationary period in which to adequately adjust to the new position. The fact that the Legislature has not established a specific statutory probationary period for clerks and secretaries who have been promoted, such as exists in *N.J.S.A.* 18A:28-6 for certificated personnel, does not obviate the need for such a probationary period. The Commissioner holds that a tenured clerk or secretary, upon promotion to another position within the school district, must satisfy the precise conditions enunciated in *N.J.S.A.* 18A:17-2(b) and (c) to achieve a tenure status in the new position. The Commissioner further holds that tenure rights accrued in a school system in any clerical or secretarial position prior to promotion shall not be negated by such promotion and shall remain as a continuing entitlement to such employee.
>
> [1978 *S.L.D.* at 45.]

The Commissioner's decision in *Given*, which was affirmed by the State Board of Education and the Appellate Division, militates against petitioner's "tacking" or combining of time argument. Pursuant to *Given*, although a promotion does not negate tenure rights which accrued prior to the promotion, the employee must serve the requisite probationary period in the new promoted position in order to gain tenure in that position. In the present case, petitioner was not employed in the secretarial position for the period of time dictated by *N.J.S.A.* 18A:17-2b. In addition, petitioner had not accrued tenure rights in any clerical position prior to being promoted to a Secretary.

The cases cited by petitioner do not support a contrary result. *Carlson* and *Carnathan* involved certificated teaching staff members. The tenure protection afforded to certificated employees does not implicate the statutory criteria relevant to this matter and is predicated upon the standards set forth in *N.J.S.A.* 18A:28-5 and –6. Although in both cases tenure was found to have accrued as to the position held by the employee when the statutory conditions were met, the issue centered on whether the teacher accrued tenure in a full or part time teaching position. In other words, unlike the present matter, the cases did not involve two separate and distinct positions. In contrast, the argument advanced by petitioner was squarely addressed and has been definitely resolved by the Commissioner's decision in *Given*.

I **CONCLUDE** that, pursuant to *Given,* petitioner's service time in the position of Office Aide should not be counted for purposes of satisfying the statutory requirements necessary to accrue tenure status in the Secretary position. I further **CONCLUDE** that petitioner did not accrue tenure in the position of Secretary since the length of her employment in this position fails to meet the necessary criteria embodied in *N.J.S.A.* 18A:17-2b.

Petitioner's Claim to Tenure in a Clerical Position

The undersigned does not embrace petitioner's alternative argument that, at a minimum, she must be found to have gained tenure in a clerical position. In this regard, petitioner contends that she should be able to utilize her service time in the promoted position toward calculating her entitlement to tenure in the initial clerical position. In support of this "tacking backwards" argument, petitioner cites the decisions rendered in *Euell v. Board of Educ. of the Princeton Regional School District,* 1978 *S.L.D.* 666 (Comm'r. August 11, 1978), *aff'd,* 1979 *S.L.D.* 825 (State Bd. November 8, 1979), *aff'd,* 1980 *S.L.D.* 1489 (App. Div. October 28, 1980) and *Sitek v. Board of Educ. of the Southern Regional High School District,* 1988 *S.L.D.* 2247, *aff'd* in part and *rev'd* in part, 1988 *S.L.D.* 2253 (Comm'r. Nov. 15, 1988), *aff'd*, 1989 *S.L.D.* 3079 (State Bd. March 1, 1989).

The decisions in *Euell* and *Sitek* provide no solace to petitioner and are readily distinguishable from the instant matter. The cases addressed whether a certificated

teaching staff member could add the time served in a promoted position for purposes of accruing tenure in the employees' former promoted from position. In both cases the time served in the new position was included in determining the tenure rights in the former position. However, the statutory scheme applicable to certificated teaching staff members expressly authorizes the application of service time in this fashion. More particularly, the statute governing the tenure of teaching staff members upon transfer or promotion unambiguously instructs that "[t]he period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member. . . ." *N.J.S.A.* 18A:28-6.

Petitioner's entitlement to tenure stems from *N.J.S.A.* 18A:17-2. Contextually, the plain language of *N.J.S.A.* 18A:17-2 does not evidence a design on the part of the Legislature to provide the same rights to a clerical employee who is promoted. Had the Legislature intended to permit the combining of service time in the two positions, it could have easily said so as it explicitly did in the context of *N.J.S.A.* 18A:28-6. *See Shapiro v. Essex County Bd. of Chosen Freeholders,* 177 *N.J. Super.* 87, 94 (Law Div. 1980), *aff'd,* 183, *N.J. Super.* 24 (App. Div. 1982), *aff'd,* 91 *N.J.* 430 (1982) ("[u]nder the expressio unius doctrine, it is generally held that where the Legislature makes express mention of one thing, the exclusion of others is implied."). That the positions of Secretary and Aide are separate and distinct positions is apparent from the CBA which incorporates different provisions and salary guides for each position. The Commissioner's decision in *Given* further supports the conclusion that the Legislature intended to create two separate probationary periods, one for clerical employees and one for secretaries, and in order to gain tenure in either position the employee must service the requisite probationary period in each position.

I **CONCLUDE** that petitioner may not utilize the time spent in the position of ten month Secretary for purposes of accruing tenure in her former clerical position. I further **CONCLUDE** that petitioner did not serve a sufficient period of time in such capacity to attain tenure protection under *N.J.S.A.* 18A:17-2b.

In sum, I **CONCLUDE** that petitioner's position as an Office Aide is tenure eligible pursuant to *N.J.S.A.* 18A:17-2. However, I **CONCLUDE** that petitioner did not accrue tenure in either the position of Secretary or a clerical position since her service time does

not satisfy the precise conditions of the statute. In so ruling, I **CONCLUDE** that petitioner may not combine the time she was employed in the position of Office Aide to the time she was employed as a ten month Secretary for purposes of accruing tenure in the position of Secretary. I further **CONCLUDE** that petitioner may not tack the time she was employed as a ten month Secretary to the time she was employed as an Office Aide for the purpose of accruing tenure in a clerical position. Accordingly, I **CONCLUDE** that the Board's Motion for Summary Decision should be **GRANTED.**

ORDER

I **ORDER** that respondent's Motion for Summary Decision be and hereby is **GRANTED.** I further **ORDER** that petitioner's Motion for Summary Decision be and hereby is **DENIED.** I further **ORDER** that the Verified Petition filed on petitioner's behalf be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

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

February 18, 2005
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

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

February 18, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 22 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Joint Exhibits:

Stipulations contained in letter from Greg K. Vitali to Honorable Margaret M. Monaco, ALJ, dated September 13, 2004

For Petitioner:

Certification of Dianne Giardina, with attached Exhibit P-1

Certification of Gregory T. Syrek, Esq. with attached Exhibits P-1 through P-21

For Respondent:

Certification of Dr. Jacqueline L. Cusack, with attached Exhibits 1 through 21

Certification of Greg K. Vitali, Esq., with attached Exhibits 1 through 4

#125-05L

125-05

State of New Jersey

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

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

April 7, 2005

Daphne Kirkland, *Pro Se*
145A West Street
Englewood, NJ 07631

Dear Ms. Kirkland:

The matter entitled *D.K., on behalf of minor child, D.K. v. Board of Education of the City of Englewood, Bergen County,* Agency Dkt. No. 362-10/04, wherein petitioner challenges the District's determination to place her son on home instruction pending the resolution of a disciplinary matter, was opened by way of a Petition of Appeal filed on October 12, 2004.[1] In a letter, dated January 14, 2005, the Superintendent of the Englewood School District advised the Bureau of Controversies and Disputes that D.K. returned to school in early November 2004, that he currently remains enrolled in the Englewood School District and that D.K.'s mother had informed the school district that she would formally withdraw her petition.

In that it appeared that there was no longer a controversy in this matter, by letter of January 31, 2005, served via regular and certified mail,[2] petitioner was requested to notify the Bureau of Controversies and Disputes, within ten (10) days of receipt of the letter, as to whether she wished to continue with her appeal or whether she wished to withdraw her appeal given the District's claim that her son had returned to classes within the Englewood School District in November 2004 and currently remains enrolled in the school district. Petitioner was advised that failure to respond to the January 31 letter within the time specified would be construed as a withdrawal of the appeal in this matter.

When no response was received, petitioner was provided a *final* opportunity to notify the Bureau of Controversies and Disputes as to whether she wished to continue with her

[1] Delays in consideration of this matter were the result of petitioner's correction of deficiencies in the filing of the petition and two notices to the Board directing it to file an Answer to the petition. It is further noted that petitioner did not file an application for emergent relief.

[2] The letter served via certified mail was returned with the reason marked as "other." The letter served via regular mail was not returned and, thus, is deemed to have been received.

appeal in a letter, dated March 1, 2005, served via regular and certified mail.[3] Petitioner was requested to respond within ten (10) days of receipt of the March 1 letter and was again advised that failure to respond with the time specified would be construed as a withdrawal of her appeal. Petitioner has not responded to either the January 31, 2005 letter or the March 1, 2005 letter.

Accordingly, as petitioner was specifically advised on two occasions, her failure to respond to the January 31, 2005 and March 1, 2005 letters is being construed as a withdrawal of the within Petition of Appeal. Consequently, this matter is no longer deemed to be a contested matter before the Commissioner and is, therefore, dismissed.[4]

Sincerely,

William L. Librera, Ed.D.
Commissioner

WLL/MKD/SF
c: Board Secretary
County Superintendent

[3] The letter served via certified mail was returned with the reason marked as "other." The letter served via regular mail was not returned and, thus, is deemed to have been received.

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

126-05

OAL DKT. NO. EDU 11685-04
AGENCY DKT. NO. 351-10/04

B.M., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, filed on March 28, 2005, in response to an Initial Decision mailed to the parties on March 8, 2005, were untimely and, therefore, not considered herein.

Upon his careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner concurs with the ALJ that petitioner has failed to sustain her burden of establishing that K.F. was a domiciliary of Montclair and, thus, entitled to a free public education in that District's schools.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the within Petition of Appeal is hereby dismissed. The Commissioner directs that petitioner pay the Board tuition in the amount of $10,832.78[1] for the period of K.F.'s ineligible attendance in its schools, November 24, 2003 to March 1, 2005.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/7/05
Date of Mailing: 4/7/05

[1] Pursuant to the school calendar attached to the Certification of Bruce Dabney, dated February 23, 2005, this amount is broken down thusly: 2003 school year, 130 days at a per diem rate of $48.38 or $6,289.40; 2004-05 school year, 86 days at a per diem rate of $52.83 or $4,543.38, for a grand total of $10,832.78.

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

B.M., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's residency determination that her daughter, K.F., was not eligible for a free education in the Township of Montclair School District. Petitioner alleged that the residency determination had been retaliation from the Board for petitioner's complaints that the Montclair School District did not appropriately recognize Black History Month.

Based upon the documentary evidence and the demeanor of the witnesses at hearing, the ALJ found petitioner's assertion of retaliation to be incredible and her testimony regarding residence to be unsupported by documentation and, at times, inconsistent with the documentary evidence. The ALJ furthermore found the testimony of the Board to be persuasive that the petitioner was not living in the District during the period in question, based on the testimony of the Board which asserted that: 1) the Board did not receive cooperation from B.M.; 2) the Board was unable to locate the petitioner at her alleged residence; and 3) the Board was unable to contact the petitioner at her purported address by certified mail. The ALJ concluded that the petitioner failed to carry her burden to prove by a preponderance of credible evidence that she was domiciled in Montclair during the relevant time, and that petitioner has failed to prove that K.F. was entitled to a free public education in the Township of Monclair from November 2003 to the present and is therefore owes the Board tuition for this period of ineligible attendance. The ALJ ordered that B.M. pay respondent tuition in the total amount of $10,832.78 for unauthorized attendance for the period from November 24, 2003 to March 1, 2005.

The Commissioner concurs with the findings of the ALJ in this matter. Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed.

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11685-04

AGENCY DKT. NO. 351-10/04

B.M. ON BEHALF OF MINOR CHILD, K.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

Respondent.

B.M., petitioner, *pro se*

Debra Shannon, Esq., for respondent (Genova, Burns & Vernoia, attorneys)

Record Closed: March 1, 2005 Decided: March 4, 2005

BEFORE **EDITH KLINGER**, ALJ:

On October 5, 2004, petitioner, B.M., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of Montclair (Board), to provide her child, K.F., with a free public education in the Township schools pursuant to *N.J.S.A.* 18A:38-1b. The period in dispute is from November 2003 to the present.

On November 5, 2004, the school district (District) filed its answer to the petition and its counterclaim for tuition and, on November 23, 2004, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on February 15, 2005 and the record closed on March 1, 2005 when the Certification of Bruce Dabney, setting forth the District's claim for tuition, was received.

In about September or October 2003, someone from the Nishuane School, located in the District, notified the central office that there was reason to believe K.F. was not residing in Montclair. This initiated an investigation and an investigator was sent to B.M.'s alleged residence on November 22, 24, and 28 and December 4, 2003 and January 13, 2004. He rang the doorbell on November 22 at 10:59 a.m. but there was no answer; he saw no one there on November 24; he did not find B.M. or K.F. there on November 28; and there was no answer when he rang the doorbell at 7:30 a.m. on December 4. On January 19, a teenager answered the door and said that neither B.M. nor K.F. were there.

On January 14, 2004, Kevin Salters, Assistant to the Superintendent of the District, wrote to B.M. His letter stated that, if he did not hear from B.M. by January 28, the Superintendent would move before the Board that K.F. "be dropped from the register of Nishuane School for non-residency."

On January 26, 2004, B.M. contacted Salters and said that she was living with her mother at 5 Claremont Place in Montclair. He told her that she had to complete a Tenant Without a Lease form and provide three additional proofs of residency, including name and new address. According to the District's records, none of these proofs were provided.

On February 6, 2004, Salters sent B.M. another letter asking her to provide the requested information by February 11, 2004. There is no record of a response to this request.

On March 1, 2004, the Board conducted a hearing and determined that K.F. should be removed from the Nishuane School for non-residency. B.M. was notified of the Board action by letter, dated March 2, 2004. A handwritten note on the Board's copy of the letter indicated that B.M. called Salters on March 3, 2004 and left him a voicemail message.

Salters responded to her voicemail message by letter, dated March 4, 2004. In the letter he stated that the District had been waiting for her proofs of residency since January and had not yet received them. He sent her a list of the documents she was required to provide and told her that the information contained therein had to prove her residency for the six weeks prior to the date of the letter. This letter was sent to B.M. by certified mail, addressee only, at 5 Claremont Place. After the post office made several attempts to deliver it to B.M., it was returned unclaimed to the District on March 23, 2004.

On March 9, 2004, Salters sent B.M. a letter enclosing a Tenant Without a Lease form to be filled out and notarized. Since she claimed to be living at 5 Claremont Place with her mother, he also requested a copy of her mother's property tax bill. These documents were to be brought to him by March 12, 2004. In addition, he told her to provide three additional proofs by April 13, 2004. These proofs were to contain her name as a person living at the 5 Claremont Place address. A handwritten note on the Board's copy of this letter states that B.M. called on March 12 and said she would drop off the documents on the following day. Salters wrote that his letter was a response to B.M.'s telephone messages. She denies making these calls.

The District provides parents or guardians with a printed list of Registration Requirements that sets forth in detail the specific types of residency proofs it requires. There is no dispute that B.M. had a copy of these requirements since she repeatedly referred to them in her testimony.

Different proofs are necessary depending upon the living arrangements of the parent and child. A child and parent living with a Montclair resident are required to provide a signed, notarized sworn statement of residency completed by the Montclair resident and the parent or guardian of the child. B.M. provided a notarized letter from her mother, V.M., which petitioner testified was given to the District in February, not March, 2004. The February date was supposedly cut off the upper right side of the first page at some point , perhaps during copying.

The document that was provided was not an affidavit; it is an unsworn, notarized letter and it was notarized in March 2004. Therefore, the document was either prepared and the signature witnessed in March 2004, in which case B.M. could not have presented it to the District in February 2004 as she claims, or the notary did not witness V.M.'s signature in February. The District stamped it "received" on March 15, 2004 and I **FIND** it more likely than not that it was received on that date.

In this letter, V.M. states that B.M. and her daughter K.F. were living with her in her apartment at 5 Claremont Place in Montclair for six weeks as of the alleged February 2004 date of the letter. This information is inconsistent with B.M.'s testimony that she lived at 97 Pine Street in Montclair until she lost her apartment and moved in with her mother on February 2, 2004.

On March 18, 2004, Salters wrote to B.M. acknowledging receipt of her mother's letter. His letter forwarded another copy of a Tenant Without a Lease Form to be completed by V.M.'s landlord, notarized and returned to Salters by March 24, 2004. This letter was also sent to B.M. by certified mail, addressee only, at 5 Claremont Place. After the post office made several attempts to deliver it, it was returned unclaimed to the District on April 7, 2004.

Bruce Dabney succeeded Salters as Assistant to the Superintendent of the District on July 9, 2004. He testified at hearing that Salters requested this documentation because B.M. had first to establish that her mother was a resident of Montclair and then that she was legally residing with her mother. This is the reason that

the Tenant Without a Lease Form had to be completed by V.M.'s landlord and notarized. Next, B.M. had to present documentation that she was actually living with her mother, which is why Salters insisted on the other three forms of proofs. The District would not consider B.M. a resident of Montclair until all circumstances were sufficiently documented.

Dabney testified that B.M. had already presented proof of residency to the District when she completed a Magnet School Enrollment Application to kindergarten for K.F. on March 14, 2001 so she was not unfamiliar with the process.

Michael Johnson is an Operation's Aide for the Montclair Public Schools. He has been an attendance officer for the District for the past ten years and performed between two and three thousand surveillances during this time. He was assigned to conduct a surveillance at 5 Claremont Place to see if B.M. was actually living there. His surveillance lasted from April 26 through April 30, 2004.

Johnson testified that he watched the Claremont Place house from his car. The street is a narrow one so that, once he was inconspicuously positioned, he was easily able to observe the movements of people and cars and observe lights coming on and going off in the house. He conducted his observations between 6:00 a.m. and 7:45 or 8:00 a.m. On April 26, 27, 28 and 29, he watched the house and saw no lights come on and no one left. On April 30, he witnessed the same lack of activity. He rang the doorbell and it was answered by a woman of Indian descent who told him that B.M. and her child had moved out. At hearing, B.M. identified this woman as the landlady.

Petitioner claimed that she had actually moved back to 97 Pine Street and the District should have known about it because she told the District's transportation office to have the school bus pick her son up there. Therefore, it should have sent her mail and conducted its surveillance at that address. She did not formally change her address in K.F.'s school records. Further, nothing in the record documents that B.M. ever resumed residence at Pine Street and, if so, when this occurred. There is only her

testimony that she had the school bus come to get him at that address but this does not prove she was living there.

She produced records showing that she had a lease on an apartment at 97 Pine Street, Montclair, from April 1, 2003 through March 31, 2004, but she already testified that she moved from that address in February 2004. This is supported by a storage rental agreement, submitted by B.M. at hearing, apparently beginning in February 2004, to store her "household items." The agreement gives her then current address as 5 Claremont Place.

B.M. offered receipts from the landlord at 97 Pine, both dated March 19, 2003. One also acknowledges receipt of a security deposit on the apartment and both are clearly from the time she took possession of it. She provided a letter from the Young Men's Christian Association of Montclair, stating that she owed $250 for pre- and/or aftercare services for K.F. while he attended Nishuane School and she went to work. The services were provided approximately from February 18, 2004 through April 30, 2004. There are also bills from Comcast for cable television service for the period from June 22, 2003 through September 15, 2003. I **FIND** all of these documents from 2003 to be irrelevant to the present appeal because the District only questions B.M.'s residency from November 2003.

On June 14, 2004, Salters wrote to B.M. advising her that K.F. would not be allowed to enroll in the Montclair schools for the next school year unless she presented four proofs of residency by August 19, 2004. When the District received no response to the letter by the designated date, K.F. was removed from the rolls.

Dabney testified that he attempted to meet with B.M. in September 2004, when K.F. came back to school. She was just one of five parents that were in the same position. The meeting never took place but he and B.M. did have a telephone conversation in which she alleged that the District had been harassing her over the years. When Dabney asked her to meet with him, she said that this was just more harassment.

On September 12, 2004, Dabney checked with the Hillside School in the District to see if K.F. was in attendance there. He was told that B.M. had come in and filled out a card stating that K.F. was signed out to attend a private school. B.M. claims that she never filled out such a form and someone must have forged her name to the document. The form was not brought to the hearing so that this was impossible to verify.

On October 5, 2004, B.M. filed this appeal with the Commissioner of Education. On October 7, 2004, Dabney spoke to B.M. who said that K.F. was not attending any school. He himself went to Claremont Place and found B.M. there but not the child. Based upon this and the filing of her appeal, K.F. was permitted to resume her attendance in the District schools pending the outcome of the appeal.

At this time, B.M. first presented the District with documentation, allegedly proving her residency. One of the documents is a copy of the first page of B.M.'s U.S. Individual Income Tax Return for the years 2002. It gives her address as 5 Claremont Place. The copy is neither dated nor signed and there is no evidence that it was ever filed with the Internal Revenue Service (IRS). There is one correspondence from the IRS to B.M., dated September 11, 2004, and addressed to her at 5 Claremont Place, but there is nothing in the record to identify to what this communication refers: it only contains a contact telephone number and the hours of service. She presented Dabney with a New Jersey driver's license, issued to her on June 3, 2004. The address on the license is 5 Claremont Place. Dabney did not accept the license as documentation because the photograph on the license is too dark to show that she was the person photographed.

At hearing, B.M. produced copies of the first page of her U.S. Individual Income Tax Returns for the years 2003 and 2004. Again, neither copy is dated nor signed and there is no evidence that either were ever filed with the Internal Revenue Service (IRS). Both give the Claremont Place address. She produced an invoice with that address from a medical laboratory for services rendered to K.F. on November 3, 2003. A State of New Jersey automobile insurance surcharge installment payment bill, dated April 15,

2004, was mailed to her there. Finally, she produced a check, dated October 12, 2004, from Kelly Services with the Claremont Place address. Dabney testified that he never saw these last five documents before the hearing.

According to Dabney, there were several reasons that the District determined that B.M. was not a resident. These reasons included the reports of the attendance officers and the returned certified mail. He was also skeptical of the later documentation that B.M. provided because he knew that there was another family, having the same last name as B.M., who claimed to be living at the Claremont Place address while their children attended District schools. This family later admitted that they were not residents of Montclair and withdrew the children. As a result, he believed that there were persons living at that address who permitted non-residents to use their address and receive mail there for purposes of school attendance in the District.

Dabney's belief that B.M. used of the address as a mail drop is supported by her failure to claim the "addressee only" certified mail from the District. Anyone at the address could accept her regular mail, but only she could obtain possession of the letters sent by the District in this manner.

B.M. claimed at hearing that the District was only challenging her residence because she had complained in 2002 that it held too few activities to celebrate Black History Month. Dabney testified that the District checked the residence of all parents entering the District and of those parents whose residence came into question while their children were already in attendance in the Montclair schools. Johnson testified that even he was investigated before his children were allowed to enroll. I **FIND** B.M.'s allegation of retaliation to be unconvincing since the record shows that other parents were in the same position and the District did not question her residence until November 2003.

N.J.S.A. 18A:38-1a provides that public schooling shall be free to any person over five and under 20 years of age who is domiciled within the school district. If the district finds that the parent or guardian of a child who is attending school in the district

is not domiciled within the district, the child may, after a hearing, be removed from the school system and the parent or guardian assessed for tuition for the period of ineligible attendance. *N.J.S.A.* 18A:38-b(2). The parent has the burden of proving domicile by a preponderance of the credible evidence. *N.J.S.A.* 18A:38-b(2).

Based upon the documentary evidence and the demeanor of the witnesses, I **FIND** B.M.'s assertion of retaliation to be incredible and her testimony as to residence to be unsupported by documentation and, at times, inconsistent with the documentary evidence. On the other hand, I **FIND** the testimony by the District, of its failure to receive cooperation from B.M., its inability to locate her at her alleged residence, and its inability to contact her at her purported address by certified mail, to be persuasive that she was not living in the District during the period in question. I, therefore, **CONCLUDE** that B.M. has failed to carry her burden to prove by a preponderance of the credible evidence that she was domiciled in the District during the relevant time. As a result, I **CONCLUDE** that B.M. has failed to prove that K.F. was entitled to a free public education in the Township of Montclair from November 2003 to the present.

If the parent or guardian fails to carry the burden of proof, *N.J.S.A.* 18A:38-1(b)(2) provides that the district can remove the child from school and assess tuition for the student prorated for the period of ineligible attendance in district schools. Accordingly, I **CONCLUDE** that B.M. is liable to the District for K.F.'s tuition prorated for the period of K.F.'s ineligible attendance and the District may immediately remove K.F. from the District schools pursuant to *N.J.S.A.* 18A:38-b(2).

In this case, the District seeks tuition for K.F.'s attendance in the Montclair School District from November 24, 2003 to the present date. Based upon the school calendar attached to the Certification of Bruce Dabney, dated February 23, 2005, K.F. was in unauthorized attendance for approximately 130 days during the 2003-2004 school year and for approximately 86 days during the 2004-2005 school year up to March 1, 2005. The per diem tuition rate for the 2003-2004 school year was $48.38. Therefore, I **CONCLUDE** that B.M. owes the District tuition in the amount of $6,289.40 for 143 days in the 2003-2004 school year. The per diem tuition rate for the 2004-2005

school year is $52.83. I **CONCLUDE** that B.M. also owes the District tuition in the amount of $4543.38 for 86 days in the 2004-2005 school year to March 1, 2005.

ORDER

It is, therefore, **ORDERED** that B.M. pay respondent tuition in the total amount of $10,832.78 for unauthorized attendance in the District schools from November 24, 2003 to March 1, 2005. It is further **ORDERED** that K.F. may be immediately removed from the Montclair public schools, at the discretion of the District, unless tuition is paid for her continued attendance.

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

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

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

March 4, 2005
DATE

EDITH KLINGER, ALJ

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

3-4-05
DATE

Mailed to Parties:

MAR 08 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

B.M.

For Respondent:

Bruce Dabney

Michael Johnson

Exhibits:

J-1 Letter of V.W.

For Petitioner:

P-1 Apartment Lease, 97 Pine Street

P-2 Registration Requirements

P-3a IRS Form 1040A, 2003 Cover Page

P-3b IRS Form 1040A, 2004 Cover Page

P-4 Comcast Bills

P-5 Invoice, YMCA of Montclair

P-6 Rent and Security Deposit Receipt, 97 Pine Street

P-7 Letter, Salters to B.M., June 15, 2004

P-8 Laboratory Bill for K.F.

P-9 Letter, IRS to B.M., September 11, 2004

P-10 Kelly Services, Paycheck

P-11 Driver's License

P-12 Memorandum, Dabney to M. Kathleen Duncan, October 7, 2004

P-13 Rental Agreement for Storage Space

For Respondent:

R-1 Letter, Salters to B.M., January 14, 2004

R-2 Letter, Salters to B.M., February 6, 2004

R-3 Letter, Salters to B.M., March 2, 2004

R-4a Certified Letter, Salters to B.M., March 4, 2004

R-4b Envelope from R-4a, Returned March 23, 2004

R-5 Letter, Salters to B.M., March 9, 2004

R-6a Certified Letter, Salters to B.M., March 18, 2004

R-6b Envelope from R-6a, Returned April 7, 2004

R-7 IRS Form 1040A, 2002 Cover Page

R-8 Automobile Insurance Surcharge Bill

R-9 Magnet School Enrollment Application, March 14, 2001

R-10 Investigation Report, April 30, 2004

R-11 Investigation Report, November 2003

R-12 Certification of Dabney

127-05

OAL DKT. NO. EDU 11801-03
AGENCY DKT. NO. 82-3/03

H.R., on behalf of minor child, N.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on February 24, 2005 and providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.[1]

Notwithstanding dismissal of the petition, however, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to

[1] In so holding, the Commissioner notes petitioner's letter filed on August 16, 2004, which could be read as a statement of intent to rely on the arguments therein and documents previously submitted, thereby explaining petitioner's failure to appear at hearing; even granting such an intent and reviewing the record on that basis, however, the evidence is insufficient to support a finding of entitlement for N.P. to attend the schools of respondent's district free of charge pursuant to *N.J.S.A.* 18A: 38-1.

the amount of tuition claimed by the Board as a consequence of the ineligible attendance of N.P. in its schools, this matter is hereby remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.[2] [3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/7/05

Date of Mailing: 4/7/05

[2] It is noted that this matter was decided on remand from the State Board of Education, which determined, in a decision dated November 5, 2003, that the Commissioner's May 21, 2003 grant of summary decision to petitioner, due to the Board's failure to answer the petition, should be vacated. The State Board reasoned that such relief was warranted because petitioner did not oppose the Board's claim that its failure to answer was excusable under the circumstances, and because, in a matter where judgment has been entered on a default basis, it is appropriate to resolve all doubts in favor of the party seeking relief. (Slip Opinion at 2)

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

H.R., on behalf of minor child, N.P., :

PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION

BOARD OF EDUCATION OF THE :
CITY OF CLIFTON, PASSAIC COUNTY,
:

RESPONDENT.
:

SYNOPSIS

Petitioner appealed the Board's residency determination that her niece, N.P., was not eligible for a free education in the City of Clifton School District, based on family and economic hardship. The Board failed to submit an Answer to the petition. Therefore, on May 21, 2003, the Commissioner granted summary decision in favor of the petitioner.

Subsequently, the Board filed an appeal to the State Board of Education, explaining that "miscommunications" in the Board's offices resulted in the petition not being forwarded to its counsel; that failure to file an answer to the petition was excusable given the "confusion within the Board offices"; and asserting that the burden in this matter is on the petitioner to demonstrate the existence of a family or economic hardship which would entitle her niece to a free public education in the Clifton schools under the standard set forth in N.J.S.A. 18A:38-1b. The petitioner failed to file an answer brief. The State Board vacated the Commissioner's decision and remanded the matter to him for further proceedings on the petition.

A hearing was subsequently scheduled at the OAL. Petitioner failed to appear, and failed to submit explanation for such nonappearance. The Commissioner therefore dismissed the petition of appeal with prejudice. However, notwithstanding dismissal of the petition, the Commissioner noted that the Board's Answer in this residency matter contained counterclaim for tuition in an unspecified amount, which was left unresolved by the ALJ. The Commissioner thereby remanded this matter to the OAL for supplementation of the record and an appropriate recommended order regarding the payment of tuition.

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.

#128-05

A.O.L., on behalf of minor children, A.L., A.L. and J.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's determination that his children were not entitled to free public education in the district during the 2002-03 school year, contending that the children lived with him in Bloomfield during that time and not with their mother in Newark.

The ALJ found the testimony of petitioner and his witnesses to be both incredible and insufficiently supported by the documentary record. The ALJ ordered petitioner to pay $16,116.66 in tuition plus costs and interest.

The Commissioner adopted the Initial Decision, noting that, pursuant to *N.J.S.A.* 52:14B-10(c) and *In re Morrison*, the record provided no basis on which to disturb the factual findings and credibility determinations of the ALJ. The Commissioner ordered payment of tuition, but set aside the order for payment of costs and interest as without support or explanation in the record.

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

OAL DKT. NO. EDU 1854-03
AGENCY DKT. NO. 1-1/03

A.O.L., on behalf of minor children, A.L., A.L. and J.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Although petitioner submitted exceptions to the Initial Decision, these have not been considered because they were filed well beyond the period provided by *N.J.A.C.* 1:1-18.4, with neither a request for extension nor an explanation for the inability to submit such request having been made in accordance with *N.J.A.C.* 1:1-18.8.[1]

Upon review, and in the absence of any basis in the record on which to dispute the fact-finding and credibility determinations of the Administrative Law Judge (ALJ) pursuant to *N.J.S.A.* 52:14B-10(c), *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987), the Commissioner concurs that petitioner has not met his burden of demonstrating that A.L., A.L. and J.L. were entitled to a free public education in the respondent's school district during the 2002-03 school year.

[1] The Initial Decision was mailed to the parties on February 22, 2005, so that exceptions, or any non-emergency request for extension, would have been due on March 7, 2005. Petitioner's submission was filed, with no prior request for extension and no claim of extraordinary circumstances, on March 16, 2004.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and petitioner is directed to pay tuition to respondent in the amount of $16,116.66 for the period of his children's ineligible attendance. However, in that the record contains nothing to explain or support the ALJ's assessment of "costs and interest" (*cf. N.J.A.C.* 6A:3-1.17), that portion of the Initial Decision's recommended Order is hereby set aside.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/05

Date of Mailing: 4/8/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01854-03
AGENCY DKT. NO. 1-1/03

A.O.L. ON BEHALF OF MINOR CHILDREN, A.L., A.L. AND J.L.,

Petitioners/Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY

Respondent.

Angelo Bianchi, Esq., for petitioner
(Bianchi and Bianchi, LLC)

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Beck, PC)

Record Closed: January 22, 2004 **Decided:** February 18, 2005

BEFORE SANDRA ANN ROBINSON, ALJ:

STATEMENT OF THE CASE

Appellant (AOL), contests the Respondent's (Bloomfield Board of Education) determination that his three children AL, AL and JL, were not Bloomfield school district resident's, and therefore not entitled to a free public education in the Respondent's district schools. Respondent seeks reimbursement of $ 16,116.66 plus costs and fees for educational services provided to Appellant's children, for the entire 2002-2003 school year.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on March 5, 2003, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to B-15 and *N.J.S.A.* 52:14F-1 to F-13. All requests for postponements were granted by the court, due to nature of each requests and the fact that the students involved in this appeal were guaranteed enrollment in the school district pending disposition by the undersigned. Documentation remains with the case file regarding unavailability of Appellant and Respondent witnesses on certain dates; Attorney conflict with other OAL cases and mediation; and, the hospitalization of Appellant's counsel. Conference dates and *de novo* hearing dates were scheduled for September 12 and November 14, 2003; March 1, June 9, November 17 and December 14, 2004; and January 11, 2005. At the conclusion of testimony on January 11th the exhibits appearing in the attached Appendix, were mark accordingly, and the record was left open for submission of post-hearing briefs. The undersigned received documents from both counsel and the record closed on January 22, 2005.

ISSUES

Were Appellants' three children residents of Bloomfield, New Jersey during the 2002-2003 school year?

If the children were not residents, is Respondent entitled to reimbursement of $16,116.66 plus costs and fees for educational services provided to the children for that school year?

BACKGROUND AND SUMMARY OF TESTIMOMY

Prior to the commencement of this action, Appellant, his wife and three children resided at the marital home located at 362 Parker Street, Newark, New Jersey, within the Newark school district. Appellant and his wife were divorced on November 19, 2002 and the wife remained in the Newark marital residence until it was sold in June 2003.

(Exhibits P-4, R-6). Appellant moved out of the marital home in August 2000 and relocate to Bloomfield, New Jersey, within the Bloomfield school district and registered the children in that school district for the 2002-2003 school year. **(Exhibits R-1, thru R-5).** Respondent performs a door check for all new students in the district. The results of several checks by Respondent's investigations led to a determination that Appellant's children did not reside with him in Bloomfield and where not eligible for a free education in the Bloomfield school district; therefore, Respondent sought to have the children disenrolled. **(R-7, R-11, R-12, R-72).**

RESPONDENT'S WITNESSES

Dr. Nicholas Bruno, is the Director of Administrative Services for the Bloomfield Board of Education with supervisory responsibility for registration, re-registration, truancy and disenrollment. He testified that the door check is a routine check for all new students coming into the district. A door check is a "knock to see if student home" check (and) a visual check is a " park and wait to see child come out of house" check. Dr. Bruno noted that the 2002-2003 new student registration began in July 2002 and that Appellant came to register his children on August 28, 2002, seven days before school began in September. Based on the Investigators findings in his report, Dr. Bruno mailed letters to Appellant and his former wife to inform them of "Notice of Deficient Application" and to advise them of their right to a hearing on the matter. **(Exhibits R-7, R-10).** Appellant, his former wife, Dr. Bruno and Investigator Allyn were present at the December 17, 2002 Board of Education meeting and participated in the presentations and discussions on Appellant's children's domicile. There were discussions on the following articles of the Amended Dual Final Judgment of Divorce at:

> **Article II 1. Custody and Support of the Children -** ...the parties shall have joint legal and physical custody and control. So long as the wife has custody the husband will pay support and maintenance of the children the sum of $500. per month per child. ...
>
> **Article II 4. c) Termination of Obligation -** ... permanent residence

away from the residence of wife...

Article III 2. Parties To Confer- On all matters of importance relating to the children's health and education, Wife shall consult and confer with Husband with a view of adopting and following harmonious policy.

The Amended Dual Final Judgment of Divorce, dated November 21, 2002 uses language and terms, which indicate that Appellant's children lived with their mother. Appellant's former wife said the following at the December 17, 2002 Board of Education meeting: "If I sold my house there would be no problem".

Dr. Bruno said the children completed the 2002-2003 school year in Bloomfield district schools and transferred to Boonton High School on or about August 28, 2003, simultaneous with the sale of the former marital home in Newark, New Jersey. **(Exhibits R-18, R-19, R-20).**

Jeff Allyn, is an Investigator employed by the Bloomfield Public Schools who has served as the district compliance officer for sixteen years. His primary responsibilities are truancy monitoring and residence verifications. On September 30, 2002 he conducted a new student door check at Appellant's residence located at 201 Watchung Avenue Unit #10 in Bloomfield, New Jersey. Appellant was at home and opened the door and told Investigator Allyn that he was divorced and his children were with their mother at 362 Parker Street, Newark, New Jersey. A second door check was completed on October 11, 2002 and Investigator Allyn was told, by a female who answered the door (around 6:30 - 7:30AM), that the children were at their mother's residence in Newark, New Jersey. The Investigator testified that between October 28, 2002 and November 22, 2002 he observed Appellant's former wife's residence in Newark, NJ to determine if the children were living there. On eleven occasions during October and November 2002 the children were seen between 7:10 AM and 7:35 AM coming out of their mother's home, getting into a vehicle driven by their mother and being driven to Brookdale School and Bloomfield High School in Bloomfield, New Jersey. He saw the mother drop-off at least five times at Bloomfield schools.

Investigator Allyn said he usually does no more than two door checks before commencing observations, because more than two checks could be considered harassment. The Investigator submitted a report of his observations which specifically sets forth twenty-two dates of observing one or more of Appellant's children leaving the Newark residence of Appellant's ex-wife and presumably heading to school in Bloomfield and that on several other occasions he observed the Newark location and did not see the children.. **(Exhibit R-11).**

APPELLANT'S WITNESSES

Marie Arms – is Appellant's Aunt and Appellant's mother's sister, who has lived in Bloomfield all of her life. She was sequestered during Appellant's mother's testimony. Mrs. Arms corroborated testimony about her sister's lengthy periods of visiting in Bloomfield for weeks, often up to months at a time and estimated that her sister stayed with her in Bloomfield for approximately seven or eight months out of the year. Her sister would return to Bayville to replenish her cloths, check on things and then return to Bloomfield. Information about Appellant's children being at home in Bloomfield with their father was also corroborated – "dinner is at Appellant's house, in Bloomfield, nearly every night of the week and the children ate dinner and slept overnight in Bloomfield." Mrs. Arms did not provide information on the estimated or actual number of times she actually saw the children sleep over night in Appellant's Bloomfield condo.

Maria Balzan – is Appellant's live-in girlfriend who observed the children every day. She is a co-signer with Appellant on the 201 Watchung Avenue Lease Agreement and has resided there with Appellant for four years. She said most of the time the children live with her and Appellant and Appellant takes them to school. She got her drivers licensed restored in December 2001 and thereafter she took the children to school from time to time as needed. However, it was the norm that when Appellant had to leave for work early in the morning he would drive the children to his ex-wife's home in Newark so she could take them to school.

Phyllis C. Lembo - is Appellant's widowed mother, who lives in Bayville, New Jersey, but visits Bloomfield quite often. She stays with her sister, Marie Arms, off and on for approximately seven months out of the year, for weeks at a time and even an entire month before returning to Bayville. Ms. Lembo testified that she is very close to her family in Bloomfield and when visiting she usually has dinner at Appellant's home nightly; she sees Appellant's girlfriend and the children nightly and is aware of the children's bed and bath time.

On cross-examination she explained the layout of her son's condominium – "it has an upstairs/downstairs, it is a two story". She said that the neighbors look after the mail when she is away from Bayville. Mrs. Lembo did not provide information on the estimated or actual number of times she actually saw the children sleep over night in Appellant's Bloomfield condo.

Sal Polizzi - lives in unit # 15 of the same building complex as Appellant. Mr. Polizzi's sister owns Appellant's unit. He testified that he personally saw the Petitioner take his children to school, from the Bloomfield residence throughout the 2002-2003 school year. Mr. Polizzi said he often played basketball with Petitioner's children until late at night in Bloomfield.

On cross-examination Mr. Polizzi estimated that during the 2002-2003 school year he may have seen Appellant on twenty occasions take the children to school. He said his departure time in the morning varies because he is self- employed in the construction business. Mr. Polizzi did not testify to or provide information about any date or occasion when he actually saw the children sleep over night in Appellant's Bloomfield condo.

APPELLANT

Alfred O. Lembo – Appellant, contends that his three children lived with him at his 201 Watchung Avenue residence in Bloomfield, New Jersey, during the 2002-2003 school year. When he moved to Bloomfield in February 2001 the children where not listed on the Leasing Agreement, but their occupancy was noted on the Landlord Affidavit

submitted to Bloomfield Board of Education. **(Exhibit P-1).** The Landlord Affidavit was accepted into evidence for the limited purpose of acknowledging completion and receipt by the Board of Education for purposes of student registration. The landlord who signed the Landlord Affidavit was not called as a witness. **(Exhibits P-3, R-8).**

Appellant said he usually took the children to school, but when he had to arrive at work early he would drop the children at their mother's, so she could transport them to school. Appellant's former wife lives on the route to his job, which made it convenient when drop-off's were needed. Appellant works in the trucking industry and heavy construction and his hours of work vary considerably. Sometimes when the mother was going to take the children to school in the morning, she would pick them up from school the afternoon before. There where other times when mother would drop off at school and pick up in the afternoon, then father would get them from the mother's house on his way home from work.

Appellant noted that at the time he registered the children in the Bloomfield school district he disclosed that he and his wife were divorcing and they would have joint custody of the children, therefore the need for two addresses on the school forms. He said the children would be moving in with him before school commenced on September 4, 2002 because the Newark home was being prepared for sale. After listening to the reason for the Newark address appearing on the school registration documents, the secretary said that Dr. Bruno, the school administrator would look into the matter.

On cross-examination Appellant explained the layout of his apartment to be two bedroom with a pull-out bed in the family room. There were two adults and three children living at the Bloomfield address. He provided no explanation as to why the Amended Dual Final Judgment of Divorce dated November 25, 2002 spoke only of the father's visitation rights and nothing about the mother visiting should the opportunity present itself. Appellant testified initially that hopes were that the property in Newark would be sold by August 2002, then, later he noted that it was placed on the market in November 2002. Appellant acknowledged that his former wife signs all documents

related to the education of their one child who is in special education and she signs almost all documents for the other two children.

BURDEN OF PROOF

Pursuant to *N.J.S.A.* 18A: 38-1, the challenger to a Board's decision to deny a free public education within its district has the burden to prove to the Commission of Education by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. The statute also provides that no child shall be denied admission while the proceeding is pending before the Commissioner and in the event the child is currently enrolled in the district, the student shall not be removed from school while the proceedings are continuing. If, however, in the judgment of the Commissioner, the evidence does not support the claim of the resident, he/she shall assess the resident tuition for the student, prorated to the time of the student's ineligible attendance in the school district.

As a result of the law cited above, in this matter, the burden rests on the Appellant by a preponderance of the evidence to show that domicile did in fact exist in the district in which the child attended school.

CREDIBILITY

The credibility of the witnesses is of paramount concern in this case. Appellant would have the undersigned to believe that after September 4, 2002 his three children lived most of the time during the school year, with him and his girl friend in a two bedroom condo. However, the weight of all testimony, including disclosures made by Appellant indicates that Appellant could not provide testimony or solid proof of the number of days the children actually resided in Bloomfield. At one point in his testimony Appellant suggested reasons as to why the several "door checks" and multiple "observation checks" could be inaccurate without offering proof for those occasions/dates, as to where the children actually where. The report of the Investigator was not refuted, but challenged in regard to the plan for observing. Most of Appellant's

witnesses had an interest in protecting Appellant from paying $16,116.66 in school fees for the 2002-2003 school year - family was protecting family.

LEGAL DISCUSSION AND CONCLUSIONS

PROOF OF DOMICILE TO QUALIFY FOR PUBLIC SCHOOL EDUCATION:

Pursuant to *N.J.S.A.* 18A: 38-1, public schools shall be free to persons over five and under 20 years of age who are domiciled within the school district. While there are certain exceptions, this case is not a case of exceptions but instead a case of questioned domicile. It is the position of Appellant that he and his three children were at all times pertinent to this case domiciled in the Bloomfield school district.

A child's domicile is normally that of his or her parents. *See* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 *U.S.* 30, 48, 109 *S.Ct.* 1597, 1608, 104 *L.Ed.*2d 29, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 *N.J.Super.* 505, 521-22, 662 *A.*2d 976 (App.Div.1995), *certif. denied,* 143 *N.J.* 325, 670 *A.*2d 1066 (1996); 25 *Am.Jur.2d Domicil* § 42 (1996); *Restatement (Second) Conflict of Laws* § 22 (1971). After a divorce or judicial separation, the domicile of the child is that of the parent with whom the child lives. *Roxbury,* 283 *N.J.Super.* at 521-23, 662 *A.*2d 976; 25 *Am.Jur.2d Domicil* § 42. The *Roxbury,* dispute over the child's domicile is similar to the joint physical custody arrangement in the instant case, and the fact that Appellant move to a different municipality, as in Roxbury, prompts a closer look at the outcome in *Roxbury,* and how it relates to this case. The Law Division Judge found in *Roxbury* that the child's single domicile was with his mother in West Milford and ordered West Milford to pay the child's education costs.

In the instant case, the divorced parents do not share equal parenting "time" under a joint custody arrangement. There is no court decree or entry in the Dual Amended Final Judgment of Divorce which outlines the division of the children's custody between parents so that they live with one parent for a designated portion of each year and with the other parent during the remainder. The testimony and observations in this case

show that for most of the 2002-2003 school year Appellant's children lived with their mother in Newark, New Jersey.

The burden of proving that Appellant and his children were domiciled in the Bloomfield school district falls squarely upon Appellant and he must show that they were appropriately attending school there. A child's domicile is normally that of his or her parents. In this case, before and after the divorce the domicile of the children was that of the parent with whom they lived. The proof in this case by Appellant falls short of meeting the burden to show that the children lived with him for the major portion of the 2002-2003 school year. The testimony offered for the time period in question (2002-2003) lacked proof and credibility and I therefore **CONCLUDE,** that Appellant has not met the preponderance of the evidence to show that domicile did in fact exist in the Bloomfield school district.

TUITION REIMBURSEMENT

As a result of the Conclusions, the next question presented is that of tuition reimbursement. *N.J.S.A.* 18A: 38-1 permits the assessing of a parent, for tuition of a student prorated to the time of the student's ineligible attendance in the schools of the district commenced. Respondent has submitted calculations of tuition due for each child, the rate for tuition for the 2002-2003 school year, and a calendar of school class dates for the 2002-2003 school year.

ORDER

It is hereby **ORDERED** that Appellant's claim be and is hereby **DISMISSED.** It is further **ORDERED** that for the days AL, AL, and JL attended the schools of the Township of Bloomfield, that Appellant shall pay Respondent tuition in accordance with the provisions of *N.J.S.A.* 18A: 38-1(b)(2), in the sum of $16, 116.66, and with costs, and interest in favor of the Respondent Bloomfield Board of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 18, 2005
Dated

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

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

2/18/05
DATE

Mailed to Parties:

FEB 22 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX
LIST OF WITNESSES

Petitioner:
Marie Arms
Maria Balzan
Alfred Lembo
Phyllis C. Lembo
Sal Polizzi

For Respondent:
Dr. Nicholas Bruno
Jeff Allyn

EXHIBITS

For Petitioner

P-1 Residential Lease - Alfred O. Lembo for Unit #10 @ 201 Watchung Avenue, Bloomfield, NJ
P-2 Notes from Patricia Vendola **(NOT ADMITTED)**
P-3 Landlord Affidavit **(LIMITED)**
P-4 Amended Dual Final Judgment of Divorce
P-5 Handwritten Notes on Jeff Allyn, Investigator 1/17/03 – 6/6/03

For Respondent

REGISTRATION
R-1 Registration Form - Joseph Lembo
R-2 Registration. Forn1- Alfred Lembo
R-3 Registration Form - Alessandra Lembo
R-4 Home Language Survey dated 8/28/02 (Alfred Lembo)
R-5 Official Transcript Request Form dated 8/28/02 (Alfred Lembro
R-6 Amended Dual Final Judgment of Divorce Filed 11/21/02
R-7 Notice of Request for Disenrollment from Nicholas Bruno to Mr. Lembo Dated November 25, 2002

R-8 Executed Landlord Affidavit

R-9 Unexecuted Landlord Affidavit

R-10 Correspondence dated December 18, 2002 to Alfred Lembo and Angela Lembo from Nicholas Bruno

R-11 Memo to Nick Bruno from Jeff Allyn dated 6/13/03

R- I2 Notice of defect in Application/Potential Ineligibility

R-13 Obligation Slip re Alfred Lembo (Bloomfield High School)

R-14 Memo f'rom Nicholas Bruno to Cirasclla & Oppel dated 8/26/03 **(NOT ADMITTED)**

R-15 Clearance form for students leaving/transferring out of B.H.S. For Alfred Lembo **(NOT ADMITTED)**

R-16 Written request of Angela Lembo Nicastro for school documents for Alfred Lembo dated 8/28/03 for transfer **(Duplicate Exhibit)**

R-17 Clearance form for students leaving/transferring out of B.H.S. For Alessandra Lembo **(NOT ADMITTED)**

R-18 Written request of Angela Lembo Nicastro for school documents for Alessandra Lembo

R-19 Student transfer card for Joseph Lembo

R-20 US Postal Service Change of address or boxholder information Request format

R-21 NJ State Dept. of Education - Nonpublic School Pupil Application Dated 5/22/98 (Communications) **(NOT ADMITTED)**

R-22 NJ State Dept- of Education - Nonpublic School Pupil Application Dated 5/22/98 (Computation) **(NOT ADMITTED)**

R-23 Essex County Educational Services - Multi-measure criteria dated 6/98 **(NOT ADMITTED)**

R-24 Essex County Educational Services -- Multi-measure criteria dated 6/99 **(NOT ADMITTED)**

R-25 NJ State Dept. of Education - Nonpublic School Pupil Application Dated 6/1/99 (Computation) **(NOT ADMITTED)**

SPECIAL EDUCATION

R-26 NJ State Dept. of Education - Nonpublic School Pupil Application Dated 6/1/99 (Communications) **(NOT ADMITTED)**

R-27 CST Pre-Evaluation Medical Information dated 10/27/99 **(NOT ADMITTED)**

R-28 NJ State Dept. of Education -Nonpublic School Pupil Application Dated 10/26/99 **(NOT ADMITTED)**

R-29 Essex County Educational Services - Notification of Meeting dated 11 /30/99 **(NOT ADMITTED)**

R-30 Essex County Educational Services - Permission for the Release of documents **(NOT ADMITTED)**

R-31 Essex County Educational Services -- Consent for Evaluation dated 2/14/99 **(NOT ADMITTED)**

R-32 Essex County Educational Services - Child Study Team Evaluation Notice dated 12/14/99 **(NOT ADMITTED)**

R-33 Essex County Educational Services - Notice of Meeting dated 12/14/99 **(NOT ADMITTED)**

R-34 Essex County .Educational Services - Notification of Mtg. Dated 12/14/99 **(NOT ADMITTED)**

R-35 Essex County Educational Services - Communication Log dated 12/14/99 **(NOT ADMITTED)**

R-36 Essex County Educational Services - Pre-evaluation Meeting Participants Dated 12/14/99**(NOT ADMITTED)**

R-37 Essex County Educational Services - Social Assessment dated 1/4/00 **(NOT ADMITTED)**

R-38 Essex County Educational Services Classroom Observation form Dated 1/l4/ 00 **(NOT ADMITTED)**

R-39 Essex County Educational Services Educational Evaluation Dated 1/4/00 **(NOT ADMITTED)**

R-40 Essex County Educational Services Psychological Report Dated 2/22/00 **(NOT ADMITTED)**

R-41 Essex County Educational Services – Classroom Observation Form Dated 2/22/00 **(NOT ADMITTED)**

R-42 Essex County Educational Services - IEP dated 2/29/00 **(NOT ADMITTED)**

R-43 Essex County Educational Services - Parent Notice dated 2/29/00 **(NOT ADMITTED)**

R-44 NJ State Dept. of Education - Nonpublic school pupil application Dated 5/30/00 **(NOT ADMITTED)**

R-45 NJ State Dept. of Education - Nonpublic school pupil application. Dated 5/30/00 (Supplementary Instruction) **(NOT ADMITTED)**

R-46 NJ State Dept. of Education - Nonpublic school pupil application Dated 5/30/00 (Computation) **(NOT ADMITTED)**

R –47 NJ State Dept. of Education - Nonpublic school pupil application Dated 5/30/00 (Communications) **(NOT ADMITTED)**

R-48 Essex County Educational Services - Multi -measure criteria Dated 6/00 **(NOT ADMITTED)**

R-49 St. Thomas Report Card **(NOT ADMITTED)**

R-50 Essex County Education Services - Notification of Meeting Dated 2/2/01**(NOT ADMITTED)**

R-51 Essex County Educational Services - CST Communication Log Dated 2/2/01**(NOT ADMITTED)**

R-52 Essex County Educational Services -Notification of Meeting Dated 2/2/01**(NOT ADMITTED)**

R-53 Essex County Educational Services - IEP dated 2/12/01**(NOT ADMITTED)**

R-54 Essex County Educational Services - Parent Notice dated 2/12/01 **(NOT ADMITTED)**

R-55 NJ State Dept. of Education -Non-public school pupil application Dated 5/30/01 (Supplementary Instruction) **(NOT ADMITTED)**

R-56 NJ State Dept. of Education-Nonpublic school pupil application. Dated 5/30/01 (Evaluation and Determination) **(NOT ADMITTED)**

R-57 Essex County Educational Services - CST Communication Log Dated 2/1/02 **(NOT ADMITTED)**

R-58 Essex County Educational Services - Notification of Meeting dated 2/1/02 **(NOT ADMITTED)**

R-59 Essex County Educational Services - Notification of meeting dated 2/1/02 **(NOT ADMITTED)**

R-60 Essex County Educational Services - IEP dated 2/19/02 **(NOT ADMITTED)**

R-61 Essex County Educational Services - Team leader check off sheet Dated 2/25/02 **(NOT ADMITTED)**

R-62 Essex County Educational Services - Parent Notice dated 2/19/02 **(NOT ADMITTED)**

R-63 Bloomfield Public School Registration checklist **(NOT ADMITTED)**

R-64 Payment Record of Alfred Lembo, Jr. dated 8/30/02 **(NOT ADMITTED)**

R-65 Bloomfield BOE Request for Parent Participation dated 3/4/03 **(NOT ADMITTED)**

R-66 Bloomfield BOE Request for Student Participation dated 3/4/03 **(NOT ADMITTED)**

R-67 Bloomfield Public Schools IEP dated 3/31/03 **(NOT ADMITTED)**

R-68 Bloomfield Public Schools Emergency Card for Joseph Lembo, Alessandra Lembo and Alfred Lembo

R-69 Information for brothers/sisters attending Bloomfield Schools

R-70 Health History for Joseph, Alfred & Alessandra

R-71 Athletic permission slip for Alfred

R-72 Calculation of Tuition Due

R-73 School Calendar

R-74 Bloomfield Public School Registration Check list Grade 6

R-75 Bloomfield Public School Registration Check list Grade 9

OAL DKT. NO. EDU 6703-03
AGENCY DKT. NO. 280-8/03

SAM BELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/05

Date of Mailing: 4/8/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6703-03
AGENCY DKT. NO. 280-8/03

SAM BELL,
Petitioner,
v.
BOARD OF EDUCATION
OF THE MERCER COUNTY
VOCATIONAL-TECHNICAL
SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

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

Dennis M. DeSantis, Esq., appearing for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: February 16, 2005 Decided: February 16, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (hererinafter "OAL") on September 29, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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

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

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

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

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, DEPARTMENT OF PERSONNEL, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 2005
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

3-3-05
DATE

MERIT SYSTEM BOARD

Mailed to Parties:

MAR 4 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

SETTLEMENT AGREEMENT

WHEREAS, Sam Bell (hereinafter referred to as "Bell") has filed a petition against the Mercer County Vocational Technical School District (hereinafter referred to as "Mercer") before the Commissioner of Education, Agency Docket No.:280-8/03 (hereinafter referred to as the "Litigation"); and

WHEREAS, Bell and Mercer have reached an agreement regarding the Litigation;

IT IS AGREED BY THE PARTIES. AS FOLLOWS:

1) Mercer shall place Bell on Step 15 of the 10-Month Teacher Salary Guide commencing July 1, 2004.

2) Bell shall withdraw, with prejudice, the Litigation.

(3) At such time as the Board of Education of Mercer formally approves the within agreement and Bell has signed the within Settlement Agreement, Mercer shall institute the salary adjustment for Bell as set forth in paragraph 1. above.

SAM BELL

BERGMAN & BARRETT, ESQS.
Attorneys for Petitioner

By: _____
MICHAEL T. BARRETT, ESQ.

Dated :

RECEIVED
2005 FEB 16 P 12:50
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DESTRIBATS, CAMPBELL, DeSANTIS & MAGEE, ESQS.
Attorneys for Respondent

By: _____
DENNIS M. DeSANTIS, ESQ.

Dated : 11/5/14

#130-05

130-05

OAL DKT. NO. EDU 9067-02
AGENCY DKT. NO. 268-9/02

DAVID SHTEINGRADT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter, returned to the agency as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, has been reviewed.

Upon review, the Commissioner notes that, by decision dated February 2, 2005, this matter was remanded for revision of the parties' Settlement Agreement because, although the President of the Linden Board of Education signed the Settlement Agreement on behalf of the Board, neither the file nor the Settlement Agreement contained a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, nor was it signed by the Board attorney as the Board's duly authorized representative. The file now contains the required resolution, so that this deficiency has been cured. However, because the settlement agreement has not been approved by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1, this matter may not be concluded by withdrawal.

Accordingly, the Commissioner now approves the parties' Settlement Agreement and adopts it as the final decision in this matter, reiterating, however, the previously expressed caution regarding terms that appear to have been effectuated prior to final approval of the settlement. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/05
Date of Mailing: 4/8/05

133-05

LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION AND LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER 1 PRINCIPALS AND SUPERVISORS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

This matter arose out of the dissolution of the Lower Camden County Regional High School District which was effective July 1, 2001, and involves the following issues: the employment rights of certain nontenured employees and health benefits following dissolution, and a claim of tenure rights violation by an individual employee, Joel McGuckin. The parties sought and were granted an Order of Partial Summary Decision on the first two issues by the ALJ in a decision issued July 1, 2002. The matter remained open as a contested case pending resolution of the individual employee's claim of tenure rights violation. A settlement agreement on this issue was reached by the parties, and approved in the Initial Decision of the ALJ dated January 12, 2005, ending the contested case.

Upon full and independent review of the record in this matter, the Commissioner approved the settlement terms and adopted the settlement as the final decision on the tenure rights claims associated with Joel McGuckin, and that portion of the instant matter was dismissed subject to compliance with the terms of the settlement. Regarding the ALJ's July 1, 2002 Order, the Commissioner determined that Partial Summary Decision was appropriately granted to the respondents. In so deciding, the Commissioner underscored that *N.J.S.A.* 18A:13-64, which establishes the rights of employees of a regional district in the event of withdrawal from or dissolution of a regional district, is intended to protect only those employment entitlements possessed prior to dissolution, and cannot be read to eviscerate the discretionary powers of a board relating to its nontenured employees nor to vest these individuals, as a result of dissolution, with an *enhanced* status over and above which they possessed in the Regional District. The Commissioner found and concluded that it cannot be plausibly argued that nontenured employees terminated as of June 30, 2001 enjoyed any legitimate claim to "continued" employment in the constituent districts upon the July 1, 2001 dissolution. Accordingly, the Initial Decision, along with the ALJ's July 1, 2002 Order granting Partial Summary Decision to respondents, were adopted as the final decision in this matter and the instant 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.

OAL DKT. NO. EDU 962-00
AGENCY DKT. NO. 83-3/00

LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION AND LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER 1 PRINCIPALS AND SUPERVISORS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. It is noted that this matter is comprised of two components: 1) a settlement agreement covering a tenure and seniority claim of petitioner, Joel McGuckin; and 2) issues with respect to the rights of certain nontenured employees following dissolution of the Lower Camden County Regional School District, decided by an Order of Partial Summary Decision granted by the Administrative Law Judge (ALJ) on July 1, 2002.[1] [2] Petitioners'

[1] On July 25, 2002 the Commissioner declined to review this Order on an interlocutory basis, so that it is now subject to review.

exceptions and respondent's reply exceptions, dealing solely with the employment rights of nontenured Regional District employees, were filed in accordance with *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination in this matter.

Petitioner's exceptions argue that, pursuant to *N.J.S.A.* 18A:13-64 and the Commissioner's interpretation of this statute in *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217 (1996), *aff'd.* State Board October 1, 1997, all nontenured teachers employed by the Regional District were entitled to have their employment continued in one of the constituent districts subsequent to dissolution of the Regional District. Specifically, they point to the Commissioner's discussion of what they contend is this very issue in *Stagaard, supra*, wherein he held:

> [t]he statute in question may not reasonably be found to create an open market where all positions at all constituent districts are subject to preferential claim by staff from the dissolving district, as such a finding would create potential chaos, confer extraordinary rights upon regional staff and effectively usurp the managerial prerogative of the constituent Boards of Education. Rather, the statute must be read to ensure that, for staff affected by the dissolution of their employing district, employment in their current position (Teacher) will be maintained. (Emphasis supplied.)
> (Petitioners' Exceptions at 4-5)

Petitioners contend this "guarantee" was violated in the case of nontenured teachers who were not offered employment in the constituent districts because "[t]heir current position" was not "maintained" as required by the statute. (*Ibid.*) Further supporting their position that nontenured individuals were entitled to this protection, petitioners cite to other language in *Stagaard, supra,* which states that the selection process for positions of employment in the constituent districts could properly be effectuated by allowing Regional District employees to select positions

[2] By letter dated January 24, 2005 from counsel for respondents and letter dated February 1, 2005 from counsel for petitioners, the Commissioner was advised that the issue with regard to employee health benefits addressed in the ALJ's July 1, 2002 Order has been resolved to the parties' satisfaction through collective bargaining and, therefore, is rendered moot, leaving only review of employment rights of nontenured individuals for the Commissioner's consideration here.

available in these districts on the basis of the employees' relative "length of service" in the Regional District. Use of this particular language, it contends, rather than the term "seniority," which only attaches after the acquisition of tenure, clearly demonstrates that a guarantee of employment pursuant to the statute was due to both tenured and nontenured staff members. (*Id.* at 5) Because the respondent constituent districts did not guarantee employment to all individuals with "length of service" but, rather, only did so for those enjoying tenure, petitioners charge that they have violated *N.J.S.A.* 18A:13-64, as interpreted by previous decisions of the Commissioner and the State Board. As a remedy, petitioners seek that each nontenured Regional District employee not employed by a constituent district be compensated his or her full salary for the entire school year subsequent to dissolution. (*Id.* at 6)

In reply, respondents first present the sequence of facts which they aver are necessary to the understanding of this matter:

> [b]y referendum on May 12, 1998, voters of the communities served by the Regional District voted to dissolve that district and to have its facilities and functions assumed by the Constituent Districts. From March 13, 2000 through April 6, 2000, the Regional District employees selected positions they would take in the constituent districts based on their tenure and seniority rights following dissolution, pursuant to *N.J.S.A.* 18A:13-64. The Commissioner of Education established a dissolution date of July 2001.
>
> The Regional District's non-tenured employees also participated in the selection process. By way of instructions contained in an informational packet distributed to the Regional District's certificated staff on March 1, 2000, non-tenured staff members were advised that, while "they were not guaranteed a position anymore than they would be in the absence of dissolution, they [could] identify a preference for any building and subject available." (*See* Certification of Thomas O. Johnston, Exhibit "B")
>
> The Constituent Districts had positions available for some, but perhaps not all, non-tenured employees from the Regional District ***. In any event, <u>all</u> non-tenured employees from the Regional District received the requisite notification of non-renewal under

> *N.J.S.A.* 18A:27-10. (*See* Johnston Certif., Exhibit "F".) (emphasis in text)
> (Respondents' Reply Exceptions at 2-3)

Consequently, respondents submit, nontenured teachers were provided with all rights to which they were entitled. To accept petitioners' position that nontenured Regional District employees were "guaranteed" employment in one of the constituent districts, they argue, serves to confer tenure protection, pursuant to *N.J.S.A.* 18A:13-64, upon individuals who did not otherwise possess tenure. (*Id.* at 3) Moreover, petitioners' reliance on the Commissioner's ruling in *Stagaard, supra,* for support is misplaced, respondents charge. Rather, in that decision:

> the Commissioner found that *N.J.S.A.* 18A:13-64 ensures that, for staff affected by a dissolution of their employing district, employment in their current position will be "maintained" and "all previously accrued tenure and seniority rights will transfer" to the constituent district. The Commissioner further noted that employees will continue employment in the constituent district "as if the entire term of employment had been with the constituent district." Thus, *N.J.S.A.* 18A:13-64 mandates that the Regional District's employees' rights to tenure and seniority merely be "preserved" upon continuing employment with a constituent district. In the case at bar, the Regional District's non-tenured employees had no tenure or seniority protections to "preserve." Nonetheless, petitioner requests that these employees' employment rights be enhanced through dissolution.
> (Respondents' Reply Exceptions at 4) (citations omitted)

Similarly misguided, they propose, is petitioners' ascribing of significance to the State Board's use of the words "length of service" rather than "seniority" in describing the staff selection process in *Stagaard.* Such reference, they assert, was merely intended "to establish an order for employees to proceed through the selection process, not to confer on them extra rights via dissolution -- rights to guaranteed continued employment -- which they would certainly not possess without dissolution." (emphasis in text) (*Id.* at 5-6)

Pointing to *Wyckoff Bd. of Educ. v. Wyckoff Educ. Assoc.*, 168 *N.J. Super* 497 (App. Div. 1979), respondents submit that it is well-established that a board's decision whether

to renew the contracts of its nontenured employees is a managerial prerogative. Further, citing *Getz v. North Hunterdon-Voorhees Regional District Board of Education*, 96 *N.J.A.R.* 2d (EDU) 606, respondents claim that it is likewise well-settled that a board has "virtually unlimited discretion in hiring or renewing non-tenured teachers." (*Id.* at 5) Here, respondents maintain, nontenured Regional District employees were accorded all of the protections afforded them by statute. The constituent districts were required to "preserve" tenure and seniority rights of these employees subsequent to dissolution, which they did. However, they "were under no obligation to preserve what the non-tenured employees did not have." Contrary to the contention of petitioners, respondents urge that *N.J.S.A.* 18A:13-64 does not operate to confer tenure protections on nontenured employees; these individuals are not guaranteed employment after a dissolution any more than they would be guaranteed continued employment without one. (Respondents' Reply Exceptions at 6).

Upon his full and independent review of the record of this matter, the Commissioner has initially considered the Settlement Agreement and General Release and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1. Upon such consideration, he approves the settlement terms and adopts the settlement as the final decision on the claims associated with Joel McGuckin in this matter. That portion of the instant matter is, therefore, dismissed, subject to compliance with the terms of the settlement.

Turning to review of the ALJ's July 1, 2002 Order, the Commissioner determines that Partial Summary Decision was appropriately granted to respondents, as he finds that nontenured Regional District employees received all of the protections to which they were entitled pursuant to *N.J.S.A.* 18A:13-64.

N.J.S.A. 18A:13-64, which establishes the rights of employees of a regional district in the event of a withdrawal from or dissolution of a regional district, in pertinent part, specifies:

> [a]ll employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment has been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***

The underlying purpose of this provision was considered and addressed in *Board of Education of the Central Regional High School District v. Board of Education of Lacey Township and the Central Regional Education Association and Ronald Villano, individually, Ocean County*, 1980 *S.L.D.* 553, 565, wherein it was recognized "that the Legislative intent [of this provision] was to protect the employment rights of those employees [of the regional district affected by the withdrawal] who have provided good and faithful service to the school district." Full consideration of this statute and its legislative intendment demonstrate that it was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. *Balwierczak et al. v. Board of Education of Berkeley Heights, Union County*, decided by the Commissioner December 8, 1999, *aff'd* State Board May 3, 2000. However, as recognized by the Commissioner in *Stagaard, supra*, *N.J.S.A.* 18A:13-64 "must be applied in a manner which preserves the continued employment and accrued rights of such staff, but does not result in the wholesale disruption of existing districts ***[or] confer extraordinary rights upon regional staff and effectively usurp the managerial prerogative of the constituent boards of education." (*Stagaard* at 219)

Against this backdrop, the Commissioner finds it by now well-established that *N.J.S.A.* 18A:13-64 guarantees "[u]pon dissolution of the regional district, a staff member is entitled to continue in the position of teacher, as it would have existed had the regional not been dissolved," *Stagaard, supra,* at 219, with such entitlement not being conditioned on tenure status. *Central Regional, supra; Stagaard, supra.* However, it is also without question that the employment protections guaranteed nontenured individuals are circumscribed by virtue of their nontenured status. ((*N.J.S.A.* 18A:27-10 *et seq.*; *N.J.S.A.* 18A:27-3.1 *et seq.*; *N.J.A.C.* 6 :3-4.1). *Central Regional, supra.* As 10-month contractual employees, nontenured individuals can harbor no expectation of continued employment from one year to the next. It is undisputed that a local board of education has the virtually unlimited discretionary authority to decline to reemploy them, pursuant to the non-renewal provisions of *N.J.S.A.* 18A:27-10 *et seq.*, or to terminate their employment in accordance with the notice provision specified in the parties' contract. (*See Dore v. Bedminster Twp. Bd. of Ed.,* 185 *N.J.* Super. 447 (App. Div. 1982); *John Kufel, Jr. v. Board of Education of the Union County Vocational-Technical School District, Union Co.*, 96 *N.J.A.R.* 2d (EDU) 14, *aff'd.* State Board, 96 *N.J.A.R.* 2d (EDU) 446, *aff'd.* 97 *N.J.A.R.* 2d (EDU 317 (App. Div. 1997) It must, therefore, be underscored that *N.J.S.A.* 18A:13-64, as a *save harmless* provision, is intended to protect only those employment entitlements these individuals possessed prior to dissolution. Neither this statute nor any prior case law interpreting it can be read to eviscerate the discretionary powers of a board vis-à-vis its nontenured employees or operate to vest these individuals, as a result of dissolution, with an *enhanced* status over and above that which they possessed in the Regional District.

Here, all staff affected by the dissolution were entitled to select *available* positions in the constituent districts based on their relative length of service in the Regional District as of May 12, 1998, the date the voters of the constituents comprising this district voted

to approve dissolution. The within record indicates that this selection process, which included both tenured and nontenured staff members, took place March 13, 2000 through April 6, 2000. The record further reflects that, by letter dated April 11, 2001, nontenured Regional District employees were notified, pursuant to *N.J.S.A.* 18A:28-10, that their employment was not being renewed and "all current and future entitlements to employment" with the District would cease at the end of their current contractual term. Thus, the Commissioner finds and concludes that it cannot be plausibly argued that these individuals, terminated as of June 30, 2001, enjoyed any legitimate claim to "continued" employment in the constituent districts upon the July 1, 2001 dissolution.[3]

Accordingly, the Initial Decision, along with the ALJ's July 1, 2002 Order granting Partial Summary Decision to respondents, are adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/13/05

Date of Mailing: 4/13/05

[3] It must be emphasized, however, that any nontenured person who believed that the Board's nonrenewal of his or her employment was in violation of constitutional or legislatively-conferred rights could have pursued such claim through a Petition of Appeal before the Commissioner pursuant to *N.J.S.A.* 18A:6-9.

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

134-05

OAL DKT. NO EDU 11954-04
AGENCY DKT. NO. 392-11/04

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH MAZZARELLA,	:	
SCHOOL DISTRICT OF RIDGEFIELD	:	COMMISSIONER OF EDUCATION
BOROUGH, BERGEN COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/13/05

Date of Mailing: 4/13/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11954-2004

AGENCY DKT. NO. 392-11/04

NO. 392-10/04

IN THE MATTER OF THE TENURE HEARING OF JOSEPH MAZZZARELLA, SCHOOL DISTRICT OF RIDGEFIELD BOROUGH, BERGEN COUNTY,

---

Stanley Turitz, Esq., for petitioner (Ferrara, Turitz, Harraka & Goldberg, attorneys)

David Nash, Esq., for respondent

Record Closed: March 21, 2005 Decided: March 21, 2005

BEFORE **JESSE H. STRAUSS,** ALJ:

This matter involves tenure charges of sexual harassment and conduct unbecoming certified by the Ridgefield Board of Education (the "Board") against Respondent Joseph Mazzarella under the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et. seq.*

Respondent is a tenured teaching staff member employed by the Board. By resolution adopted on October 18, 2004, the Board found the existence of probable cause to certify tenure charges against respondent, which, if credited, are sufficient to warrant a dismissal or reduction in salary. The Board further resolved to suspend respondent without pay effective October 28, 2004, pursuant to *N.J.S.A.* 18A:6-14.

The circumstances that gave rise to the tenure charges involve complaints by several female staff members of the District that respondent improperly telephoned them at home, interfered with their teaching during school hours, and, at least on one occasion, implied to one of them that failure to comply with his requests would impact on her possible tenure.

On or about November 2, 2004, the Board filed its written tenure charges, supporting evidence and a certification of determination with the Commissioner of the Department of Education (Department) together with proof of service upon respondent. Respondent filed an answer to the tenure charges on November 22, 2004. The Department acknowledged receipt of the certified tenure charges on November 3, 2004. Thereafter, the parties were notified by letter dated November 23, 2004, that the Department was referring the matter to the Office of Administrative Law (OAL) for hearing. The matter was transmitted to the OAL on December 9, 2004 and was thereafter assigned to the undersigned on December 17, 2004.

The undersigned conducted a pre-hearing conference in the matter on January 4, 2005 and issued a pre-hearing Order on January 7, 2005, establishing the requisite timeframes for proceeding in this matter in accordance with the provisions of *N.J.A.C.* 1:6B-1.1 *et. seq*. After granting a joint request for a 30-day extension of time to February 23, 2005 in which to complete discovery, the hearing commenced on March 14, 2005. On March 14 the parties proposed a settlement of the matter subject to approval of the Board at its meeting of March 17, 2005. Following that Board meeting, the parties notified the undersigned that the matter had been settled, subject to approval of the Administrative Law Judge assigned and the Commissioner of the Department of Education. They thereafter presented a proposed Settlement Agreement.

Based upon a review of the record, as well as the proposed Settlement Agreement and Board of resolution attached hereto, and the representation of the parties on the record of this matter, I make the following **FINDINGS**:

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.
2. The parties have expressed that the settlement of the matter reflects a determination by the Board that the litigation is unlikely to result in a finding of sexual harassment against respondent, and therefore is unlikely to result in his dismissal, which will mean that respondent would be required to work in the same department with complainants. The parties also desire to save the time, expense and disruption to all parties involved in the prolonged litigation of this matter.
3. The parties to the matter have consented to the terms of the Settlement Agreement as evidenced on the record and as evidenced by the signatures of the parties and/or their authorized representatives on the written Settlement Agreement. At a meeting held on March 17, 2005, the Board authorized the settlement memorialized in the attached Settlement Agreement.
4. Respondent entered into the Settlement Agreement with a full understanding of his rights as evidenced by his representations on the record as well as in the Settlement Agreement.
5. The parties have shown that the settlement of the matter is in the public interest. The terms of the agreement will satisfy the reasonable objectives of the District, will avoid interaction between the complainants and respondent and will avoid the necessity of expensive and time-consuming litigation.

I therefore **CONCLUDE** that this Settlement Agreement meets the requirements of *N.J.A.C.* 6A:3-5.6 and that approval of same is in the public interest.

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

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

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

March 21, 2005
DATE

JESSE H. STRAUSS, ALJ

3-24-05
DATE

M. Kathleen Duncan/eh

Mailed to Parties:

MAR 30 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR 21 P 1:12

SETTLEMENT AGREEMENT

WHEREAS the Ridgefield Board of Education, Mr. Joseph Mazzarella, teaching staff members Rosalia Fiordilino, Darla Ferdinand, Roseann Abate and Nancy Arcuri (hereinafter referred to as "complainants") and the Ridgefield Education Association (hereinafter the "Association") are the parties to this agreement;

WHEREAS Mr. Joseph Mazzarella is employed by the Ridgefield Board of Education;

WHEREAS Mr. Mazzarella has consulted with counsel and has been fully advised of his rights, including but not limited to his due process rights as a tenured employee;

WHEREAS Mr. Mazzarella has consulted with counsel and been advised that the Commissioner has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate;

WHEREAS allegations of sexual harassment and other conduct unbecoming were brought against Mr. Mazzarella by teaching staff members Rosalia Fiordilino, Darla Ferdinand, Roseann Abate and Nancy Arcuri (hereinafter referred to as "complainants");

WHEREAS Mr. Mazzarella has denied all allegations that he engaged in sexual harassment or other conduct unbecoming;

WHEREAS the complainants are members of the Ridgefield Education Association (hereinafter "Association");

WHEREAS the complainants have consulted with counsel and with the Association and have voluntarily consented to the terms of this agreement;

WHEREAS the Ridgefield Education Association has consulted with counsel and voluntarily consents to the terms of this agreement;

WHEREAS the Ridgefield Board of Education certified tenure charges against Mr. Mazzarella on October 28, 2004 alleging that he engaged in sexual harassment and other conduct unbecoming;

WHEREAS Mr. Mazzarella has been an employee of the Ridgefield Board of Education since 1999 and has received only positive evaluations during his employment;

WHEREAS the Ridgefield Board of Education eliminated the position of Director of Curriculum and Instruction subsequent to the certifying of tenure charges against Mr. Mazzarella and Mr.

Mazzarella would be required to work in the same department with complainants in the event this matter is adjudicated and it is determined that he is not subject to dismissal;

WHEREAS this agreement has been entered into voluntarily by the Ridgefield Board of Education, Mr. Mazzarella, the complainants and the Association after consulting with counsel;

WHEREAS a proposed settlement agreement was reached *In the Matter of the Tenure Hearing of Joseph Mazzarella* and entered into the public record at a hearing before Administrative Law Judge Jesse Strauss on March 14, 2005;

WHEREAS as part of the public record at the hearing before Administrative Law Judge Jesse Strauss on March 14, 2005, Mr. Mazzarella, the complainants and Mr. William Miller, President of the Association, indicated on the public record that they have all consulted with counsel and voluntarily consented to the terms of this agreement;

WHEREAS Administrative Law Judge Jesse Straus indicated on the public record that the proposed settlement is in the public interest;

WHEREAS Superintendent Richard Brockel indicated on the public record that he believes the proposed settlement is in the public interest and that he would recommend the approval of the agreement by the Ridgefield Board of Education at its meeting on March 17, 2005;

WHEREAS the proposed settlement agreement calls for the following:

1) The parties, for themselves and all heirs and successors in interest, agree to the mutual surrender of any and all claims that the parties may have against each other resulting from anything that has happened up to the date of this Agreement, including claims of which any of the parties is unaware and claims which are not specifically released and given up in the following language. The parties specifically release and give up any and all claims which each may have against the other arising from or relating to Mr. Mazzarella's employment and separation from employment with the District, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (8) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (9) the Constitutions of the United States of America and the State of New Jersey, (10) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (11) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (12) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.*, including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, (13) the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (14) any expressed or implied contract between the District and the Employee, whether oral or written, (15)

any collective negotiations agreement, (16) all regulations promulgated pursuant to any of the aforementioned laws, (17) any other Federal, State, County, local or District common law, statutes, ordinances, resolutions and regulations not mentioned above, and (18) any employment manual or handbook or personnel or District policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

2) Mr. Mazzarella shall continue as an employee of the District through August 31, 2005, although Mr. Mazzarella shall not report to work for the remainder of his employment. The District agrees to provide Mr. Mazzarella with the administrative salary that he was earning as of September 1, 2004 and provide Mr. Mazzarella all the benefits and privileges that Mr. Mazzarella is contractually entitled to receive through August 31, 2005, excluding any entitlement to sick days, personal days and/or vacation days.

3) Mr. Mazzarella resigns as an employee in good standing effective August 31, 2005 subject to the Commissioner's approval of the agreement.

4) The District agrees to retroactively provide Mr. Mazzarella with the administrative salary and benefits he would have earned at the administrative salary he was earning on September 1, 2004 had he not been suspended effective October 28, 2004. The District agrees to deposit said retroactive payment into an escrow account controlled by Mr. Mazzarella's counsel, Robert M. Schwartz, with a receipt of said deposit provided to Mr. Mazzarella through Mr. Mazzarella's counsel no later than thirty (30) days from the effective date of this agreement. Mr. Schwartz shall release said retroactive payment to Mr. Mazzarella no later than five (5) days after the approval of this agreement by the Commissioner of Education.

5) To the maximum extent permissible by law, the parties agree to maintain the confidentiality of the settlement agreement.

6) The parties agree to refrain from disparagement of one another regarding any and all actions that may have occurred up to the date of this Agreement.

WHEREAS the proposed settlement agreement is subject to the approval of the Ridgefield Board of Education;

WHEREAS the Ridgefield Board of Education has determined that it is in the public interest to avoid the time, expense and disruption to all parties involved in the prolonged litigation of this matter given that the Ridgefield Board of Education has determined that such litigation is unlikely to result in a finding of sexual harassment against Mr. Mazzarella and therefore is unlikely to result in his dismissal;

WHEREAS this agreement satisfies the standards established by the State Board of Education for the settlement of a claim of tenure charges as set forth in N.J.A.C. 6A:3-5.6 and in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846);

NOW THEREFORE be it resolved that the Ridgefield Board of Education approves this agreement at the meeting of the Ridgefield Board of Education held on March 17, 2005, subject to approval by the Commissioner of Education.

FROM :

Joseph Mazzarella

President, Ridgefield Board of Education

William Miller, President
Ridgefield Education Association

Rosalia Fiordilino

Darla Ferdinand

Roseann Abate

Nancy Arcuri

Ridgefield Public School District

DR. JAMES P. VERBIST
SCHOOL BUSINESS ADMINISTRATOR / SECRETARY
MR. JOSEPH D'AMICO, JR., PRESIDENT
MRS. DEBORAH FUGNITTI, VICE PRESIDENT
MRS. LAUREN LARKIN
MR. JEFFREY J. DESIMONE
MR ROBERT DORSETT
MR. JOHN PONTICORVO
MR. MATTHEW SKELLEY

555 CHESTNUT STREET
RIDGEFIELD, NEW JERSEY 07657
201-945-0476
FAX 201-945-7830
JVERBIST@RIDGEFIELDSCHOOLS.COM

The Ridgefield Board of Education met at 7:00 p.m. on Thursday, March 17, 2005 in the High School Cafeteria, Ridgefield, New Jersey.

The following Board Trustees were present:

Mr. Dorsett
Mrs. Fugnitti
Mr. DeSimone
Mr. Ponticorvo
Mrs. Larkin
Mr. Skelley
Mr. D'Amico

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR 21 P 1:11

At said meeting the following Resolution was adopted:

It is hereby moved by Mr. Skelley and seconded by Mr. Ponticorvo that the Board of Education adopted the following Resolution:

Settlement Agreement

BE IT RESOLVED that the Ridgefield Board of Education upon the recommendation of the Superintendent of Schools that the proposed settlement "In The Matter of the Tenure Hearing of Joseph Mazzarella" bearing OAL Docket No. EDU 11954-04, Agency Docket No. 392-11/04; 392-10/04 is in the best interest of the Ridgefield Board of Education;

THEREFORE, the Ridgefield Board of Education hereby approves the terms of the Settlement Agreement as set forth in an open hearing on March 14, 2005 before Judge Strauss and memorialized in a written Settlement Agreement hereby approved by the Board of Education; and that the Board President is hereby authorized to execute said Settlement Agreement; and

BE IT FURTHER RESOLVED that the said Settlement Agreement is subject to the approval of the Commissioner of Education; and

BE IT FURTHER RESOLVED that the Board of Education accepts the resignation of Joseph Mazzarella from the school system as of August 31, 2005 as set forth in said Settlement Agreement.

MAR-18-2005 12:07 FROM:RIDGEFIELD BOOK ED 12019457830 TO:12014890880 P.2/3

Upon Roll Call Motion carried unanimously: 7 Yes 0 No 0 Abstain

I, Dr. James P. Verbist, School Business Administrator/Board Secretary of the Board of Education of the Borough of Ridgefield, in the County of Bergen, State of New Jersey, hereby certify that the above extract from the minutes of the March 17, 2005 Work Session/Business Meeting of the Ridgefield Board of Education to be a true and accurate copy of the official minutes of the meeting.

James P Verbist

Dr. James P. Verbist
School Business Administrator/Board Secretary

3/18/05
Date

#131-05

131-05

OAL DKT. NO. EDU 10753-04
AGENCY DKT. NO. 396-11/04

N.R., on behalf of minor child, C.M.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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 settlement agreement as the final decision in this matter.* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/13/05

Date of Mailing: 4/13/05

* The Commissioner notes that the Board withdrew its counterclaim for tuition prior to entering into this settlement agreement.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10753-04

AGENCY DKT. NO. 396-11/04

N.R. O/B/O C.M.E.,

Petitioner,

v.

HAMILTON TOWNSHIP
BOARD OF EDUCATION,

Respondent.

N.R., petitioner *pro se*

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, attorneys)

Record Closed: March 7, 2005 Decided: March 16, 2005

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 27, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-1.3, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

3-16-05
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

3-21-05
DATE

M. Kathleen Duncan/dn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

Destribats, Campbell, DeSantis, Magee & Staub, Esqs.
247 White Horse Avenue
Trenton, NJ 08610
Tel: (609) 585-2443
Attorneys for Respondent

RECEIVED

2005 MAR 10 P 3:51

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

N.R. on behalf of C.M.E. PETITIONER, v. HAMILTON TOWNSHIP BOARD OF EDUCATION, RESPONDENT.	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **OAL DOCKET NO:** EDU 10753-04 **AGENCY DKT. NO. 396-10/04** STIPULATION OF SETTLEMENT

This matter being opened to the Court by Petitioner, Nancy Rodas, pro se, and the parties having reached a settlement in this matter;

IT IS agreed as follows:

1. C.M.E. may continue as a student in the Hamilton Township School District. C.M.E. is currently attending Yardville Heights Elementary School which is located within the Respondent's school district.

2. Nancy Rodas shall withdraw her Petition in the within matter.

The parties agree to the terms of the foregoing Stipulation of Settlement.

DESTRIBATS, CAMBELL, DeSANTIS,
M AGEE & STAUB, ESQS.
Attorneys for Respondent

BY: Nancy Rodas
NANCY RODAS, Petitioner

Dated : March 7, 2005

BY: Dennis M. DeSantis
DENNIS M. DeSANTIS, ESQ.

March 8, 2005

DESTRIBATS, CAMPBELL
DESANTIS, MAGEE & STAUB
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

135-05

#135-05

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning Board, an Abbott District, filed a petition challenging the Department's denial of funding for certain items in their revised 2005-2006 Preschool Operational Plan, which the Board asserts are necessary to provide a well-planned, high quality early childhood program for the children of Elizabeth. Specifically, the Board challenged denial of funding for "Special Requests" to fund: 1) two additional secretaries for each of three stand-alone early childhood schools; 2) two additional custodians at each of those three schools; and 3) two additional security guards at each. These Special Requests were virtually identical in substance to requests approved in the prior three years from Elizabeth as part of previous Preschool Operational Plans.

The ALJ found that Elizabeth's justification regarding its need for two more secretaries and custodians at each of the three early childhood schools should be accepted in part and rejected in part, and that the Board's request for three security guards at each of the three stand-alone early childhood schools should be granted. In so deciding, the ALJ found that the Board presented convincing argument in support of a particularized need for three security guards, two secretaries and four custodians per school.

Upon a full and independent review of this matter, the Commissioner agreed with the ALJ's conclusions regarding the Board's Special Requests, and approved funding for three security guards, two secretaries and four custodians per school for the 2005-06 school year for the three schools at issue herein, and emphasized his fiduciary responsibility to assure that funds are both utilized efficiently and allocated in a manner that provides for quality preschool programs. Accordingly, the Initial Decision was adopted for the reasons stated therein, as amplified by the Commissioner, as the final decision in this matter.

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

April 14, 2005

OAL DKT. NO. EDU 1876-05
AGENCY DKT. NO. 45-2/05

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties' exceptions and reply exceptions were filed in accordance with the necessarily abbreviated exception period for Early Childhood Program appeals and were considered in reaching the determination herein.

Upon a careful and independent review of the record, the Initial Decision and the parties' exception arguments, and noting that the parties' exceptions raise no new substantive arguments, but, rather, rely on those presented to the ALJ, which were comprehensively presented and evaluated in the Initial Decision, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that: 1) the Elizabeth Board's (Board) Special Request 4 for funding for three security guards for each of the three "stand alone" early childhood schools, for a total of nine security guards, be approved; 2) the Board's Special Request 9 for funding for three secretaries per school be approved for two secretaries for each of the three "stand alone" early childhood schools, for a total of six secretaries; and 3) the Board's Special Request 26 for funding of five custodians per school be approved for four custodians for

each of the three "stand alone" early childhood schools, for a total of twelve custodians for the reasons set forth below.

With respect to the funding of three security guards for each of the three pre-schools at issue, notwithstanding the Department of Education's (Department) document entitled "District One-Year Budget Instructions and Guidance School Year 2005-2006" (Guidance) recommending one security guard per school, the Commissioner finds that the Board herein has demonstrated a particularized need for additional guards due to the size of the schools, the number of exits, the layout of the buildings, the parental traffic and the tender age of the student population. In so concluding, the Commissioner specifically rejects the Department's contention that only two guards are necessary because the guard assigned to process individuals through the metal detector at the front entrance could also monitor the camera surveillance system that covers the roaming security guard's areas. (Department's Exceptions at 4) In the event of a problem or high volume at the metal detector, the guard's attention could be diverted so as to leave the surveillance cameras untended, possibly with tragic consequences. In that assurance of student safety in this era of school violence dictates an abundance of caution in making determinations which could affect student safety, therefore, the Commissioner grants the Board's request for three security guards per facility.

Turning to the Board's request for three secretaries per school, as opposed to the one clerical staff member recommended in the Department's Guidance document for each stand-alone early childhood building, the Commissioner initially observes that the Guidance document makes no provision for differences in size of school populations. Given the absence of guidance for staffing schools with large student populations and the Board's persuasive argument that additional clerical staff are needed for the three stand-alone schools at issue, which have populations of 300-350 students, the Commissioner finds that funding for only one secretary per site is not adequate to provide the clerical support necessary to: 1) ensure a high level of

accuracy in the preparation of documents and reports; 2) provide support for the administrative staff; and 3) handle the constant flow of parents and other visitors. The Commissioner is not persuaded, however, that three secretaries per school, as requested by the Board, are essential to the schools' operations. In so concluding, it is noted that the Board does not contend that the individual schools will not be able to perform any specified functions absent the approval of three secretaries per school. After a comprehensive review of the clerical duties to be performed, therefore, it can reasonably be concluded that the clerical duties can be distributed so that two secretaries per school can effectively provide the required services.

Additionally, in reviewing the number of custodians needed for the schools at issue herein, which contain 20 classrooms each, it is noted that the Guidance document recommends three custodians per facility for schools of this size. After reviewing the Board's arguments and documentation in support of its request for five custodians per school, the Commissioner finds that the Board has failed to demonstrate that it will be unable to provide the custodial services required for the efficient operation of its preschool program in these schools unless funding for five custodians per school is approved. However, given the level of cleanliness to be maintained with a school population of this age, where each classroom has an attached lavatory and students participate in multiple snack times daily in their classrooms, the Commissioner finds that three custodians are insufficient in that such staffing would necessitate a one-person shift either at night or during the day. Accordingly, the Commissioner concurs with the ALJ that funding for four custodians per school is appropriate in these circumstances.

With respect to the Board's contention that the Guidance document has all the hallmarks of administrative rules having statewide applicability and should thus be subject to the notice and procedures of the Administrative Procedures Act (APA) (*see Metromedia, Inc., supra*), the Commissioner notes his concurrence with the ALJ's conclusion that:

> Not every administrative agency policy, such as those contained in the Guidance, must follow the APA procedures, especially where they have been relatively quickly adopted in response to the drum roll of *Abbott* cases. The "moving target" analogy mentioned in *Abbott v. Burke*, 170 *N.J.* 537, 544 (2000) and the Court's reference to the fact that the factual dynamic in these cases constantly is changing, results in a need for DOE to act as quickly, albeit responsibly, as possible. Under the circumstances the DOE's adoption of the Guidance passes *Metromedia* muster. (Initial Decision at 15-16)

Finally, although the Board's claim that there is no empirical data to support the staffing ratios in the Guidance document is not totally without merit, the Commissioner finds that the ratios set forth in that document are simply *recommended* staffing levels, and the Special Request process takes into account the need for flexibility to address particularized needs.

In conclusion, the Commissioner approves funding for three security guards, two secretaries and four custodians per school for the 2005-06 school year for the three schools at issue herein. In so determining, the Commissioner emphasizes that it is his fiduciary responsibility to assure that funds are both utilized efficiently and allocated in a manner that provides for quality pre-school programs.

Accordingly, for the reasons expressed therein as amplified above, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/05

Date of Mailing: 4/14/05

* Pursuant to *P.L.* 2004, *c.*71, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1876-05

AGENCY DKT. NO. 45-2/05

CITY OF ELIZABETH BOARD OF EDUCATION,

Petitioner

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

(Richard E. Shapiro, LLC, attorney)

William F. Cook, Deputy Attorney General, for respondent

(Peter C. Harvey, Attorney General, State of New Jersey, attorney)

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

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

BACKGROUND AND PROCEDURAL HISTORY

In a series of school funding decisions the New Jersey Supreme Court has now required public school districts in this State to provide a "high quality" preschool education beginning at age three. See *Abbott v. Burke*, 153 *N.J.* 480, 505 (1998); *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000); *Abbott v. Burke*, 170 *N.J.* 537 (2002). To do so the Commissioner has promulgated regulations which govern preschool programs (*N.J.A.C.* 6A:10A-1 *et seq.*) and districts now are required, for example, to provide one

teacher and one aid for every 15 children, class size is capped at 15 children and programs must be provided that meet the Department's Preschool Teaching and Learning Expectations: Standards of Quality, 2002.

Pursuant to *N.J.A.C.* 6A:10A-2.3, Elizabeth developed a three year operative plan which was approved by DOE in June 2003 (J-2). Also, *Abbott* districts were required to submit annual programmatic budgets for each school year as well and Elizabeth did so for the 2005-06 school year, the last year of its current three-year plan. (J-1)

Elizabeth's total projected 2005-2006 pre-school enrollment is 3024 - 2439 students enrolled in district-operated programs and 585 students enrolled in programs by private providers. Elizabeth's in-district preschool programs for 2005-2006 will be offered in several places, including temporary classroom units, 21 in-district elementary schools (which include three new pre-Kindergarten through grade 8 schools) and, most importantly for this case, three "stand alone" early childhood schools: (1) the Frances C. Smith Center for Early Childhood Education (School No. 50), School No. 51 (which opened in September 2004) and School No. 52 which is to become operational in August or September 2005.

In August 2004 the DOE's Office of Early Childhood Education provided Elizabeth, as well as all other *Abbott* districts with an instructional package entitled "District One-Year Budget Instructions and Guidance – School Year 2005-2006" (J-1) (hereinafter "Guidance") and the districts then had to submit an annual professional development plan, transition plan, field trip plan, finalized self assessment validation system ("SAVS"), improvement plans and updates of other *Abbott* program areas if there had been any significant changes.

Thus, in mid-November 2004, Elizabeth submitted its 2005-06 operational plan and in January 2005 Assistant Commissioner MacInnis issued DOE's response (J-2,-J-6) in which he denied Elizabeth's "Special Requests" to: (a) fund two additional secretaries for each of the three stand alone schools (J-4); (b) two additional custodians at each of those three schools (J-5); and (c) two additional security guards at each. The DOE did, however, approve one more security guard for each school. Elizabeth

then filed the instant petition challenging the failure by DOE to approve all of the additional positions as arbitrary, capricious, unreasonable and in violation of the *Abbott* directives.

During the present 2004-05 school year and in the past two school years (2002-03, 2003-04) DOE approved, either initially or during an administrative appeal review process, the same number of additional number of custodians, secretaries and security guards whose approval Elizabeth sought in this case (P-1). Of course, the total number of such positions was less in 2003-04 (11) and 2004-05 (22) since only one facility was operational in 2003-2004 (School No. 50) and only two in 2004-05 when School No. 51 first was opened. The third facility (School No. 52) will, as noted, become operational beginning next August or September.

Elizabeth's Special Requests 4, 9 and 26 for 2005-06 were virtually identical in substance to the approved requests in the prior three years. Of course, for 2005-06 there will be an increase in total funding over 2004-05 of approximately $14,000 in salary and $6,000 in benefits for security guards, $16,000 in salary and $6,000 in benefits for secretaries and $23,000 in salary and $6,000 in benefits for custodians due to mandated increases required by the District's contractual obligations and the addition of the third school. Again, in response to the submissions by Elizabeth, although the DOE approved one additional security guard for each school instead of the two more requested; it denied funding for two additional secretaries and two additional custodians for each school.

Accordingly, on January 27, 2005 the District's Supervisor of Early Childhood Education, Valerie Dunn, wrote to Tonia Davis, DOE's Early Childhood liaison to Elizabeth, asking DOE to "clarify" its determination respecting five areas in which non-approvals were given, including the three in issue here (J-7).[1]

[1] Exhibit J-7 consists of Dunn's letter of January 27, 2005 and follow-up communications of February 4, February 8 and February 23, 2005 between the parties to be discussed *infra*.

In that letter Dunn wrote:

> After careful review of the Department's budget approval letter dated January 14, 2005, the following issues are unclear and need clarification:
>
> . . . .
>
> Three custodians have been approved for School No. 50, School No. 51, and School No. 52. Two additional custodians per center have been denied. The additional custodians have been approved in previous years. The five custodians for each center are divided between three shifts. The custodians are necessary in order for the centers to properly maintain the building and to assist with the facilities management. Is more documentation needed to approve the six custodians?
> **COST: Six custodians denied at $240.540 for salaries and $78,000 for benefits**
>
> Two Security Guards for School No. 50, School No. 51, and School No. 52 were approved. One additional security guard was denied for each Early Childhood Center. Three security guards per center have been approved in previous years. Is more documentation needed to approve the three security guards?
> **COST: Three security guards denied at $80,073 for salary and $39,000 for benefits**
>
> One secretary has been approved for School No. 50, School No. 51, and School No. 52. Two additional secretaries have been denied. Three secretaries per center have been approved in previous years. As per special request 9, the secretaries are needed in order to assist the administrators with routine procedures associated with running the school as well as perform a myriad of tasks such as daily attendance, maintaining written and verbal communication with parents, processing and finalizing requisitions, coordinating student activities, and greeting parents and visitors. Is more documentation needed to approve the six secretaries?
> **COST: Six secretaries denied at $177,778 for salaries and $78,000 for benefits**
>
> Your prompt attention to these matters is greatly appreciated. I am hopeful that we can resolve these issues in the near future.

In a reply faxed to Dunn on February 4, 2005 Davis only asked her for more data respecting the salary for a new teacher. No mention was made of the three position categories now in issue and no additional documentation was sought. However, at about the same time (Dunn did not identify a precise date), Davis called her and asked her to "prioritize" the continuing requests for the two additional secretaries, two additional custodians and one additional security guard for the three schools.

In a reply letter dated February 8, 2005, Dunn advised Davis that Elizabeth had reviewed its request for the positions in question and again concluded that all were needed in the 2005-06 school year for proper operation of the facilities (J-7). Thus, after again providing information on the need for all 33 positions, Dunn observed: "we are unaware of any data or factual support from the Department to justify a claim that these positions are expendable or are not needed. On the other hand, we have ample support to justify the continuing need for these positions" (J-7). The DOE did not respond further to the District's assertions of need in the February 8, 2005 letter, did not ask for additional documentation to cure any deficiencies it perceived and repeated its denials in a letter sent to the Superintendent of Schools on February 23, 2005 (J-7). By then, the instant Petition had been filed.

TESTIMONY

A. For DOE

Two witnesses testified on behalf of the DOE, Davis and Eric Rodney, both of whom are Educational Program Development Specialists in the Office of Early Childhood Education. Rodney will be succeeding Davis as the liaison to Elizabeth.

Davis testified that after the Department provided Elizabeth with the "Guidance" Elizabeth submitted its plan which asked for DOE approval of the 15 additional positions in issue. Two months later, except for DOE's approval of one more security guard position at each school, the additional funding requests were rejected (J-6). Davis pointed out that since the Guidance prescribed a recommended number of security guards (one), secretaries (one) and custodians (three), the DOE: (1) reviewed the Special Requests in light of those recommended guidelines (J-1, p.8); (2) considered whether Elizabeth had demonstrated a "particularized need" (J-1, p. 21); (3) analyzed whether the District's submission demonstrated how the requests were "essential to an effective and efficient education in the preschool program"; and (4) reached the decision set forth in the January 14, 2005 MacInnes letter (P-6). She conceded on cross-examination that as far as she knew the DOE did not review its prior approvals for the higher level of funding in the same areas for 2002-03, 2003-04 or

2004-05, nor did it consider a custodian staffing calculation chart which Elizabeth presumably used in part to justify its special request No. 26 (P-2).

The DOE's second witness, Dr. Eric Rodney, also an Educational Program Development Specialist in the Early Childhood Education Office, helped develop the Guidance. He had a direct role in the area of custodial staffing and in that respect had reviewed and analyzed both national and "*Abbott*" district statistics which prescribed needs in terms of a ratio of square footage to numbers of custodians. To that end, he identified a cost study table developed by his office (R-1) which reported a "national median" of 169.65 square feet "maintained per student" and 24,167 square feet "maintained per full time custodial worker."[2] Applying those statistics to Elizabeth's three early childhood stand-alone schools, DOE estimated the District needed only 2.1 custodians per school even though Elizabeth had requested five. Indeed, the DOE approved three per school which itself was one more than the DOE's estimate of the actual need but comported with the Guidance suggested ratio of one custodian for each six or seven classrooms.

B. For Respondent

Four witnesses testified for Elizabeth; Valerie Dunn (Supervisor), Louis Couto (Director of Plant, Property and Equipment), Manuel Gonzalez (Acting Principal at School No. 50) and Lourdes Leon (Principal at School No. 51).

Dunn, of course, has been directly involved as Supervisor in the development and implementation of both the District's Three Year (2003-06) Operational Plan and its One Year (2005-06) program budget, including the Special Requests made in 2003-04 and 2004-05 for Security Guards, Secretaries and Custodians. In preparing those requests she consulted with the two principals and Couto, among others, to ascertain their particular requirements as previously she had done for 2002-03, 2003-04 and 2004-05 (Exs. P-4 to P-15). In those school years a full complement of three secretaries, three security guards and five custodians per school was requested and ultimately were approved without the need to pursue administrative litigation at OAL as

[2] This document's 2002-2003 national statistics were extracted from a study published in a trade magazine to be discussed *infra* (P-3).

had to be done for 2005-06 (P-1). Yet, the needs for 2005-06, she said, are "exactly the same "as in previous school years.

Dunn also commented on the most recent budget "discussion" process which took place between November 2004 and late February 2005 and compared it with prior years during which ongoing dialogue and discussions with DOE took place. This latest effort, she said, was different in that: (1) the DOE, despite being asked, never informed Elizabeth what additional information it needed; and (2) never offered to meet with appropriate Elizabeth staff members to explore any concerns. Indeed, in 2003-04 the parties met face-to-face to discuss and "negotiate" over the Special Requests for 2003-04 (P-11 to P-15) and the apparent lack of interest by DOE to engage in that process this year was disturbing.

Respecting the steps Elizabeth took for 2005-06, Dunn emphasized the work that had gone into the development of the Special Request rationales, including giving DOE a schematic diagram of School No. 50 as an exemplar of what each of the three schools looked like (J-3). Yet, no comment was received from DOE between the District's submission on November 15, 2004 and the denial letter of January 14, 2005 (J-6) pointing to where, if at all, the District's submissions were deficient this year. That is why Dunn sent her letter of January 27, 2005 to Davis (J-7) questioning the January 14, 2005 denials and reiterating the rationale for funding all 33 of the positions. To her great disappointment, the response from Davis on February 4, 2005 made no mention at all of the non-instructional staff requests, prompting Dunn to reply on February 8, 2005 with the justifications previously articulated (J-7).

Of course, as noted, at some point between January 27, 2005 and February 8, 2005, Davis called Dunn and asked her to "prioritize" the requests. The February 8, 2005 letter from Dunn did not do this. Instead, in it Dunn declared that the District was "unaware of any data or factual support from [DOE] to justify a claim that these positions are expendable or not needed" and it was the District's continuing position that DOE, not the District, "should reconsider its decision" and provide funding for all 33 positions as requested. About two weeks later and a week or so after Elizabeth's Petition had been filed, the District received an answer – although the average salaries for in-district teachers had been recalculated, there was total silence as to Special

Requests 4, 9 and 26 to fund the additional positions (J-7, letter of February 23, 2005 from Assistant Commissioners Frede and MacInnes to Superintendent Thomas G. Dunn).

On cross-examination, Dunn agreed the pertinent Special Requests made in 2002-03, 2003-04 and 2004-05 (P-4 to P-10), except for salary and benefit increases mandated by the collective negotiations contract, were identical in language to the 2005-06 versions of the same requests (Exs. J-3,J-4,J-5). This similarity, she said, was to be expected since the needs had not changed.

The next District witness, Louis Couto, has been Elizabeth's Director of Plant, Property and Equipment for the past eight years and supervises the custodial and maintenance staff. He submitted data to Dunn during the preparation of Special Report 26 (J-5) which he developed, in part, from materials he obtained in 1998 at a seminar sponsored by Clemson University (P-16). The author of the data, Edwin B. Newman, had many years of private experience in the facilities management field and had written several articles and books on the subject.

Couto explained that initially he relied on the Custodial Time Standards developed by Feldman (P-16, pp. 2-39, 2-40), which are still current and provide, for example, "[m]inutes per square feet" for a custodian for both routine and project work. Couto assessed the types of areas in the three Centers (all of which essentially have the same design), calculated the square footage of each area and determined from the "Feldman standards" the "time standard per thousand square feet" in a preschool setting and the total time in minutes per day (P-2).

Based on his own experience and personal observations, Couto arrived at an estimate for the time spent by custodians on responsibilities that were not included in Feldman's Custodial Time Standards in order to adjust for the local situation. Also, he made a "per fixture" rather than a square footage calculation for the lavatory/restroom areas and a per room calculation for clean-up after meals in the rooms (P-2). Based on his calculations of the time needed to clean each Center, Couto determined there was a need for 5.2 custodians at each one, which he then "rounded down" to five.

Concerning the data upon which Rodney said he relied (R-1), Couto noted it was a general survey only, did not address Elizabeth's specific custodial duties (which may differ), or how many persons even responded to the survey. In the absence, as well, of any indication it was particularized to the preschool setting , the survey in Couto's view was "not useful"[3]

On cross-examination, Couto conceded he had never seen the DOE standards for custodial staffing and was not aware of the ratio recommendation contained in the Guidance (J-1, p. 8 – "one janitor for every six to seven classrooms in a stand-alone ECE building"). Rather, he used the data from Feldman (P-16), which he adjusted to account for Elizabeth's particular needs in schools with 300 preschoolers and 60 or so staff.

The next witness for petitioner was Manuel Gonzalez, Acting Principal at School No. 50 in the absence of its regular principal who has been on sick leave since November 2004. The Center, he said, has 20 teachers, 20 teaching assistants, nurses, facilitators, child study team personnel, three secretaries, three security guards and five custodians in addition to about 300 students. The school is located in a mall adjacent to a supermarket where there is substantial vehicular traffic.

Gonzalez identified the schematic plan of School No. 50 (P-17) and described where the children arrive each day, either on foot, by car or in 14 buses. One security guard is located at a set of doors near the main entrance where a metal detector is located and through which persons must pass after they sign in. A second security guard is located about 100 feet away (out of sight of the first guard) at the end of a corridor where there is a security door to the classroom area. The guard also can scrutinize a passageway to a loading dock and his or her major role is to make sure no unauthorized persons enter the classroom areas. A third guard "roams" the classroom area to watch for and respond to potential problems since the other two guards mainly are responsible to attend to the entry door points. Gonzalez also noted there are doors located on the side and in the back of the school which are kept locked unless there is

[3] Rodney, who identified P-3, was unclear as to its genesis other than it was authored by one Joe Agron who apparently is Editor-in-Chief of American School and University, a trade publication in which P-3 appears in its April 2003 edition. As noted, R-1 is a table of statistics taken from P-3, p. 32.

a need to open them from the inside when, for example, deliveries are made. He periodically checks these doors himself to make sure they are locked.

In short, given the physical layout of School No. 50, Gonzalez insisted all three security guards are needed and the loss of even one would severely impair his ability to offer the same level of safety and protection that now exists, especially in the classroom areas.

Next, regarding the need for three secretaries rather than only one, Gonzalez said each has very distinct responsibilities (P-18) and the voluminous amount of "documentation" they must handle daily, along with their many other chores, makes the need for all three a vital one. All are kept busy all day and to lose even one, no less two, would be "devastating".

Regarding the continuing need for the five custodians which he now has, Gonzalez asserted that actually he could use a sixth and having "only" five means the crew "has to push". Given the fact the school houses about 300 three to four year olds each day, plus staff and visitors, and that every one of the 20 classrooms has its own lavatory, he claimed he would be unable to meet the minimum standards for proper hygiene without all five.

On cross-examination, the witness agreed there are nine security cameras at the school and a monitor which also are used for security purposes. However, the monitor is not in a location that can be seen by the guard stationed at the metal detector site, and no one else is available to perform that task.

The final witness for Elizabeth, Lourdes Leon, is principal of School 51, which opened in September 2004. The physical layout there is similar to that at School No. 50, except her Center has enclosed play areas (P-20). The school is located in an area of Elizabeth where there is a substantial amount of traffic and each day 11 large buses deliver and pick up students.

With respect to the need for three security guards at her school, Leon explained that due to the particular layout the guard at the front entrance area who monitors the

metal detector cannot see the second guard who is posted at the entry doors to the classroom areas which can only be opened electronically by "swiping" a card (similar to School No. 50). The third guard is the "roamer" who meets the buses when they arrive, controls traffic flow and during the rest of the school day patrols the corridors in the instructional area. Thus, as far as Leon is concerned, her school's security needs are such that she could not tolerate the loss of even one guard. As she put it, the building "would not function" given the daily demands placed on it to provide safety for 300 students, 60 staff and perhaps 50-60 visitors.

As far as the secretarial need is concerned, Leon was adamant that having only one secretary is "impossible", and even two could not satisfactorily do all the work. In fact, all three are kept busy every day and she could use a fourth secretary to assist the others.

Finally, regarding the special request for five custodians, Leon said there is no question all are needed. The building cannot be kept clean on a daily basis with just three or even four custodians since 20 classrooms must be wet mopped daily, each lavatory must be sanitized and all of the myriad other requirements must be met. As she put it, the children "live in those classrooms most of the day".

On cross-examination, Leon stressed that the three to four year old age group requires a great deal more attention in terms of clean-up than older children, and although each classroom has a lunch-time assistant for two hours to relieve the teachers and aides, they are not custodians or janitors and are there to help with the children. Again, as far as the extra security guards are concerned, she stressed the need for all of them and even though there are 14 security cameras and an alarm system in the school, there are "blind spots" which cameras cannot see.

DISCUSSION

The Guidance supplied to Elizabeth and all other *Abbott* districts explained the purpose, *inter alia*, of Special Requests as follows:

> *Abbott* preschool programs must meet the unique educational needs of the children in each *Abbott* community and arrange for the necessary supports to enable every child to achieve the State's Core Curriculum Content Standards. As such, budget guidance may not identify all aspects of a quality preschool program for every district. To remedy this problem and enable districts to identify what the New Jersey Supreme Court terms "particularized needs," the Department will accept Special Requests. Special Requests are those that either exceed the recommended costs in categories defined by the budget guidance or represent categories not contained in the budget guidance or budget worksheet deemed essential to an effective and efficient program within a category of particularized need identified by the district or a provider.
> (J-1, at pp. 20-21)(emphasis added).

A Special Request requires the use of a special form (J-1, p. 22) and the directions note it is a one-year request that either: (1) does not fit within; or (2) exceeds the amounts in any of the line-item categories contained in their respective budget guidelines. The Guidance further requires that sufficient detail accompany the request since:

> Only those special requests accompanied by detailed descriptions and justifications, including documented evidence of need and/or effectiveness from studies, evaluations, needs assessments, etc. will be considered by the Department. Two separate and complete estimates must be submitted for each special request related to the item or service. Please submit only one request per form. You may attach any additional relevant information or documentation to support your request.
> (J-1, p.22)

For the reasons which follow I believe Elizabeth's justification regarding its need for two more secretaries and custodians at each school should be accepted in part and rejected in part, and that its insistence that it needs all three security guards at each Center should be sustained.

Secretaries (J-4)

The Guidance suggests a recommended ratio of one secretary per stand alone building. Elizabeth seeks funding for three secretaries at each, the same number approved since 2002-03 (Exs. J-1,J-4,P-1,P-9.) The January 14, 2005 MacInnes letter disapproved Special Request 4 to maintain all three secretaries since the Guidelines only budget for one, and there are three "district-wide clerical positions" which can be used to fill in as needed. In my view, given the assigned duties which the secretaries perform as explained by Gonzalez and Leon, providing only one secretary at each Center would be counter-productive and a second secretary to help handle the myriad assigned tasks is a must. If there is need for more support the district-wide clerical staff should be able to fill that need.

As the DOE noted, each Special Request relates to its own school year and what DOE approved in the past, while evidential, is not dispositive. With only a finite amount of funds available, and bearing in mind that preschool education is not of State Constitutional dimension, priorities must be established and what was affordable in one school year may not be affordable in the next. There is no requirement in any statute, rule, policy or *Abbott* decision which mandates continuation of the same staffing level given the fact that costs increase even if staffing does not. As the DOE points out, while approvals or denials of special requests are not to be "formulaic", neither are they written in stone simply because there was an approval the previous year. The Guidance provides a recommended ratio, demands an annual reassessment and explains that approval is warranted only where the request is "essential" to meet a "particularized need". That analysis was done in this case and I recommend the DOE modify its prior action and approve a total of six secretaries for the three Centers rather than only three.

Custodians (J-5)

For the 2005-06 school year, Elizabeth requested DOE approval to fund five custodians per Center. The DOE approved funding for only three (J-6) even though each school had five custodians in prior school years (P-1,P-7). Substantial testimony was offered by Rodney, Cuoto, Gonzalez and Leon on this item. Rodney, in particular,

has researched and analyzed the area and relying in part on the published study (P-3,R-1) as well as other data, he believes the Guideline recommendation of one custodian for 6 to 7 classrooms was acceptable. Since each Center has 20 classrooms this resulted in a determination that three custodians are needed for each, not five (J-1, p. 8).

Cuoto, on the other hand, resorted to the Newman materials (P-16) and adjusted some of the data to what he felt, based upon his "observations", "experience" and "actual time measurement", to be the actual needs at the three Centers. For example, where the Newman data assigned only 20 minutes per 1000 square feet of classroom space (P-16), Cuoto adjusted that upward by 30 percent to 26 minutes (P-2).

On balance, given the direct observational testimony offered by Couto, Gonzalez and Leon, a "particularized need" for one more custodian at each Center is warranted given the type of demands made on them to service the school population involved. Although not dispositive, the square feet per student maintained in Elizabeth (152.865) is about 10 percent less than the national median of 169.85 reported in April 2003 in the cited cost study (P-3,R-1). Whether it actually takes 26 minutes to clean a classroom and attached lavatory rather than 24, or 20 or less may never be known with certainty. However, even given the description of the work performed by the custodians at School No. 50 (J-7,P-2,P-10,P-14,P-18) and at School No. 51 (P-19), the District has failed to demonstrate that unless funding for five custodians is approved it will not be able to provide the type of services required for an efficient preschool program. If after a year of experience with one less custodian per Center the District is able to provide detailed justification rather than generalized observations and somewhat suspect statistics regarding time management, I am sure the DOE will closely assess the new data. For 2005-06, then, I recommend approval of a total of 12 custodians for the three Centers, four at each one. Reducing the number to only nine as the DOE suggests would require a one person shift either at night or during the day. That is not workable.

Security Guards (J-3)

With respect to the security guard complement, Elizabeth contends it needs three at each school, or a total of nine (Exs. J-4,P-5,P-8), the number they have had per school since 2002-03 (P-2). The Guidance document (J-1) recommended just one per school, but the DOE approved two and rejected the third (J-6).

A quite detailed justification for three guards per school was offered by Gonzalez for School No. 50 and Leon for School No. 51, accompanied by floor plan diagrams for each (Exs. P-17,P-20). The need at School No. 51 was further articulated in Leon's memorandum of February 9, 2005 to Dunn (P-19) and, to a lesser extent by Gonzalez the previous day (P-18). Given the size of the areas to be covered, the security issues when the guards are occupied at their individual posts, the parental traffic in and out during the day, the need for extra vigilance at arrival and departure times and during fire drills and the vulnerability of students of such tender age, I believe Elizabeth has demonstrated a particularized need to continue to receive funding for three security guards per Center. An abundance of caution is required in this vital area and deleting even one guard per Center would be unacceptable, if not potentially dangerous. Thus, I recommend that funding be provided for three security guards at each Center, or a total of nine for all three sites.

A few final comments are in order. First, Elizabeth argues that the contents of the Guidance are nowhere to be found in the regulations and since they have "all the hallmarks" of administrative rules having statewide applicability, they should have been subjected to the notice and hearing procedures of the Administrative Procedure Act. See *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1981). As a corollary, Elizabeth also argues that neither the DOE regulations nor the Guidance provide "ascertainable standards" to guide the agency in carrying out its discretionary function in determining whether a "particularized need" has been shown.

I must disagree. Not every administrative agency policy, such as those contained in the Guidance, must follow the APA procedures, especially where they have been relatively quickly adopted in response to the drum roll of *Abbott* cases. The "moving target" analogy mentioned in *Abbott v. Burke*, 170 *N.J.* 537,544 (2000) and the

Court's reference to the fact that the factual dynamic in these cases constantly is changing, results in a need for DOE to act as quickly, albeit responsibly, as possible. Under the circumstances the DOE's adoption of the Guidance passes *Metromedia* muster.

Next, Elizabeth argues that there is no reliable empirical data to support the DOE's recommended staffing ratios, as witnessed by Rodney's reliance on a study which it claims is seriously flawed in terms of a scientific basis. I, too, mentioned some of these very deficiencies, as did Couto, *e.g.*, the type and number of schools to which the surveys were sent, the number of respondents, etc. Indeed, the article cautions that the statistics are only "benchmarks, keeping in mind that all costs are greatly affected by a number of factors . . . ." (P-3, p.32). Nevertheless, the Guidance ratios, as DOE points out, are only recommended "thresholds" and the entire Special Request process takes into account the need for flexibility in terms of "particularized need". The suggested ratios are, in my view, legitimate benchmarks against which specific situations for 2005-06 are to be measured. In that light I find them to be perfectly acceptable. Indeed, in this very case even though the Guidance recommended a ratio of only one security guard to each stand alone, the DOE itself approved two guards (J-6), and I also have recommended one additional custodian and one additional secretary.

I also disagree with Elizabeth's claim that the DOE has ignored its own regulation by failing to provide specific reasons for denying a program or expenditure. See *N.J.A.C.* 6A:10-9.7(a)(1). While DOE could, and perhaps should have been more detailed in describing why the special requests were rejected in whole or in part, they were not "formulaic".

Finally, DOE did not "sit mute" in regard to Elizabeth's inquiries as to what additional information was needed (J-7, Letter of January 27, 2005). Soon thereafter, Davis spoke to Dunn and asked her to "prioritize" its requests – to me an open invitation to Elizabeth to enter into a bilateral dialogue over the special requests. Elizabeth's response, which is contained in Dunn's letter of February 8, 2005 (J-7), was an outright rejection of any offer to negotiate and constituted a demand that the DOE, not Elizabeth, modify its stance. Indeed, Dunn herself cited the 2003-04 process where,

following DOE's initial rejection of special requests, Dunn, Davis and Frede met and entered into a discussion leading to a modification of DOE's position (P-13,P-15). There is no reason why Elizabeth did not seek to pursue the same course of action in January-February 2005, and Dunn agreed with me when I commented that Elizabeth could have initiated face-to-face discussions as well. In some way both sides sat "mute", but I cannot say that DOE in violation of its *Abbott* obligation thoroughly to assess the District's actual needs failed to do so.

CONCLUSION AND ORDER

Accordingly, I hereby **CONCLUDE** and **ORDER:** (a) with respect to Special Request 4 (Security Guards) that funding for three per Center (a total of nine) be approved; (b) with respect to Special Request 9 (Secretaries) that funding for two per Center (a total of six) be approved; and (c) with respect to Special Request 26 (Custodians) that funding for four per school (a total of 12) be approved.

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

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

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

March 22, 2005
DATE

STEPHEN G. WEISS, ALJ

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

March 22 2005
DATE

Mailed to Parties:

MAR 23 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Witness List:

For Elizabeth Board of Education:

Valerie Dunn

Louis Cuoto

Manuel Gonzalez

Lourdes Leon

For the New Jersey State Department of Education:

Tonia Davis

Eric Rodney

Exhibit List:

J-1 District One-Year Budget Instructions and Guidance, School Year 2005-2006

J-2 Three-year Operational Plan (2003-2006) and one-year Early Childhood Programmatic budget (2005-2006), Board of Education of Elizabeth

J-3 Special Request 4, Security Guards

J-4 Special Request 9, Secretaries

J-5 Special Request 26, Custodians

J-6 January 14, 2005 Decision Letter

J-7 Letters of January 27, 2005, February 4, 2005, February 8, 2005 and February 23, 2005

P-1 Chart of DOE Approvals (2001-2002 through 2005-2006)

P-2 Custodian Staffing Calculation (School No. 50)

P-3 Thirty-second Annual M&O Cost Study, American School & University Magazine, pp. 26 et seq., April 2003

P-4 Letter of January 15, 2004 to Superintendent Dunn

P-5 Special Request 4 for Security Guards (2004-2005 School Year)

P-6 Special Request 9 for Secretaries (2004-2005 School Year)

P-7 Special Request 26 for Custodians (2004-2005 School Year)

P-8 Special Request 4 for Security Guards (2003-2004 School Year)

P-9 Special Request 9 for Secretaries (2003-2004 School Year)

P-10 Special Request 26 for Custodians (2003-2004 School Year)

P-11 Letter of January 6, 2003 from Frede and MacInnes to Thomas G. Dunn, Jr.

P-12 Abbott Preschool Program, One Year Programmatic Budget Worksheet for 2004-2005

P-13 Notes of Meeting of January 27, 2003

P-14 Description of Custodian Duties

P-15 Letter, February 14, 2003 from Frede to Thomas G. Dunn, Jr.

P-16 Clemson University Custodial Staffing and Standards Handout (1998)

P-17 Floor Plan of School No. 50

P-18 Memorandum from Gonzalez to Dunn, February 8, 2005

P-19 Memorandum from Leon to Dunn, February 9, 2005

P-20 Floor Plan of School No. 51

R-1 Statistics from 32nd Annual M&O Cost Study (From P-3, p. 32)

R-2 (For Identification) Custodial Staffing Statistics for Elizabeth and 16 Other *Abbott* Districts

136-05

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Abbott District Board of Education challenged the Department's denial of funding for certain items in its revised 2005-2006 Preschool Operational Plan, which the Board asserts are necessary to provide a well-planned, high quality preschool program for Vineland's children. Specifically, the Board challenged the Department's denial regarding: 1) unconditional approval of the request for matching funds for its Families and Children Early Education Services (FACES) grant; and 2) the request for a food service worker's salary and benefits.

On the first issue, the ALJ denied the Board's claim, emphasizing that the Department did not deny Vineland's request, but took the position that a commitment to fully match the FACES grant, which has not been officially funded, will not be made until the monies are actually needed, which may, if such approval occurs after final district budget approval, require the Board to review its preschool account to determine if additional funds are available or can be reallocated at the time that the grant award is approved. In so concluding, the ALJ cited the Department's obligation to scrutinize closely the spending of state monies by local school districts. On the second issue, the ALJ ordered the Department to direct Vineland to include the food service worker's salary and benefits in the preschool budget, concluding that, as a mandated preschool program expense, it is properly part of the preschool budget. The ALJ found that the Department's directive to include food services costs for the preschool program in the K-12 district budget as part of the Fund 50 ("enterprise account") line item would unnecessarily commingle expenditures, leading to accounting confusions and inaccurate reflections of the financial condition of each program. Furthermore, the ALJ found inconsistent the Department's directive to transfer the disputed employee expense into a fund run at a deficit when the Department is concurrently requiring other employee expenses to be moved out of the fund.

The Commissioner concurred with the ALJ's findings regarding issue #1 above, and adopted that portion of the Initial Decision. With respect to issue #2, however, the Commissioner set aside the Initial Decision, finding that the Department's directive to place preschool food service worker expenses in Fund 50 was appropriate given the nature of the district's food service operation and the purpose of the enterprise fund; he also found no basis on the record to conclude that the Department had ordered other food service employee expenses to be transferred out of Fund 50. The Petition of Appeal was dismissed in its entirety.

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 15, 2005

OAL DKT. NO. EDU 660-05
AGENCY DKT. NO. 41-2/05

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, timely exceptions were filed by the respondent Department of Education (Department); neither exceptions nor replies to the Department's exceptions were filed by the petitioning Board of Education (Board).

In its exceptions, the Department takes issue with the Initial Decision's conclusion that salary and benefits for an in-district food service worker should be funded as an approved miscellaneous expenditure within the Board's preschool budget, rather than accounted for within the district's overall budget through the enterprise fund ("Fund 50"). According to the Department, although there is no specific statute or rule with respect to where food service worker salary and benefits must be placed within a school budget, Fund 50 is singularly appropriate because of its unique status as an isolated auxiliary fund for programs that generate their own revenues against which to charge associated expenditures. Moreover, because Fund 50 is a district-wide fund from

which the district's entire food service operation is run, it appropriately covers operations associated with all grades within the district, not only those for K-12. Countering the concerns of the Administrative Law Judge (ALJ) with respect to commingling of expenditures, the Department notes that the Board presently funds its preschool food service worker through Fund 50, and that there is no evidence of confusion in accounting or inaccurate reflection of preschool or K-12 fiscal condition occurring as a result. Finally, in response to the ALJ's finding that the Department is inconsistent in requiring transfer of some food service employee expenses into a fund that is running a deficit at the same time it is requiring other such expenses to be transferred out, the Department contends that while the Board has indeed been directed to submit a corrective action plan to decrease the deficit in Fund 50, there is no evidence, either documentary or in testimony of Board and Department witnesses, of any Department directive to effectuate the plan by transferring food service employee expenses to other accounts. (Department's Exceptions at 2-4)

Upon review, the Commissioner initially concurs with the ALJ, for the reasons clearly set forth in the Initial Decision, that the Department was correct in denying unconditional approval to the Board's request for matching funds for its FACES grant. The Commissioner, like the ALJ, fully endorses the Department's position that, if the grant application is acted upon subsequent to approval of the final district budget, funding should be provided only to the extent that matching costs cannot be met through additional revenue or reallocations identified within the approved budget.

With respect to the disputed food service worker expenditure, however, the Commissioner cannot agree that the Department erred in denying the proposed

expenditure and directing instead that it be placed in Fund 50 within the general budget. Rather, the Commissioner concurs with the Department that such allocation is appropriate for two reasons, both of which contrast with the situation facing private providers: 1) School district budgets include a differentiated auxiliary fund (Fund 50) expressly for those programs such as food services which generate both revenue and expenditures, with the expectation that, where a program contributes revenues, associated costs will also be handled through the fund, the goal being to reach eventual self-sufficiency; and 2) the Board's food service operations are district-wide, so that there is no practical or budgetary reason to segregate preschool food service costs from those for K-12. This view is not altered by the fact that the Board's Fund 50 is presently in deficit; that is a matter appropriately addressed, as is being done in this instance, through a corrective action plan to move the fund toward self-sufficiency within the context of the full district budget, not by allocating a cost that clearly belongs in the district-wide enterprise fund to the separate preschool budget.[1] Additionally, there is nothing on record to support the Board's suggested finding that, without approval of the disputed expenditure within the preschool budget, the Board will be unable to ensure that its preschool students receive adequate nutrition and education; the Department, as noted by the ALJ, is not arguing that the Board's preschool food service program requires no staffing, but rather that, because of the nature of the district's food service operation and

[1] There is nothing on record to support the ALJ's statement, at page 5 of the Initial Decision, that the Board's approved corrective action plan includes "the effort to move other food worker related expenses out of fund 50 to show less of a deficit;" certainly there is no evidence that the Department directed any such strategy.

existence of the enterprise fund, such staffing as it needs should be funded and assessed within the context of the district's general budget.[2]

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein with respect to the Department's denial of unconditional matching funds for the FACES grant, but, for the reasons expressed above, is set aside with respect to denial of funding within the preschool budget for food service worker salary and benefits. The Petition of Appeal is, therefore, dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/05

Date of Mailing: 4/15/05

[2] Board testimony indicates that the disputed request is for the same preschool food service worker who is currently funded through Fund 50, and that the Board seeks, as it has done repeatedly in the past, to transfer the cost of this employee from its general budget to the early childhood fund. (Hearing Transcript at 83)

[3] Pursuant to P.L. 2004, c. 71, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six (6) days of the Commissioner's decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 660-05

AGENCY DKT. NO. 41-2/05

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert A. DeSanto, Esq., for petitioner (Gruccio, Pepper, DeSanto & Ruth, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 17, 2005 Decided: March 24, 2005

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The City of Vineland School District (petitioner or Vineland) is an Abbott district as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. On January 14, 2005, the New Jersey

State Department of Education (respondent or Department) notified the petitioner it had reviewed its 2005-2006 revised Preschool Operational Plan. The Department approved a total budget amount of $12,605,148. On February 8, 2005, Vineland filed a Petition of Appeal with the Commissioner disputing five items in the submitted budget that were not approved for funding. Those items were: (1) a partially-approved special request for office supplies and materials; (2) Families and Children Early Education Services (FACES) grant match; (3) a food service worker salary and benefits; (4) supplies for family workers; and (5) salary and benefits for a part-time janitor. On February 16, 2005, the Department transmitted the contested case to the Office of Administrative Law (OAL). On the same date, the Department's Answer was filed with the OAL, pursuant to *N.J.A.C.* 6A:10A-9.7c. On March 10, 2005, the hearing was held before the undersigned at the OAL offices, in Mercerville, New Jersey. Prior to the record being opened on the day of hearing, counsel for the parties advised the Court that petitioner had withdrawn its request for office materials and supplies (No. 1 above) and supplies for family workers (No. 4 above). Also, the parties discussed the request for salary and benefits for a part-time janitor (no. 5 above) and that request was reexamined and granted by the respondent based on new information supplied by petitioner.

That left two remaining issues, those being the request for matching funds of the Families and Children Early Education Services (FACES) grant and the request for a food service worker's salary and benefits. The record remained open following the hearing to permit the parties to submit post-hearing briefs. By letter dated March 16, 2005, and received at the OAL on March 17, 2005, the respondent filed a written closing statement setting forth the arguments in support of its position.

DISCUSSION

A. Families and Children Early Education Services (FACES) Grant Match

The FACES grant has been issued to Vineland each year commencing with the 2002-2003 school year. This is a grant funded through the New Jersey Department of Human Services and is used to promote literacy, parent education, prenatal and health services and childcare. For the school years of 2002-2003 and 2003-2004, the Department approved the matching funds in

the amount of $250,000 without any conditions. For the 2004-2005 school year, the Department approved a matching grant in the amount of $125,000 without conditions. The petitioner has requested $125,000 from the Department as a matching grant for the 2005-2006 school year. It has not been disputed that the services and programs run by Vineland and funded by the FACES grant are the same as they have been since they were instituted in the 2002-2003 school year. In this matter, petitioner is requesting an unconditional approval of matching funds from the Department in the amount of $125,000. Vineland argues that without an unconditional approval it cannot represent to the Department of Human Services that it will have sufficient funds to implement the programs designed to be funded by this grant and thereby put the entire grant in jeopardy.

Respondent's position is set forth in the documents in evidence marked as R-1. R-1 consists of four letters between Dr. Ellen Frede of the Department of Education and Dr. Clarence Hoover, the superintendent of the Vineland Public School District. R-1 consists of four letters, the first being dated February 6, 2005, and the last being March 3, 2005. The last letter, from Dr. Frede to Dr. Hoover, sets forth respondent's position in clear and concise terms. That correspondence states, in applicable part:

> This letter will serve to reaffirm that in the event that DHS funds FACES, the department will amend Vineland's preschool budget to include the $125,000 match. If the approval comes after the final district budget approval, Vineland must first review its pre-K account to determine if additional revenues are available or if funds can be reallocated. If Vineland has insufficient funds in its pre-k account, the DOE will increase the payments by $125,000.

Therefore, it is the Department's position that should DHS approve Vineland's request for a FACES grant prior to the Department approving its final district budget the Department will provide matching funds up to $125,000. If, however, the FACES grant application is not approved by DHS until after the Department approves the final district budget, then the budget will be reviewed to determine if there are any unspent funds within the pre-K account which can be applied to the Department's portion of matching funds.

Vineland makes two counter arguments. First, it states that excess funds cannot be determined until the end of the school year because there is no way of knowing what events may occur during the year to require expenditures. Therefore, until the entire year's expenses are determined, there can be no finding of excess funds. Secondly, Vineland alleges that in practicality, the Department never increases a budget amount in the middle of a budget year, even when they clearly should do so, such as in cases where enrollment increases. I find this second argument to be speculative and not worthy of further discussion.

For purposes of clarification, Vineland has no dispute with the Department with respect to payment of the $125,000 in matching funds prior to the District budget's approval. It is only if the Department of Human Services does not issue its FACES grant until later in the year, meaning post-District budget approval, where a problem may arise.

The Department is not denying Vineland's request. Its position is it will not commit to fully match the FACES grant until it confirms the funds are actually needed. The Department believes this is prudent fiscal policy as there may be unspent funds in Vineland's budget because of unrelated circumstance or unanticipated events. This is not an unreasonable stance. The Department has an obligation to closely scrutinize the spending of state monies being given to local school districts. Without that scrutiny there is a risk state monies will not be spent in accordance with their intended purpose. Therefore, it is not unreasonable for the Department to periodically review a local district's budget and spending to confirm a need continues to exist and the funds are being used to address that need. It is universally recognized the budget process is constantly evolving. Unexpected events occur during any given school year which change the need for funding. Sometimes districts have unexpected expenses and need their funding supplemented. Other times anticipated expenses do not come to fruition and a budget may show a surplus. Consequently, the Department has an obligation to confirm that funds are needed before it makes an expenditure to a local district and it would be appropriate to also confirm the district does not have excess funds before doing so because if unspent budget funds exist there is no need for a district to be granted additional funds and thereby increase its surplus.

For the reasons set forth herein I **DENY** Vineland's request for an order directing the Department to unconditionally approve matching funds awarded to petitioner through a FACES grant.

B. Food Service Worker Salary and Benefit

On this issue, Vineland has requested the Department fund a food service worker's salary and benefits for its preschool program. The amount requested is $24,740.00 being made up of $11,740.00 in salary and $13,000.00 in benefits. Petitioner argues a food service worker is needed because the Department requires Vineland's Preschool Program to take part in the Child and Adult Care Food Program and the National School Lunch Program in the same way its K-12 operation does. In addition, Vineland argues that it is required by regulation *N.J.A.C.* 6A:10A-3.6(j) that "each school shall provide an enriched balanced nutritional food program. . ." Petitioner argues without funding from the Department, it can not comply with Department mandates nor with the aforesaid regulation. Respondent's position is that the preschool food service worker should be funded through the K-12 district budget and not the preschool budget. In particular, the Department says that costs associated with food services for the preschool program should be included in the Fund 50 line item. Fund 50 is a line item in the district K-12 budget which refers to activities run by a district which generate income. Food services are included in this item as monies are received by the district through the sale of lunches to staff and students. In Vineland's case, Fund 50 operates at a deficit in the K-12 budget to a large extent because of the quantity of free and reduced cost lunches distributed to qualifying students. Vineland argues Fund 50 is only applicable to K-12 as the preschool budget is distinctly separate from the K-12 operating budget. It also argued that since its Fund 50 is operating at a deficit, and in fact, is the subject of a corrective action plan mandated by the Department because of that deficit, it is inappropriate to place an additional financial burden through that line item onto the district budget. This, Vineland argues, is especially true since its approved corrective action plan includes the effort to move other food worker related expenses out of Fund 50 to show less of a deficit. The result would be to increase the amount of deficit Fund 50 operates at currently and will further strain that line item and make the correction plan ineffective. In addition, Vineland argues they are being treated unfairly by the Department in that the Department funds 100% of the food service cost incurred by the providers who supply preschool services to the district, but

the Department refuses to fund any food service to it for its district sponsored preschool program. Vineland relies, not only on the regulation which mandates it provide a nutritional food program for its students, but also relies on the Abbott Preschool Implementation Guidelines. It cites page 46 of that document (P-3) which reads "children should receive adequate nutrition and education concerning health and nutrition. "Petitioner argues without appropriate funding it can not provide that mandate to the children in its district-run preschool program.

In contrast, the Department's position is that Fund 50, the Auxiliary Enterprise Fund, is the most logical place in the budget for preschool food services. Respondent argues the Early Childhood Program is not approved for a food service worker since there is not a line item in the budget for this particular service. The Department recognizes, however, that Early Childhood Providers receive food services expenses but in-district Early Childhood Programs are not funded. The Department's position is that since there is no line item for an expenditure in the Early Childhood budget for a food service worker the most logical place, by process of elimination, is to put that expense into Fund 50. That, respondent recognizes, is commingling services among the two budgets. In addition, respondent finds no disparity in its policy to fund 100% of the food service expenses furnished by the providers to the preschool children they service as opposed to the District, wherein there is no funding for food services and some children are required to pay all or part of their nutritional expenses.

It must be emphasized the Department is not denying a food service worker is necessary for the in-district preschool program. It is also not denying the worker's position should be funded. Respondent cites no authority for where the food service worker's salary and benefits expense should appear in the budgets. The Department's argument that no line in the preschool budget fits this service is unpersuasive. First, there is a miscellaneous line in where all non-characterized expenses can be placed and second, the Department has the authority to direct this expenditure be placed anywhere it chooses. The fact there is no specific budget line enumerated for this expenditure is only because respondent has not designated one. The Department is taking the unique position that the food service worker's salary and benefits should be shown on the district K-12 budget, however, it has not committed to approve the expense when Vineland submits that proposed budget for review and approval. In weighing the arguments of the parties and applying logic and good practice I **CONCLUDE** a preschool food service worker's expense

should be included in the preschool budget as it is a preschool program mandated expense. To move it into another budget unnecessarily commingles expenditures which may lead to accounting confusions and inaccurate reflections of the financial condition of each program. Furthermore, transferring an employee expense into a fund run at a deficit when the Department is requiring other employee expenses be moved out of the fund is totally inconsistent. I recognize it is within the discretion of the Department to fully fund services to providers but not districts.

For the reasons set forth here, I **ORDER** the Department to direct Vineland to include the food service worker's salary and benefits in the amount of $24,740 in the "miscellaneous" line item in its in-district preschool budget and to approve that budgetary expenditure.

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

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

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3-24-05

DATE

JOHN SCHUSTER III, ALJ

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

3-24-05

DATE

E-mailed Initial Decision to the parties on:

3-24-05

DATE

jh/cad/lam

LIST OF WITNESSES

For petitioner:

Kimberly Friddell

Daniel Smith

For respondent:

Joseph Kirchon

Eric Rodney

LIST OF EXHIBITS

Joint:

J-1	District Special Request Form submitted for FACES matching grant
J-2	Response from Department of Education to plan and budget submitted by Vineland dated January 14, 2005

For petitioner:

P-1	Amounts requested by Vineland
P-2	Special Request Form for food service worker salary and benefits
P-3	Page 46 of Implementation Guidelines

For respondent:

R-1	Series of correspondence between Dr. Frede and Dr. Hoover all referring to FACES funding issue

137-05

OAL DKT. NO. 1875-05
AGENCY DKT. NO. 43-2/05

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/05

Date of Mailing: 4/15/05

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1875-05

AGENCY DKT. NO. 43-2/05

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Perry L. Lattiboudere, General Counsel, for petitioner

Cindy Campbell, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 23, 2005 Decided: March 24, 2005

BEFORE **EDITH KLINGER**, ALJ:

State-Operated School District of the City of Newark (District) filed a Verified Petition of Appeal before the Commissioner of Education appealing the Department's determination on funding of early childhood plan. On February 23, 2005, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1

to -13. The matter was scheduled for hearing on March 16 and March 22, 2005. The parties appeared on March 16, 2005 and advised the undersigned that an agreement was reached and have prepared the attached Settlement Agreement indicating the terms of settlement, which was received by the undersigned on March 23, 2005.

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

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

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

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

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

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

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked

"Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 24, 2005
DATE

EDITH KLINGER, ALJ

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

DATE

E-mailed Initial Decision to the parties on:

DATE

pb

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8343
Attorney for Petitioner

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, PETITIONER, V. NEW JERSEY DEPARMENT OF EDUCATION, RESPONDENT.	OAL DKT. NO. EDU 01875-2005N AGENCY REF. NO. 43-2/05 **SETTLEMENT AGREEMENT**

Petitioner, the State-Operated School District of the City of Newark ("District") and Respondent New Jersey Department of Education ("DOE"), collectively referred to hereinafter as "the parties," having appeared before the Honorable Edith Klinger, A.L.J. on March 16, 2005, voluntarily resolved all disputed matters and enter into the following settlement:

1. Additional classrooms above the number of classrooms for the 2004-2005 school year will receive start up costs.
2. The parties agree to address the accounting software issue in the context of the 2004-2005 fiscal year.
3. With respect to the issue of professional development, the parties agree that:

   a. The District will phase in adoptions of core curriculum over three years;

   b. Funding of the 2005-2006 costs will be supplemented by an additional $260,224.00;

c. The District will submit an amended professional development plan that will include the cost of literacy and math materials

4. The District withdraws all claims relating to funding for nurse positions;

5. The District withdraws all claims relating to the issue of a contingency fund for provider appeals.

6. The parties stipulate that the approved projected enrollment for the 2005-2006 school year is 6,530 students.

Marion A. Bolden
State District Superintendent

DATE

PETITIONER,

State-Operated School District of the City of Newark

3/23/2005

Andy M. Campbell
Deputy Attorney General

DATE

Attorney for RESPONDENT,

New Jersey Department of Education

138-05

JOHN CAUCINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY, AND MONMOUTH COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the decision by the respondents to permanently disqualify him from employment in any position with a school or other educational institution under the supervision of the Department of Education because of petitioner's 1995 federal felony conviction for bank fraud under 18 *U.S.C.A.* §1344. Petitioner contended that the federal offense to which he pled guilty is not one of the criminal convictions requiring permanent disqualification under *N.J.S.A.* 18A:6-7.1. The Department moved for summary decision, contending that there were no material facts in dispute and that it was entitled to prevail as a matter of law. Petitioner opposed the motion.

The ALJ found that there were no material facts in dispute, and that the matter was ripe for summary disposition. The ALJ stated the sole issue in this matter to be the legal question of the applicability of *N.J.S.A.* 18A:6-7.1(c)2 to petitioner's conviction under 18 *U.S.C.A.* §1344. The ALJ determined that petitioner was convicted under a statute of the United States that is similar to *N.J.S.A.* 2C:20-4, for a crime substantially equivalent to theft by deception: a disqualifier as a third degree crime under *N.J.S.A.* 18A:6-7.1(c)2. The ALJ concluded that the Department properly disqualified the petitioner from employment; granted summary decision to the Department; and dismissed the Amended Petition.

Upon a full and independent review of the record in this matter, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted for the reasons stated therein and the instant Petition of Appeal was dismissed. The record of this matter was forwarded to the State Board of Examiners for action as that body deems appropriate.

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

April 15, 2005

OAL DKT. NO. EDU 6213-04
AGENCY DKT. NO. 242-7/04

JOHN CAUCINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY, AND MONMOUTH COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review of the record in this matter, the Commissioner agrees with the Administrative Law Judge's determination that petitioner's 1995 federal felony conviction for bank fraud under 18 *U.S.C.A.* §1344 is substantially equivalent to *N.J.S.A.* 2C:20-4, a third degree crime, thus disqualifying him from school or other educational employment pursuant to *N.J.S.A.* 18A:6-7.1.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein and the instant Petition of Appeal is hereby dismissed. The record of this matter is being forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/05

Date of Mailing: 4/15/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6213-04

AGENCY DKT. NO. 242-7/04

JOHN CAUCINO,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY, AND MONMOUTH COUNTY VOCATIONAL SCHOOL DISTRICT,

Respondents.

Marcie L. Mackolin, Esq., for petitioner (Chamlin, Rosen, Uliano & Witherington, attorneys)

Jason M. Ross and **Marta N. Kozlowska**, Deputy Attorneys General, for respondent Department of Education (Peter C. Harvey, Attorney General of New Jersey, Attorney)

Sanford D. Brown, Esq., for respondent Monmouth County Vocational School District (Brown & Connelly, attorneys)

Record Closed: February 10, 2005 Decided: March 11, 2005

BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE

Petitioner John Caucino has been employed as a teacher in the Monmouth County Vocational School District. On June 11, 2004, the New Jersey Department of Education Criminal History Review Unit issued written notice to Mr. Caucino that he is permanently disqualified from employment in any position with a school or other educational institution under the supervision of the Department of Education, pursuant to *N.J.S.A.* 18A:6-7.1, because of his 1995 federal felony conviction for bank fraud under 18 *U.S.C.A.* §1344. By Amended Petition of Appeal, petitioner challenges this action, contending that the federal offense to which he pled guilty is not one of the criminal convictions that requires permanent disqualification under *N.J.S.A.* 18A:6-7.1. Respondent Department has moved for summary decision, contending that there are no material facts in dispute and that it is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5. Petitioner opposes the motion.

PROCEDURAL HISTORY

The Department issued its permanent disqualification notice on June 11, 2004. By letter of June 21, 2004, Petitioner's counsel responded to assert that the federal crime to which petitioner pled guilty is not enumerated in *N.J.S.A.* 18A:6-7.1 and is therefore not a disqualifying event. It was requested that the matter be reviewed in light of the differing interpretations of the applicable statute. Criminal History Review Manager Carl Carabelli replied by letter of June 30, 2004, that the statute is clear in its preclusion and he suggested that if petitioner were challenging the disqualification based on a legal issue, review of the determination could be sought by filing a formal appeal with the Commissioner of Education. A Petition of Appeal was filed on July 14, 2004, and an Amended Petition of Appeal was filed on July 19, 2004. On July 29, 2004, petitioner filed an Amended Petition for Emergent Relief, seeking to stay the Monmouth County Vocational School District Board of Education from acting to terminate him from his teacher position prior to his appeal being heard.

On July 30, 2004, the matter was transmitted to the Office of Administrative Law for determination as a contested case. Oral argument on the emergent relief application was heard on August 12, 2004, and the application was denied by Order dated August 16, 2004. By Decision on Motion dated August 26, 2004, the Commissioner of Education adopted the Order Denying Emergent Relief and returned the matter to the Office of Administrative Law for further proceedings as may be necessary. Prior to the scheduled hearing date, the Department moved for summary decision and petitioner responded in opposition. The last of the papers on the motion were received on February 10, 2005, and the record closed on that date.

DISCUSSION

From my review of the parties' submissions, I **FIND** that there is no genuine dispute concerning the facts material to resolution of the motion for summary decision. Prior to his employment as a teacher in the Monmouth County Vocational School District in Freehold, New Jersey, petitioner worked for Ocean Bay Mortgage Company in Toms River, New Jersey. Between 1985 and 1989, petitioner engaged in a scheme with associates to falsify bank loan application documents and construction reports in order to improperly secure 100 percent financing for their projects. Petitioner's fraudulent activities resulted in significant financial losses for Action Savings Bank.

Petitioner pled guilty to 18 *U.S.C.A.* §1344, Bank Fraud, in 1995 and was sentenced in 1999. U.S. Probation Officer Kenneth Manuel wrote to Ida Graham, Director of the Office of Licensing and Credentials, Department of Education, in October 1999 to advise of petitioner's conviction and sentencing. Petitioner was ordered to pay restitution of $15,000 to the Federal Deposit Insurance Corporation and to serve a five year term of probation. The letter advised that petitioner had received the benefit of $173,250 in funds of the Action Savings Bank to which he was not entitled. The letter further advised that petitioner was employed as a teacher with the Monmouth County Vocational School District and that he was complying with all areas of his conditions of probation. No action was taken against petitioner's teaching position at that time. A subsequent fingerprint search prompted issuance of the Department's permanent disqualification notice of June 11, 2004.

Petitioner does not challenge the foregoing facts. Nevertheless, he contends that summary decision is not appropriate. The ground for this contention is that there is a dispute as to whether the federal statute to which he pled guilty is encompassed by *N.J.S.A.* 18A:6-7.1. This is the statute disqualifying an individual from holding a position in education when that person has a criminal history involving certain crimes. The Department aptly responds that since the material facts are undisputed and the only issue remaining is the legal question of the applicability of *N.J.S.A.* 18A:6-7.1(c)2 to petitioner's conviction, the matter is ripe for summary decision. I agree.

Petitioner contends that his conviction for federal bank fraud is not a disqualifying conviction within the intent of *N.J.S.A.* 18A:6-7.1. He asserts that it is not an enumerated offense under *N.J.S.A.* 18A:6-7.1(c)2, and further asserts that it is not a disqualifying conviction within the meaning of *N.J.S.A.* 18A:6-7.1(c)3, which provides that such a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense. According to petitioner there is no corresponding New Jersey statute listed in *N.J.S.A.* 18A:6-7.1 that is substantially equivalent to the federal statute to which he pled guilty. More particularly, petitioner argues that theft by deception, *N.J.S.A.* 2C:20-4, which is a disqualifier as a third degree crime under *N.J.S.A.* 18A:6-7.1(c)2, involves deceiving individuals and is not substantially similar to federal bank fraud under 18 *U.S.C.A.* §1344, which involves only financial institutions.

The more persuasive argument is the Department's contention that petitioner's conviction under the federal bank fraud statute, 18 *U.S.C.A.* §1344, is a disqualifying conviction within the meaning of *N.J.S.A.* 18A:6-7.1(c)3. Following the list of enumerated disqualifying convictions under New Jersey law, that section provides in part that a disqualifying conviction also exists if the individual has at any time been convicted under any similar statutes of the United States for a substantially equivalent crime or other offense. In other words, petitioner has been convicted under a statute of the United States that is similar to *N.J.S.A.* 2C:20-4, for a crime substantially equivalent to theft by deception.

18 *U.S.C.A.* §1344 states:

> Whoever knowingly executes or attempts to execute a scheme or artifice-
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 30 days, or both.

N.J.S.A. 2C:20-4 states:

> A person is guilty of theft if he purposely obtains the property of another by deception.
> A person deceives if he purposely:
> a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind, and including, but not limited to, a false impression that the person is soliciting or collecting funds for a charitable purpose, but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
> b. Prevents another from acquiring information which would affect his judgment of a transaction; or
> c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceived knows to be influencing another to whom he stands in a fiduciary relationship.

Both statutes have similar language to describe the prohibited conduct. Both involve obtaining the property of another by means of false pretenses or impressions. It is true that *N.J.S.A.* 2C:20-4 does not specifically refer to financial institutions. However, a defendant who fraudulently induced lenders to transfer money to him in the form of loans based on the false impressions which he purposefully created has been held to have committed theft by deception as set forth in *N.J.S.A.* 2C:20-4. *State v. Rogers,* 230 *N.J. Super.* 593, 601 (App. Div. 1989), *certif. denied*, 117 *N.J.* 54 (1989). The misconduct described in *Rogers* is strikingly similar to the federal crime petitioner committed, as both involved falsification of bank documents to obtain loans and misrepresentations regarding the equity in real properties. Further, the minimum amount involved in petitioner's crime is represented by the $15,000 restitution he was required to pay. This places his offense in the category of a third degree theft pursuant to *N.J.S.A.* 2C:20-2,

which states that theft constitutes a crime of the third degree if the amount involved exceeds $500 but is less than $75,000.

Based upon the foregoing discussion, I **CONCLUDE** that 18 *U.S.C.A.* §1344 is similar to *N.J.S.A.* 2C:20-4, and that petitioner's conviction in violation of 18 *U.S.C.A.* §1344 is substantially equivalent to a third degree crime as set forth in *N.J.S.A.* 2C:20-2. Thus, I further **CONCLUDE** that the Department properly disqualified the petitioner from employment pursuant to *N.J.S.A.* 18A:6-7.1 The Department's motion for summary decision is **GRANTED** and the Amended Petition is **DISMISSED**.

I so **ORDER**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 11, 2005
DATE

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

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

3/11/05
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 16 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For petitioner:

Letter memorandum in opposition to motion for summary decision, with attachments

For respondent Department:

Brief in support of motion for summary decision, with attachments; letter reply

For respondent District:

None

WITNESSES

For petitioner:

None

For respondent Department:

None

For respondent District:

None

139-05

BARBARA R. O'HERN, VINCENT CRAPELLI AND DARRYL HUGHES,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY, MICHAEL STASI, GAYLE HORVATH, DARRELL JACKSON AND DEBRA LOCK,	:	
RESPONDENTS.	:	

SYNOPSIS

This matter arose out of a decision by the Board of Trustees of Red Bank Charter School to bar further involvement on the Board by Vincent Crapelli and Darryl Hughes, who had been serving as Trustees prior to discovery that they had not been elected by majority vote in accordance with the school's bylaws. The single issue presented was whether Crapelli and Hughes were duly elected members of the Board who could not be removed by the Board's failure to pass a ratification vote.

The ALJ found that that the Board elected Crapelli and Hughes to membership by acclamation, and that the men went on to serve with the same authority enjoyed by other Trustees for several months. The ALJ acknowledged that the bylaws of the charter school require a majority vote of the Board to seat a new trustee, but asserted that functionally the acceptance by acclamation expressed the will of the Board, and, to the extent that an imperfection in the process existed, it was corrected when the Board adopted its annual report in July 2004 listing Crapelli and Hughes as Trustees. The ALJ ordered the men to be reinstated to active Board membership immediately, and emphasized that the majority of a board ought not to find refuge in a perceived technicality to carry forward its purposes. The ALJ pointed out that the Board is authorized under its bylaws to remove Trustees by majority vote, but no such vote was taken in this case.

The Commissioner concurred with the findings and conclusions of the ALJ. The Commissioner held that, under the circumstances, no ratification vote was necessary to legitimize Crapelli and Hughes' election to the Board, and that the vote taken in this instance could not be used to nullify the Board's prior action and effectively remove duly sitting Board members with whom the majority had become dissatisfied without following the process for such removal established in the charter school's bylaws. The Initial Decision was adopted as the final decision, and the Commissioner directed the Board of Trustees to ensure that future Board elections are conducted in accordance with its charter and bylaws. The Commissioner also reminded charter schools generally of the importance of compliance with their own rules of governance with respect to election of Board of Trustee members.

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 19, 2005

OAL DKT. NO. EDU 499-05
AGENCY DKT. NO. 5-1/05

BARBARA R. O'HERN, VINCENT CRAPELLI AND DARRYL HUGHES,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY, MICHAEL STASI, GAYLE HORVATH, DARRELL JACKSON AND DEBRA LOCK,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, respondents filed timely exceptions, to which petitioners replied.

In their exceptions, respondents object to the minimal weight accorded the November 23, 2004 letter from the Department of Education to Board President Stasi, to statements by the Administrative Law Judge (ALJ) that the Board of Trustees acted hastily and arbitrarily in voting not to ratify the appointment of petitioners Crapelli and Hughes to the Board, and to the ALJ's disregard of *Prickett, supra*, the case law precedent cited by respondents. (Respondents' Exceptions at 1-4) In reply, petitioners object to respondents' characterization of the Department's letter and urge adoption of the ALJ's conclusions, describing respondents'

actions as "[taking] the law into their own hands" by failing to conduct the necessary legal and factual review before acting.[1] (Petitioners' Reply at 1-2)

Upon review, the Commissioner concurs with the ALJ that, under the particular circumstances of this matter, it is appropriate to look beyond form to the substance of the Board's actions and to reinstate Crapelli and Hughes to Board membership on that basis. Meeting minutes plainly show Crapelli and Hughes to have been accepted as members by the Board of Trustees on May 12, 2004 and to have functioned in all respects as full, voting Board members thereafter. Most significantly, minutes of the Board's July 14, 2004 meeting show that "all members present," including respondents Stasi, Horvath and Lock, "approved" the listing of Board members to be submitted to the Department in the Charter School's 2003-04 Annual Report. The excerpt from that report incorporated into the meeting minutes not only specifically includes Crapelli and Hughes as voting Board members, but additionally explains that the Board was comprised of seven members until April, when the eighth and ninth members were approved; it further incorporates an annotation in the minutes explaining that, although the Annual Report indicates that the men were approved in April, their actual approval came in May, April being the time when interviews and tours were conducted.

Clearly, as found by the ALJ, notwithstanding the absence of a recorded majority vote specifically for the purpose of "electing" Crapelli and Hughes as required by the charter school's bylaws, the Board in effect elected them in May, with any defect in the election process corrected by the Board's recorded vote to accept the Annual Report on July 14. Under these

[1] Petitioners also claim that "certain factions within the Red Bank Charter School may be sending [the Commissioner] letters or a petition to influence [the Commissioner's] decision in this matter" and they object to any consideration being given to such submissions, which they have not seen and which are not submitted by parties to this matter. (Petitioners' Reply at 2) It is noted that submissions of this type are never considered by the Commissioner in deciding a contested case, since the Commissioner's decision must be made based solely on the record developed pursuant to applicable procedural rules.

circumstances, despite any suggestion to the contrary in the Department's November 23, 2004 letter—which, the Commissioner notes, was issued without benefit of the factual record and legal perspective developed at hearing—the Board did not need a subsequent ratification vote to legitimize Crapelli and Hughes's election, and the one taken cannot be used to nullify the Board's prior action and effectively remove duly sitting Board members with whom the majority has become dissatisfied without following the process for such removal established in the charter school's bylaws.[2] [3]

Accordingly, the Initial Decision of the OAL, ordering that Vincent Crapelli and Darryl Hughes be forthwith reinstated to membership on the Board of Trustees of the Red Bank Charter School, is adopted as the final decision in this matter. The Board of Trustees is directed to ensure that future Board elections are conducted strictly in accordance with the provisions of its charter and bylaws, and charter schools generally are reminded of the importance of compliance with their own rules of governance in this regard.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/05
Date of Mailing: 4/19/05

[2] In objecting to the ALJ's characterization of their actions as arbitrary and capricious, respondents note that "the seven existing Board members had six months of experience working with Crapelli and Hughes as *de facto* Board members on which to base their considered decisions. The vote not to elect Crapelli and Hughes was far less arbitrary than a vote six months earlier would have been." (Respondents' Exceptions at 2)

[3] The resolution of Crapelli and Hughes' status on July 14 also renders inapplicable the case law precedent cited by respondents, even granting, *arguendo*, that it is germane to charter school Board members as claimed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 499-05

AGENCY DKT. NO. 5-1/05

BARBARA R. O'HERN,

VINCENT CRAPELLI AND

DARRYL HUGHES,

Petitioners,

v.

RED BANK CHARTER SCHOOL,

MICHAEL STASI, GAYLE HORVATH,

DARRELL JACKSON AND DEBRA LOCK, [1]

Respondents

Daniel J. O'Hern, Jr., Esq., on behalf of petitioner, Barbara R. O'Hern (**Becker Meisel**, Attorneys)

Vincent Crapelli, intervener, *pro se*

Darryl Hughes, intervener, *pro se*

George W.C. McCarter, Esq., for the respondents (McCarter & Higgins, Attorneys)

Record Closed: March 1, 2005 Decided: March 8, 2005

BEFORE **SOLOMON A. METZGER**, ALJ:

---

[1] The Office of Charter Schools was named as a party to these proceedings and has now filed a motion to be dismissed from the case, as it cannot grant relief and none has been sought against it. The other parties either consent, or have voiced no opposition and the motion is hereby granted.

This matter arises out of a decision by the Red Bank Charter School and a majority of its Board of Trustees to bar further involvement on the Board by Vincent Crapelli and Darryl Hughes, who had been serving as Trustees. A petition contesting this action was filed by Barbara O'Hern, another trustee, with the Commissioner of Education pursuant to his authority under the Charter School Act, N.J.S.A. 18A:36A-1 to – 18. The matter was transmitted to the Office of Administrative Law on application for emergent relief and for hearing. The parties agreed that the Board would defer major commitments until the conclusion of these proceedings, which allowed them to bypass the emergent relief stage and to file cross-motions for summary decision, *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520 (1995). Vincent Crapelli and Darryl Hughes were granted intervener status without objection. The single issue presented is whether Crapelli and Hughes are properly members of the Board of Trustees. The Board has fallen into disagreement over certain financial transactions, the merits of which have not been presented. New officers are to be elected in May 2005 and the parties sought to proceed on narrow grounds in the interest of expedition.

The relevant facts are undisputed. Mr. Crapelli and Mr. Hughes began meeting with Board members and the school principal in the few months prior to the May 2004 Board meeting, as part of a process aimed at assessing their interest in and suitability for Board membership. On May 12, 2004, Board President Michael Stasi, while presiding at the regular monthly meeting of the Board, welcomed Crapelli and Hughes onto the Board as members. After this meeting the two men attended Board meetings in both public and executive session, received confidential information for upcoming agenda meetings, and served on Board committees. At the school graduation in June 2004 the men walked in the academic procession. The Board secretary had them file personal financial statements with the Monmouth County Superintendent of Schools in the manner required of Board members. The July 2004 annual report of the Red Bank Charter School certifies to the Commissioner that Crapelli and Hughes were "approved" as Trustees in May 2004.

The bylaws of the Charter School require a majority vote of the Board to seat a new Trustee. On November 23, 2004, Rochelle Hendricks, the Acting Director of the Office of Vocational-Technical Career and Innovative Programs in the Department of Education, wrote to

President Stasi. It had come to her attention that Crapelli and Hughes were not "properly elected" under the Red Bank Charter School bylaws, as there was no indication the Trustees actually engaged in a vote on May 12, 2004. The letter opines that the two men cannot serve if not elected and that resolutions bottomed on their votes are null and void. Ms. Hendricks directed President Stasi to address this matter immediately and to provide evidence that the Board was acting in conformity with its bylaws. A motion to ratify the May 12, 2004 election/selection failed at the December 8, 2004 meeting by a 4-3 vote. Thereafter, the Board majority barred Crapelli and Hughes from acting as Trustees. This is the substance of the record.

It is plain from the undisputed facts that the Board selected Crapelli and Hughes to membership on May 12, 2004 by some form of acclamation. There is no evidence of dissent and the two men went on to serve with the same authority enjoyed by other Trustees. The Board unanimously adopted its annual report in July 2004, which includes a page listing Crapelli and Hughes as Trustees. The November 23, 2004 letter from Ms. Hendricks called their status into question and the Board majority in effect used this letter to nullify the May 2004 decision. I am persuaded that the Board acted hastily and that it was arbitrary to simply excuse these men from further service.

Functionally the May 12, 2004 acceptance by acclamation expressed the will of the Board with close to the same certitude as would have been expressed in a *viva voce* vote or ballot. To the extent that an imperfection in the process existed it was corrected when the Board adopted its annual report in July 2004 and sent it forward to the Commissioner pursuant to N.J.S.A.18A:36A-16. The report lists Crapelli and Hughes as Trustees. The December 8, 2004 Board vote not to ratify the May 12, 2004 decision was therefore superfluous, as the status of these men had at the latest been resolved in July 2004. The Board is authorized under the bylaws to remove Trustees by majority vote, but no such vote was taken [2].

The precedents cited by petitioners are not squarely on point, but they do suggest that our courts will search beneath form to the substance of matters when passing on the decisions of

[2] Section 9 of the bylaws allows a majority to remove a trustee "with or without" cause and section 17(F) provides for removal when a Trustee willfully undermines legitimate Board activity. As an aside section 9 seems a too powerful aid in the hands of a majority bent on mischief, though this is a matter of policy within the purview of the Commissioner.

public and private Boards, see *Billig v. Buckingham Towers Condo Ass'n.*, 287 N.J.Super. 551 (App. Div. 1996); *Woodhull v. Manahan*, 85 *N.J. Super.* 157 (App. Div. 1964). Thus, the majority ought not to find refuge in a perceived technicality to carry its purposes forward. It may also be worth noting that the Legislature did not mandate elections for Charter School Trustees, N.J.S.A. 18A:36A-5 (c).

Respondents have cited no New Jersey authorities to support their conduct and rely on *Prickett v. American Steel & Pump. Corp.,* 253 A.2d 86 (Del. Ch. 1969), a decision of the Delaware courts. That case stands for the proposition that a bylaw contravening a corporate charter on the question of staggered terms is void and Trustees elected in accordance with the bylaw serve *de facto* until a new judicially supervised election is held. I have no disagreement with the case, but see little factual correlation to our matter. Moreover, Red Bank Charter School is a public body under N.J.S.A. 18A:36A-3 and while it is early in the history of these entities, they seem closer in kind to Boards of Education than to private corporations.

Based on the foregoing, it is **ORDERED** that Vincent Crapelli and Darryl Hughes be reinstated to Board membership forthwith.

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

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

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

3/7/05
DATE

SOLOMON A. METZGER, ALJ

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

3/8/05
DATE

Mailed to Parties:

MAR 11 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

140-05

OAL DKT. NO. EDU 7569-04
AGENCY DKT. NO. 243-7/04

J.L. on behalf of minor child S.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner approves those settlement terms within his jurisdiction as the final decision in the matter of petitioner's claim for Board of Education payment of the cost of their resident student's court-ordered placement in an out-of-state private boarding school. The Commissioner expressly notes, however, that this approval does not extend to Term No. 3, stipulating that S.L. is a " 'student with a disability' within the meaning of the New Jersey State Education Law." Absent any indication that S.L. has been so determined pursuant to *N.J.A.C.* 6A:14-3.5 or 3.6* (see *N.J.A.C.* 6A:14-1.3), the Commissioner may not accept this term, which he notes has no bearing on the issue before him in this non-special education matter, as a simple factual statement; on the other hand, the Commissioner has no jurisdiction to approve an

* Indeed, the record of this matter suggests that he has not.

agreement that would itself serve to determine a student's eligibility for special education services.

Accordingly, the Commissioner approves the settlement to the extent that it falls within his jurisdiction. The matter is hereby dismissed, subject to compliance with applicable terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/05

Date of Mailing: 4/19/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7569-04
AGENCY DKT. NO. 243-7/04

J.L., on behalf of minor child S.L.,
Petitioner,
v.
ELMWOOD PARK
BOARD OF EDUCATION, et als.,
Respondent.

Carole Ann Geronimo, Esq., for petitioner

Matthew P. Demaria, Esq., for respondent Elmwood Park Board of Education

Cindy M. Campbell, Deputy Attorney General, for State respondents
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 9, 2005 Decided: March 9, 2005

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

This matter was transmitted to the Office of Administrative Law ("OAL") on August 3, 2004 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

Petitioner and the Elmwood Park Board of Education have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

3. Petitioner has voluntarily dismissed all claims against respondents Office of the Attorney General and the New Jersey Department of Education.

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

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

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

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

March 9, 2005
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3-11-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR -9 A 8:36

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

J.L. and M.L. on behalf of S.L.	:	STIPULATION OF SETTLEMENT
- against -	:	OAL DOCKET NO. 24307/04
	:	AND ~~EDS 7209-04~~ EDU 7565-04
Elmwood Park Board of Education and the Office of the Attorney General, State of New Jersey and Department of Education, Division of Finance	:	AGENCY NO. 2004-9072

IT IS HEREBY STIPULATED AND AGREED, by and between the Board of Education of the Elmwood Park School District, Bergen County (hereafter referred to as, the "School District") and Jairo Lozano and Martha Lozano (hereinafter collectively referred to as, the "Parents"), the Parents of STEVEN LOZANO (hereinafter referred to as, the "Student") that the Parents' request for payment for the School District to pay all costs and fees with respect to the Student's placement at the Family Foundation School from the date of placement (March 8, 2004) as well as any and all claims that have been or may be raised by the Parents against the School District or the State of New Jersey office of the Attorney General, as such claims have been or may be alleged or raised, shall be settled in accordance with the terms and conditions set forth below.

1. Wherever stated the term "School District" shall also include its agents, officers, employees and consultants. Wherever stated, the term "School" shall also include the School's directors, agents, employees and consultants. Wherever stated, the term "CSE" means

the School District's Committee on Special Education.

2. The Parents and Student reside at 39 Orange Avenue, Elmwood Park, New Jersey 07404.

3. The Student is a "Student with a disability" within the meaning of the New Jersey State Education Law.

4. The School District agrees to fund the sum of TWO THOUSAND SEVEN HUNDRED TWENTY FIVE DOLLARS ($2,725.00) **per month** for the educational tuition costs, on a twelve month basis per school year (July 1 through June 31) for the Student at the Family Foundation School commencing on March 8, 2004 and continuing thereafter for as long as one or both of the Parents is a resident in the School District and the Student is attending the Family Foundation School. This obligation shall continue, on a year to year basis, for so long as the Student is enrolled at the Family Foundation School and up until he graduates from the same. It is anticipated that S.L. will graduate in June of 2006. The Parents will be responsible for the remainder of the costs associated with that placement, including, but not by way of limitation, room and board charges and all personal expenses for the Student, the costs to travel to the Family Foundation School and any field trip costs.

5. The School District agrees to enter into an agreement with the Family Foundation School setting forth its obligations and the form of the agreement is annexed hereto as **Exhibit A.**

6. If required, the Parents agree to meet with the School District on an annual basis to review the Student's status and to sign such releases as may be necessary for the School District to obtain his grades and progress reports from the Family Foundation School.

7. The School District, at its discretion, may wish to file a "Naples

Application" approving the Family Foundation School, at 431 Chapel Hill Road, Hancock, New York as the educational placement of the Student effective March 8, 2004 with the Commissioner of Education. The agreement to pay for the Family Foundation School contained in **paragraph 4** of this Agreement, however, is not subject to the approval of the Commissioner of Education. Should the School District proceed with an application, the Parents will sign such consents and releases as may be required by the Commissioner of Education. **The School District agrees that its obligations as set forth in Paragraph 4 of this Agreement and for this school year and all succeeding school years shall not be affected by the approval or non-approval of the Naples Application by the Commissioner of Education.**

8. In consideration of the other conditions agreed to by the School District, the Parents waive any and all claims that could or have been asserted against the School District for attorney's fees and full reimbursement of the cost of the placement at the Family Foundation School from the date that the Student was placed at the Family Foundation School and all legal fees regarding the placement and the preparation of this stipulation and all claims arising out of the Student's education at the School District. The Parents waive and release the Attorney General of the State of New Jersey from all claims alleged against that entities in the due process petition filed against it.

9. This Stipulation shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the District or the Parents and shall not be referred to in any subsequent proceeding by any party other than to enforce the express terms of this Stipulation. In the event that this Stipulation is not fully executed and approved by all parties hereto, this Stipulation 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.

10. The Parents acknowledge that they have consulted with legal counsel during the negotiations of this Stipulation and have had the opportunity to review this Stipulation in detail with counsel, who has discussed this stipulation with them in the presence of a Spanish speaking interpreter and they fully understand its terms and requirements. The Parents further expressly state that they are satisfied with the representation provided by their legal counsel. The Parents hereby state that they are signing this Stipulation voluntarily of their own free will and not under duress or coercion of any kind. The Parents have had this Stipulation read to them in their native language and they certify that they understand all of the terms and conditions of same.

11. This Stipulation shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

12. All parties are bound by this Stipulation and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This Stipulation is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representative, employees, agents and attorneys, successors or assigns.

13. This stipulation may not be changed except by written, signed agreement between the parties.

14. This Stipulation may be signed in any number of counterparts, all of which together shall constitute one original document.

IN WITNESS WHEREOF, the undersigned sign this agreement as of the dates set forth below.

Jairo Lozano

By: JAIRO LOZANO, Parent
39 Orange Avenue
Elmwood Park, New Jersey 07404
DATED:

By: MARTHA LOZANO, Parent
39 Orange Avenue
Elmwood Park, New Jersey 07404
DATED:

ELMWOOD PARK BOARD OF EDUCATION

BY: David B. Blake, Business Administrator
DATED: March 3, 2005 Board Secretary

ELMWOOD PARK BOARD OF EDUCATION

BY: Matthew De Maria, Esq.
Attorney for the School District
250 Boulevard
Elmwood Park, New Jersey 07404
Phone: 201-794-6067
FAX 201-794-8580
DATED: March 3, 2005

S.L.

By: Carole Ann Geronimo, Esq.
Attorney for the Student
10 South Franklin Turnpike, Suite 201
Ramsey, New Jersey 07446
Phone 201- 512-4400
Fax: 201-512-4403
DATED:

SO ORDERED THIS 9th DAY OF March, 2005

HON. KENNETH R. SPRINGER, A.L.J.

Exhibit A

Agreement Between Elmwood Park Board of Education and Family Foundation School Effective 2003-2004 and 2004-2005 School Years Only

Agreement for **Steven Lozano:** **Revised 12/07/04***

AGREEMENT dated this 3rd day of December 2004, between the Elmwood Park BOE, having offices at 465 Blvd., Elmwood Park, NJ 07407, (hereinafter referred to as "SENDING DISTRICT") and THE FAMILY FOUNDATION SCHOOL, an approved private school for the disabled in the County of Delaware in the State of New York (hereinafter "Contractor"):

Witnesseth

NOW, THEREFORE, in consideration of the covenants herein contained, the parties agree as follows:

1. The SENDING DISTRICT agrees to purchase the educational services described in the pupil's individualized education program for **Steven Lozano**, a resident pupil from the SENDING DISTRICT, from the Family Foundation School. The Family Foundation School agrees to provide the educational services described in the pupil's individualized education program to **Steven Lozano** in accordance with the applicable New Jersey Statutes and the rules and regulations of the State Board of Education.

2. This agreement shall be in effect for the 2004 school year. The educational service shall commence July 1st 2004 to June 30th 2005.

3. The Contractor and any personnel employed by the Contractor shall be deemed independent Contractors with respect to the services provided by this agreement.

4. The District shall provide and make available to the Contractor educational records, as required by the Contractor or the Contractor's educational coordinator.

5. The Contractor agrees:

a. To coordinate the instructional program between the Contractor (and, if applicable, the hospital) and the District;

b. To provide educational group activities for all students who are physically able to participate;

c. To be an active participant in the student's placement team;

d. To provide assistance for the student's re-entry into the District's schools;

e. To provide educational instruction in accordance with the Education Law of the State of New York, the regulations of the Commissioner of Education of the State of New York and all other statutes, laws and regulations applicable to the service being provided hereunder; and

f. To allow access to its facilities, with or without notice, by the District and it's designated representatives.

6. It is agreed that in those instances where the Contractor or the District is unable to obtain a teacher for a specific subject, an alternate method of instruction will be developed for that subject, e.g., telephone conferences, independent study, etc.

7. The District shall pay the Contractor a total of **$2725.00 per month for educational services retroactive for 2003/2004 semester from March 8th 2004 thru June 30th 2004 to the present semester July 1st 2004 thru June 30th 2005.*** In order to be entitled to payment, the Contractor agrees to submit a bill, on a monthly basis, for the services rendered. Said bill shall contain detailed records of contact time, teacher name, student name, dates and other relevant information.

8. This agreement may be terminated by the District for any of the following events:

a. The discharge of the student(s) from the Contractor's facility or the return of the student(s) to schools within the District;

b. Termination or withdrawal of any approvals, certifications, licenses or similar of the contractor's facility or the Contractor, with respect to the services provided herein;

c. Upon a determination by the District that the Contractor's facility or teacher(s)or the Contractor is not providing an appropriate education to a student, at the sole discretion and option of the district;

d. Upon thirty days written notice to the Contractor by the District.

9. The District shall have the right to examine any and all accounts kept by the Contractor in connection with this agreement.

10. The Contractor shall maintain daily attendance records in the same form as required in public schools of the State of New Jersey. Such records shall be provided to the District on a monthly basis or as otherwise requested by the District.

11. This agreement is entered into in the State of New Jersey and shall be interpreted and construed pursuant to the laws of the State of New Jersey.

11. This agreement may not be changed or amended except by express written agreement executed by the District and the Contractor.

12. The Contractor agrees that it has, in effect, liability insurance in the minimum amount of $1,000,000 per occurrence. A certificate evidencing such insurance, which certificate shall state that it is not cancelable unless ten days prior written notice is provided to the District, shall be provided to the District prior to the commencement of the Contractor's services pursuant to this agreement. The Contractor agrees to indemnify defend and hold the District, its employees, officers, agents and Board of Education harmless from any claims, liabilities, suits, proceedings and actions, of whatever name and nature as the same may relate, in any manner, to the services provided by the Contractor and its personnel pursuant to this agreement. Said indemnification, hold harmless and defense shall apply to any claim, liability, suit, proceeding and action in which the District, its employees, officers, agents and Board of Education may be named as a party, notwithstanding that the Contractor may deem said claim, liability, suit, proceeding or action frivolous or without merit. It is intended that this paragraph be interpreted in the broadest manner possible so as to insulate the District from any liability or judgement, monetary or otherwise, as the same may relate to the personnel and services provided by the Contractor pursuant to this agreement.

CONTRACTOR	DISTRICT
THE FAMILY FOUNDATION SCHOOL	Elmwood Park BOE
By:_____	By: David B. Blake David B. Blake, Business Administrator Board Secretary
Date:_____	Date: March 3, 2005

CERTIFICATION OF TRANSLATOR

I, Clarissa Lozano, hereby certify that I speak fluent Spanish and that I understand and speak English well. My brother, Jairo Lozano and my sister in law, Martha Lozano, do not speak English well. I certify that I translated the Stipulation of Settlement to Jairo Lozano and Martha Lozano on February 10, 2005 from English to Spanish. I was also part of a conference call with their attorney Carole Ann Geronimo and I translated her statements to them. I further certify that I and Carole Ann Geronimo asked them if they had any questions and they did not have any and they stated to me and Carole Ann Geronimo that they understood the terms of the agreement and that they were willing to sign it. Carole Ann Geronimo explained a waiver to them and I translated for her to them. I asked them if they agreed to waive all other rights against the School District and I translated Carole Ann Geronimo's explanation to them that the agreement contained a full waiver of their rights to claim any other money from the School District. They stated to me that they understood and that they wished to sign the agreement. Martha and Jairo Lozano then signed the Stipulation of Settlement in my presence and I signed this certification.

Both Martha Lozano and Jairo Lozano are both over the age of 18, are of sound mind and under no constraint or undue influence.

CLARISSA LOZANO

Sworn to before me this 21st day of February, 2005

Notary Public or Attorney at Law of the State of New Jersey

JOHN GEORGIADES
NOTARY PUBLIC
State of New Jersey
My Commission Expires August 3, 2009

141-05

C.M., on behalf of minor children, A.B. and A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that her nieces, A.B. and A.B., were not eligible for a free education in the City of Clifton School District based on family or economic hardship. The matter was transmitted to the OAL as a contested case. Petitioner failed to appear at the hearing.

Based on the petitioner's failure to submit an affidavit from the parent or guardian of the children setting forth the circumstances which comprise a qualifying family or economic hardship, the ALJ concluded that the petitioner failed to sustain her burden of proof, and dismissed the instant petition with prejudice. With respect to a counterclaim for tuition by the respondent Board, the ALJ noted that petitioner has not disputed the claim in any way and ordered that C.M. pay respondent tuition for the period of A.B. and A.B.'s ineligible attendance.

Upon a full and independent review, the Commissioner concurs with the ALJ that petitioner's appeal was appropriately dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the Final Decision in this matter; the petitioner is directed to compensate the Board in the amount of $14,125.32; and the Petition of Appeal is dismissed.

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

April 19, 2005

OAL DKT. NO. EDU 9383-02
AGENCY DKT. NO. 286-9/02

C.M., on behalf of minor children, A.B. and A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner's appeal is appropriately dismissed for failure to prosecute and the Board's counterclaim for tuition is appropriately granted.

Accordingly, the recommended decision of the OAL is adopted. Petitioner is hereby directed to compensate the Board in the amount of $14,125.32[1] for the period of A.B. and A.B.'s ineligible attendance in the Board's schools and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/05

Date of Mailing: 4/19/05

[1] It is noted that the Affidavit of Karen Perkins, Business Administrator, specifies that the annual per pupil cost of attendance at the Board's Clifton High School is $7,306, and that the two children in this matter attended this school for 170 days, equaling a tuition cost of $7,062.66 for each child. However, Ms. Perkins' Affidavit incorrectly totals this amount as $14,612, rather than the correct total of $14,125.32.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9383-02

AGENCY DKT. NO. 286-9/02

C.M., ON BEHALF OF MINOR CHILDREN, A.B. AND A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

Robert G. Rosenberg, Esq., for Petitioner

Anthony D'Elia, Esq., for Respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: January 11, 2005 Decided: March 22, 2005

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

STATEMENT OF THE CASE

Petitioner, C.M., is challenging the Board of Education's determination regarding the residency of A.B. and A.B.

On November 22, 2002, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

FINDINGS OF FACT

This matter was scheduled for hearing on the following dates:

1. The matter was originally scheduled on May 12, 2003 at which time Petitioner appeared; Respondent did not because counsel was appearing in Superior Court. The matter was rescheduled for August 12, 2003, when Respondent appeared but Petitioner did not.

2. Upon receiving a note explaining why Petitioner was not present on August 12, 2003, the matter was rescheduled for Monday, January 5, 2004, at which time Petitioner requested and received an adjournment in order to give her an opportunity to obtain the necessary affidavit of family or economic hardship from the children's parents.

3. The matter was rescheduled to Friday, June 11, 2004. Once again, it was adjourned due to the assignment of the undersigned to hear a case with statutory priority.

4. On the next rescheduled date, Monday, June 14, 2004, Petitioner's attorney had a court conflict and, therefore, requested and received an adjournment.

5. The matter was then rescheduled to Friday, October 1, 2004, when once again, Petitioner's attorney was unavailable.

6. On the next rescheduled date, Monday, January 4, 2005, neither Petitioner nor her attorney appeared for the hearing. There is, however, a note of a telephone call which is dated January 5 from petitioner's attorney in which he indicates he forgot about the hearing and asks what the disposition was.[1]

7. At the January 4, 2005 hearing, Respondent's attorney requested and was granted an opportunity in view of Petitioner's failure to appear, to proceed *ex parte* and to present an updated affidavit of tuition owed in support of the Board's counterclaim. That application was granted.

8. The record closed on January 11, 2005 and this decision was originally due no later than February 25, 2005. I requested and received an extension of time to complete the decision until April 11, 2005.

ANALYSIS AND CONCLUSIONS

In cases such as this, where a Board of Education has challenged the eligibility of a child or children to seek a free public education within the District, there are statutory requirements which must be met in order for a determination of eligibility to be made. In this case, the issue is whether there is a family or economic hardship which necessitates Petitioner taking these children into her home and having them reside with her *gratis*. *N.J.S.A.* 18A:38-1.

The burden is on Petitioner to prove by a preponderance of evidence that such is the case here. In order to demonstrate this hardship, the statute requires an affidavit from the parent or guardian of the children setting forth the circumstances which comprise the hardship. No such affidavit has been produced. I **FIND**, therefore, Petitioner has failed to sustain her burden of proof.

[1] Upon review of the file, I note the telephone message erroneously notes the date of hearing as 1/4/04; this is apparently an error since although there was a scheduled hearing for Monday, 1/5/04, that was adjourned at the request of Petitioner to give her an opportunity to seek legal counsel. The telephone message should read 1/4/05.

With respect to the counterclaim, Respondent Board of Education has submitted an affidavit[2] in which the Business Administrator and Board Secretary attests to the amount of tuition owed by C.M. Petitioner has not disputed the claim in any way. Accordingly, I **FIND** the amount of the tuition owed to the district on behalf of these two children is $14,612.00.

ORDER

I hereby **ORDER** this petition challenging Respondent's determination regarding residency be and hereby is **DISMISSED WITH PREJUDICE**; I further **ORDER**, pursuant to the counterclaim of Respondent, C.M. to pay to the district, on behalf of these children the sum of $14,612.00, the full amount of the tuition due and owing.

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

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

[2] The affidavit is attached to this decision and made a part hereof.

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

March 22, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

March 22, 2005
DATE

Mailed to Parties:

MAR 23 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

Anthony V. D'Elia, Esq.
CHASAN, LEYNER, BARISO & LAMPARELLO
300 Harmon Meadow Boulevard
Secaucus, New Jersey 07094
(201) 348-6000
Attorney for the Respondent,
Board of Education, City of Clifton

C.M. on behalf of A.B. and A.B.

Petitioner,

-vs-

BOARD OF EDUCATION,
CITY OF CLIFTON

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

Docket No.: 284-9/02

AFFIDAVIT OF KAREN PERKINS

I, Karen Perkins, of full age, being duly sworn according to law, deposes and says:

1. I am employed by the Respondent, Clifton Board of Education and hold the offices of Business Administrator and Board Secretary.

2. I have been employed in the above capacity since January 1, 1995.

3. As part of my duties and responsibilities as Business Administrator, I am responsible for providing annual reports to the New Jersey Department of Education regarding the total annual per pupil costs for the Respondent, Clifton Board of Education.

4. In connection with this hearing, I have been requested to review the business records utilized by my office to compute the aforementioned annual per pupil costs for

the local school district, including any reports which may have already been filed with the New Jersey Department of Education.

5. The minor children in this matter, Andrea and Allison Bazalar were enrolled with the Clifton school system between 9/12/02 and the present. I have confirmed the above attendance information with business records currently maintained by the Clifton Board of Education.

6. After a review of the reports and other business records on file with my office, I can state that the annual per pupil cost for each minor child for that period of time at Clifton High School (their school of attendance) was (170 days; $7,306.00/year) =$7,062.66 for each child as a total of $14,612.00.

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.

Karen L Perkins

Karen Perkins
Business Administrator

Sworn to and subscribed before
me this 20 day of August, 2003

Anthony V. D'Elia
Attorney-at-law
State of New Jersey

147-05

MICHAEL GIANNETTA, SUSETTE GIANNETTA, AND MICHAEL GIANNETTA, JR.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, *ET AL.*,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

This matter was initiated by a Petition of Appeal, filed on October 6, 2004, wherein Michael Giannetta, Jr., an 18-year-old student at Egg Harbor Township High School, and his parents sought: 1) to compel the Board to award Mr. Giannetta credit for subjects he passed during his junior year, which had been denied due to his 43 days of absence; 2) promotion of Mr. Giannetta to the twelfth grade; and 3) reimbursement for legal fees relating to an "unfair assault charge" the district brought against Mr. Giannetta as the result of a fight with another student. Petitioners further requested that school authorities be held accountable for the following allegations: failure to act in the best interest of a child; failure to enforce school policy in a uniform manner; and failure to respond to matters in a reasonable and timely manner. An Amended Petition addressing deficiencies was filed by petitioners, and respondent Board filed an Answer denying petitioner's claims, requesting an award of attorney fees and asserting that: 1) the Petition of Appeal was not timely filed, and 2) petitioning parents lack standing to bring these claims on their son's behalf given that their son is of majority age. Subsequently, the parties were requested to submit memoranda of law or letter briefs setting forth their legal arguments on the two threshold issues of untimeliness and lack of standing.

Upon a thorough review of the matter, the Commissioner concurred with the Board's position that the Petition of Appeal was untimely filed, and cited *N.J.A.C.* 6A:3-1.3(d) which defines the 90-day period for appeal. The Commissioner addressed the mandatory nature of the 90-day time period, which has been well established by case law, and found no factual circumstances that constitute grounds for relaxation of the 90-day rule. With respect to the Board's request for legal fees, the Commissioner found no statutory authority to award such fees.

The Commissioner dismissed the petition for failure to timely file in accordance with *N.J.A.C.* 6A:3-1.3(d); denied the Board's claim for legal fees; and stated that it was not necessary to reach to the issue of standing given this determination.

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

April 25, 2005

AGENCY DKT. NO. 357-10/04

MICHAEL GIANNETTA, SUSETTE GIANNETTA, AND MICHAEL GIANNETTA, JR.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY, *ET AL.*,	:	DECISION
RESPONDENTS.	:	

For Petitioners, Michael Giannetta, Susette Giannetta and Michael Giannetta, Jr., *Pro Se*

For Respondent, Emily A. Buonadonna, Esq. (Cooper Levenson, Attorneys at Law)

This matter was initiated by way of a Petition of Appeal, filed on October 6, 2004,[1] wherein Michael Giannetta, Jr., an 18-year-old student at Egg Harbor Township High School, and his parents seek to compel the Egg Harbor Township Board of Education (Board) to award Michael Giannetta, Jr. credit for subjects he passed during his junior year, but for which credit was denied due to his 43 days of absence. (Petition of Appeal at 1) Petitioners also seek the promotion of Mr. Giannetta to the twelfth grade and reimbursement for legal fees for the "unfair assault charge" the school district brought against Mr. Giannetta as the result of a fight with another student.[2] (*Ibid.*) Additionally, petitioners request that the authorities involved be held accountable for: 1) failure to act

[1] Although the petition was dated August 31, 2004, the postmark reflects that the petition was mailed on October 4 and it was received in the Bureau of Controversies and Disputes on October 6, 2004.

[2] The Commissioner notes that the 43 days of absence include Michael Giannetta, Jr's 10-day suspension for fighting. In connection with this incident, Mr. Giannetta was charged with attempting to cause bodily injury to a juvenile by punching him with a closed fist in violation of *N.J.S.* 2C:12-1(a)1 and purposely causing or recklessly creating the risk of public inconvenience, annoyance or alarm, by engaging in a fight with another student while attending the Egg Harbor Township High School, in violation of *N.J.S.* 2C:33-2(a). Petitioners claim that these charges were ultimately dismissed. (Attachment to Petition of Appeal, Complaint-Juvenile Delinquency)

in the best interest of a child; 2) failure to enforce school policy in a uniform manner; and 3) failure to respond to matters in a reasonable and timely manner. (*Ibid.*) By letters of October 12, 2004, October 27, 2004 and November 5, 2004, petitioners were advised that they were required to correct specific deficiencies in the petition before it could move forward. An Amended Petition addressing the identified deficiencies was filed on November 3, 2004. The Board filed its Answer on December 30, 2004, denying petitioners' claims, requesting an award of attorney fees and asserting as separate defenses, *inter alia*, that: 1) the Petition of Appeal was not timely filed and 2) petitioning parents Michael and Susette Giannetta lack standing to bring these claims on their son's behalf given that their son is of majority age. (Answer at 1-3)

By letter of January 3, 2005, the parties were notified that respondent's affirmative defenses of untimeliness and lack of standing were threshold issues requiring a determination before any decision could be made as to what further proceedings, if any, were required in this matter. Consequently, petitioners were requested to submit a memorandum of law or letter brief setting forth their legal arguments as to why the petition should not be dismissed for failure to file the Petition of Appeal in accordance with *N.J.A.C.* 6A:3-1.3(d), and their arguments with respect to the petitioning parents' standing to participate in this appeal. The Board was requested to respond to petitioners' submission within twenty days of receipt of same. When petitioners did not respond, by letter of January 31, 2005, petitioners were given a final opportunity to address the threshold issues and were advised that failure to respond would result in the dismissal of the within petition for failure to prosecute the appeal.

Petitioning parents Michael and Susette Giannetta filed a response on February 10, 2005. Petitioners claim that a lengthy letter to the school board was delivered on March 23, 2004, "concerning the harsh treatment given my son and the lenient treatment given his attacker." (Petitioners' February 10, 2005 Response at 1) Then, "[i]n June 2004, when the issue came up of my son not receiving credit for classes passed his junior year because of too many absences, I

went through the proper levels of appeal, with the last request being before the school board." (*Ibid.*) Petitioners' claim that they were never given a hearing, but instead the school board held a private meeting and ruled against their son. (*Ibid.*) Subsequently, petitioners claim, their lawyer at the time sent two letters to the superintendent, Dr. Heery, regarding their son receiving credit for his classes. (*Ibid.*) Petitioners report that a response from Dr. Heery was received by their attorney on August 11 or 12. (*Ibid.*) Petitioners also claim that numerous phone calls were made to the county superintendent from April to August trying to set up a meeting with him, and in August, the county superintendent told them he could not help them and directed them to the Commissioner of Education. (*Ibid.*) Petitioners conclude that they are well within the 90-day limit since the last answer from Dr. Heery was received August 11 or 12 and that "[s]ince the Board has never adequately taken care of these issues, these issues remain open." (*Ibid.*) Moreover, petitioners assert that they are not only appealing about their son not receiving credit for last year, but also are bringing before the Commissioner the "underhanded" way they have been treated by the school district.

With respect to the parents' standing to participate in this matter, petitioners claim that they have standing because their son was "under 18 at the time all these issues were happening," noting that he turned 18 on August 31, 2004. (*Id.* at 2) Additionally, petitioners request that whatever the outcome of these proceedings, that they not be burdened with legal fees, submitting that they cannot even afford to hire their own lawyer and that such fees would "literally take food out of our children's mouths." (*Ibid.*) Finally, petitioners state that their son has since dropped out of high school, five months before he should have graduated, and that they hold the school district responsible because of the district's callous attitude and treatment of their son. (*Ibid.*)

In a response filed on March 2, 2005, the Board explains that Michael Giannetta, Jr. was absent for a total of 44 days or 24 % of the 2003-04 school year, which was too many absences to earn credit for all his courses for the year as set forth in the District's Attendance Policy. (Board's March 2, 2005 Submission at 1) Of these absences, 28 were excused and 16 were unexcused. (*Ibid.*)

The Board points out that its Attendance Policy states that, if a high school student accumulates more than 10 unexcused absences, the student will not have completed the prescribed course of study and will be placed on No Credit Status, and that the No Credit Status requires the student to present all doctor's notes to the attendance secretary within 15 days. (*Id.* at 1-2) Moreover, if a student acquires 20 or more unexcused absences, the student will be retained and, if a student acquires a total of 35 excused and unexcused absences, the student will be retained. (*Id.* at 2) The Board asserts that the Attendance Policy is included in the Student Handbook and that petitioners cannot claim that Mr. Giannetta, Jr. did not receive a copy of the Student Handbook. (*Ibid.*)

The Board further contends that petitioners were notified of Mr. Giannetta, Jr.'s academic standing based on his number of absences and that they exercised their rights of appeal to the Attendance Appeals Committee, the superintendent and the Board. (*Ibid.*) Both the Attendance Appeals Committee and the superintendent denied petitioners' appeal and, on June 29, 2004, after reviewing petitioners' appeal and supporting documentation, the Board sustained Mr. Giannetta, Jr.'s attendance record of 44 absences and determined that he would have to repeat the eleventh grade. (*Ibid.*) Petitioners were notified of the Board's decision by letter of June 30, 2004 and subsequently appealed to the Commissioner. (*Ibid.*) The Board claims that it was not served with the original petition and notes that the Amended Petition was filed on November 3, 2004, more than four months or 126 days after petitioners' receipt of the final Board action. (*Ibid.*) The Board points out that *N.J.A.C.* 6A:3-1.3(d) specifies that a petition of appeal must be filed no later than the 90th day from receipt of the notice of a final order, ruling or other action by the district board and notes that the Supreme Court in *Kaprow v. Berkeley Township Board of Education,* 131 *N.J.* 572, 578 (1993) addressed the public policy reasons behind the rule. (*Id.* at 3) Thus, the Board reasons, petitioners' claims are time barred and should be dismissed. (*Id.* at 4)

With respect to petitioners' standing in this matter, the Board argues that petitioners lack standing to pursue this matter because Mr. Giannetta, Jr. voluntarily withdrew from school, and

the Board further notes that petitioners will suffer no harm if the requested relief is not granted, *e.g.*, awarding credit for Mr. Giannetta's eleventh grade classes and promotion to the twelfth grade, because Mr. Giannetta is no longer in school. (*Ibid.*) Moreover, the Board asserts, since "petitioners cannot establish some measurable amount of detrimental impact on their own son's rights, they also lack standing to seek relief on behalf of other students in the school." (*Ibid.*) Additionally, the Board contends that, upon reaching the age of majority, the right to appeal transferred to Michael Giannetta, Jr, who has been silent throughout the appeal process. (*Id.* at 6) Finally, the Board avers that petitioners' claims are moot since Michael Giannetta, Jr. voluntarily withdrew form the school district and is no longer subject to Board policy and regulations. (*Ibid.*)

Upon a thorough review of this matter, the Commissioner fully concurs with the Board's position that the Petition of Appeal herein was untimely filed. By letter of June 30, 2004, petitioners were notified that the Board had sustained Mr. Giannetta's suspension and his record of 43 days[3] of absence, and had thus determined that he would be required to repeat the eleventh grade in accordance with the provisions of Policy #5200. (Attachment to Amended Petition and Board's Exhibit F) Thereafter, petitioners contacted the superintendent and the county superintendent in an effort to alter the Board's decision.

Pursuant to *N.J.A.C.* 6A:3-1.3(d), the 90-day period for appeal to the Commissioner begins when the affected individuals have received adequate notice. In order for the notice to be adequate, the individuals must have been alerted to the existence of facts which give rise to a cause of action. *Kaprow, supra* at 586-587. Here, petitioners were clearly put on notice by letter of June 30, 2004 that their appeal to the Board had been denied. Pursuant to the *Rules Governing the Courts, R.*1:3-3, "[w]hen service of a notice or paper is made by ordinary mail, and a rule or court order allows the party served a period of time after the service thereof within which to take some

[3] It is noted that the Board's arguments refer to 44 days of absence. However, it appears that Mr. Giannetta's absences actually totaled 43 in that this letter and the other exhibits provided by the Board reflect this number.

action, 3 days shall be added to the period." Accordingly, petitioners had 93 days from June 30, or until October 1, 2004, to appeal the Board's determination to the Commissioner. Petitioners did not file the within appeal until October 6, 2004. Petitioners' subsequent efforts to negotiate with the superintendent and meet with the county superintendent do not toll the 90-day timeline. Numerous decisions concerning the 90-day time limitation have been litigated and the courts have consistently held that the rule is mandatory and that the 90-day time period begins to run on the date that notice is received of the action taken. *See Nissman v. Bd. of Educ. of the Twp. Of Long Beach Island,* 272 *N.J. Super.* 373, 380 (App. Div. 1994), *cert. denied* 137 *N.J.* 315 (1994); *Wynne v. Tillery, Camden County Superintendent of Schools et al.,* 96 *N.J.A.R.*2d (EDU) 995; and *Portee v. Newark Board of Education,* 94 *N.J.A.R.*2d (EDU) 381. As stated by the Supreme Court in the *Kaprow* matter, attempts to resolve a claim through negotiation with the local board do not negate the fact of receipt of adequate notice, nor do they toll the running of the time limitations. (*Kaprow, supra,* at 588)

Notwithstanding petitioners' assertion that they are not limited to the 90-day filing requirement because they are not only appealing the issue of their son not receiving credit for last year, but also are bringing before the Commissioner the "underhanded" way they have been treated by the school district and the failure of the Board to take care of these issues, the Commissioner finds that all the allegations raised by petitioners are related to issues determined by the Board in its June 30, 2004 determination and are, thus, subject to the same 90-day time limitation. Moreover, the Commissioner does not find that the factual circumstances set forth in petitioners' pleadings constitute grounds for relaxation of the 90-day rule. No constitutional issues are involved in the matter nor does it present issues of significant public interest beyond the parties. On the contrary, the Commissioner herein determines, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood,* 1990 *S.L.D.* 663, 673, that the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioners' appeal as untimely.

With respect to the Board's request for legal fees, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct such compensation. *See B.B., on behalf of her son, L.C. v. Board of Education of Union County Regional High School District No.1. and Donald Merachnik, Superintendent of Schools,* 1987 *S.L.D.* 323, 336*; Balsley v. North Hunterdon Bd. of Educ.,* 117 *N.J.* 434, 441 (1990*); and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473, 504 (1983).

Accordingly, for the reasons set forth above, the petition in this matter is dismissed for failure to timely file in accordance with *N.J.A.C.* 6A:3-1.3(d), and the Board's claim for legal fees is denied. Given this determination, it is not necessary to reach to the issues of standing or whether this matter has been rendered moot by Mr. Giannetta, Jr.'s withdrawal from school.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/05

Date of Mailing: 4/26/05

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

148-05

OAL DKT. NO. EDU 5992-04
AGENCY DKT. NO. 74-2/04

WILLIAM E. SHERIDAN	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CENTER FOR RESPONSIBLE ECONOMIC AND TECHNICAL EXCELLENCE HIGH SCHOOL, INC. ("CREATE"), HUDSON COUNTY, AND STEPHEN A. LIPSKI, INDIVIDUALLY,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement appears to have been effectuated prior to approval of the settlement agreement by the Commissioner, pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/05

Date of Mailing: 4/27/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05992-04

AGENCY DKT. NO. 74-2/04

WILLIAM E. SHERIDAN,

Petitioner,

v.

CENTER FOR RESPONSIBLE ECONOMIC AND TECHNOLOGICAL EXCELLENCE CHARTER HIGH SCHOOL, INC. *("CREATE"). HUDSON COUNTY AND STEPHEN A. LIPSKI, INDIVIDUALLY,

Respondents.

Phillip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Eugene R. Boffa, III, Esq., for respondent (Schumann, Hanlon, Doherty, McCrossin & Paolino, attorneys)

Record Closed: February 25, 2005 Decided: March 24, 2005

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 24, 2004, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents consisting of five pages in all.

Having reviewed the contents of the attached documentation, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documentation meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

3/24/05
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

3/30/05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 01 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

RESOLUTION OF THE BOARD OF TRUSTEES OF CREATE CHARTER HIGH SCHOOL AUTHORIZING THE SETTLEMENT OF AN OUTSTANDING LEGAL ISSUE WITH A FORMER EMPLOYEE

WHEREAS, the CREATE Charter High School is desirous of resolving a legal matter with a former employee, William Sheridan,

WHEREAS, the CREATE Charter High School has received a proposal from its attorneys to settle this matter at a cost of $7,800.00 with their recommendation that CREATE do so.

NOW, THEREFORE, be it resolved by the Board of Trustees of CREATE Charter High School to adopt the recommendations of its attorneys to settle this matter with a former employee, William Sheridan in the amount of $7,800.00; and,

BE IT FURTHER RESOLVED that the Executive Director of CREATE Charter High School be authorized to enter into an agreement to do all things necessary and proper in furtherance of said agreement.

Record of Vote:

Introduce By:	Margo D. Cooper
Seconded By:	Wanda Benetiz

TRUSTEE	AYE	NAY	ABSTAIN	ABSENT
Emad Attalla	X			
Wanda Benitez	X			
Louis Casasnovas	X			
Margo D. Cooper	X			
William H. Kron, Jr.	X			
Stephen Stamos	X			

Stephen Stamos, Board Secretary

Dec. 16, 2004
Date

SCHUMANN, HANLON, DOHERTY, MCCROSSIN & PAOLINO

COUNSELLORS AT LAW

PAUL M. HANLON *
EDWARD J. McCROSSIN, III *
EUGENE T. PAOLINO
JAMES F. DRONZEK

DAVID K. DeLONGE
RONALD P. COLICCHIO**†

*Member of N.J. & N.Y. Bars
**Member of N.J., N.Y. & Fla. Bars
†L.L.M. in Taxation

30 MONTGOMERY STREET
15TH FLOOR
P.O. BOX 2029
JERSEY CITY, NEW JERSEY 07302
(201) 434-2000
FAX: (201) 434-3956
FAX: (201) 938-1503
FAX: (201) 434-2676

ENGLEWOOD OFFICE:
39 PARK PLACE • ENGLEWOOD, NJ 07631
(201) 541-3880
FAX: (201) 567-7770

RED BANK OFFICE:
244 BROAD STREET • RED BANK, NJ 07701
(732) 345-6500
FAX: (732) 345-6503

FOUNDED IN 1650 AS
SCUDDER & GILCHRIST

FREDERIC W. SCHUMANN
(1908 - 1983)

BRIAN C. DOHERTY
(1948 - 2001)

WRITER'S E-MAIL ADDRESS:

EBOFFA3@SHDLAW.COM
REPLY TO JERSEY CITY ADDRESS

February 23, 2005

Philip Feintuch, Esq.
Feintuch, Porwich & Feintuch
721 Newark Avenue
Jersey City, NJ 07306

Re: **William E. Sheridan v. CREATE Charter High School**
Docket No. EDUOR 05992 2004N

Dear Mr. Feintuch:

Pursuant to the settlement in the above-referenced matter, I enclose herewith my client's check in the amount of $7,800 payable to William Sheridan. I am also enclosing a Voucher which I ask that you have your client sign and return in the envelope provided.

Very truly yours,

Eugene R. Boffa,III, Esq.

ERB,III:aj
Enclosures
cc/Hon. Thomas E. Clancy

RELEASE

This Release, dated, February 15, 2005 , is given

BY the Releasor (s) WILLIAM E. SHERIDAN , JR. referred to as "I".

TO STEPHEN A. LIPSKI and CREATE CHARTER SCHOOL referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and right 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 applied to claims resulting from anything which has happened up to now. I specifically release the following claims:

For any and all claims arising out of employment and for which an action was brought before the Commissioner of Education, known as Docket No. EDUOR 05992 2004N.

2. Payment. I have been paid a total of $ 7,800.00 (Seven Thousand Eight Hundred Dollar in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds 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, the proper corporate officers have signed it and its corporate seal is affixed.

Witnessed or Attested by:

Mary Ann Sita

Mary Ann Sita

William E. Sheridan Jr

WILLIAM E. SHERIDAN JR (Seal)

(Seal)

STATE OF NEW JERSEY)
SS.
COUNTY OF HUDSON)

I CERTIFY that on February 15, 2005 personally came before me and stated to my satisfaction that this person (if more than one, each person)

WILLIAM E. SHERIDAN, JR.

(a) was the maker of the attached instrument; and
(b) executed this instrument as his or her own act.

Mary Ann Sita

(PRINT NAME AND TITLE BELOW SIGNATURE)

MARY ANN SITA

MARY ANN SITA
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 3/8/2007

CREATE
CHARTER HIGH SCHOOL
164 LEMBECK AVENUE, JERSEY CITY, NJ 07305

THE PROVIDENT BANK 55-7230 / 2212 **No.** 003480

DATE 02/16/05 AMOUNT *****$7,800.00

Pay Exactly seven thousand eight hundred and xx / 100

TO THE ORDER OF William Sheridan

AUTHORIZED SIGNATURE

AUTHORIZED SIGNATURE

⑈003480⑈ ⑆221272303⑆ 6042⑉1684⑉9⑈

CREATE CHARTER HIGH SCHOOL **No.** 003480

PO Number	Account	Comment	Amount			
PO Number	Account	Comment	Amount	200500464	11-200-230-820-000-000	Settlement of Legal Claim	$7,800.00

Inv#/Comment:

Total for Check #3480: $7,800.00 for William Sheridan

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

721 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

Via Facsimile Only

February 25, 2005

Honorable Thomas E. Clancy
Presiding Judge
State of New Jersey
Office of Administrative Law
33 Washington St.
Newark, NJ 07102-3011

RE: William E. Sheridan vs. Create Charter School
OAL Docket #: EDUOR 05992-2004N

Dear Judge Clancy:

Please be advised the above captioned matter has been amicably resolved. The respondent in this matter is in receipt of my client's Release and I am in receipt of the respondent's check made payable to my client. Please mark this matter withdrawn.

I thank you for the courtesies given to me in this matter.

Respectfully yours,

PHILIP FEINTUCH

PF/jt
Via Fax # 973-648-6124
cc: Eugene Boffa, III, Esq.

SCHUMANN, HANLON, DOHERTY, MCCROSSIN & PAOLINO

COUNSELLORS AT LAW

PAUL M. HANLON *
EDWARD J. McCROSSIN, III *
EUGENE T. PAOLINO
JAMES F. DRONZEK

DAVID K. DeLONGE
RONALD P. COLICCHIO**†

*Member of N.J. & N.Y. Bars
**Member of N.J., N.Y. & Fla. Bars
†L.L.M. in Taxation

30 MONTGOMERY STREET
15TH FLOOR
P.O. BOX 2029
JERSEY CITY, NEW JERSEY 07302
(201) 434-2000
FAX: (201) 434-3956
FAX: (201) 938-1503
FAX: (201) 434-2676

ENGLEWOOD OFFICE:
39 PARK PLACE • ENGLEWOOD, NJ 07631
(201) 541-3880
FAX: (201) 567-7770

RED BANK OFFICE:
244 BROAD STREET • RED BANK, NJ 07701
(732) 345-6500
FAX: (732) 345-6503

FOUNDED IN 1850 AS
SCUDDER & GILCHRIST

FREDERIC W. SCHUMANN
(1908 - 1983)
BRIAN C. DOHERTY
(1948 - 2001)

WRITER'S E-MAIL ADDRESS:

REPLY TO JERSEY CITY ADDRESS

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 NOV 10 P 3:06

November 8, 2004

Honorable Thomas E. Clancy
33 Washington Street
7th Floor
Newark, NJ 07102

Re: Sheridan v. CREATE

Honorable Thomas Clancy:

Please be advised that this matter is scheduled for mediation before Your Honor on Monday, November 17, 2004. However, the parties have settled this matter.

Thank you for your attention to this matter.

Very truly yours,

Eugene R. Boffa,III, Esq.

ERB,III/yre

RELEASE

This Release, dated. February 15, 2005 , is given

BY the Releasor (s) WILLIAM E. SHERIDAN , JR. referred to as "I".

TO STEPHEN A. LIPSKI and CREATE CHARTER SCHOOL referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and right 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 applied to claims resulting from anything which has happened up to now. I specifically release the following claims:

For any and all claims arising out of employment and for which an action was brought before the Commissioner of Education, known as Docket No. EDUOR 05992 2004N.

2. Payment. I have been paid a total of $ 7,800.00 (Seven Thousand Eight Hundred Dollars) in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds 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

149-05

OAL DKT. NO. EDU 9842-04
AGENCY DKT. NO. 274-8/04

R.M., on behalf of minor child, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the parties by the OAL on March 3, 2005, providing petitioner ten (10) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/05

Date of Mailing: 4/27/05

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

150-05

OAL DKT. NO. EDU 1794-02
AGENCY DKT. NO. 8-1/02

DEBORAH A. STRANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the 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 settlement as the final decision in this matter, *subject*, however, to the understanding that the term pertaining to confidentiality (Term 3) may not be read in a manner inconsistent with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* Although the parties to a settlement may agree to keep its specific terms confidential between themselves, such agreement does not negate the fact that, pursuant to *N.J.A.C.* 1:1-14.1(a), records of all hearings shall be open for public inspection unless the Administrative Law Judge (ALJ) orders the sealing of the record, or any part thereof, for good cause shown.

Additionally, it is noted that the agreement's consideration term (Term 2) appears to have been effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and parties are cautioned, in a contested matter

duly transmitted to the OAL, against effectuating any term of a settlement agreement prior to its submission to, and approval by, the Commissioner.

Subject to the proviso and caution noted above, this matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/05

Date of Mailing: 4/27/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1794-02
AGENCY DKT. NO. 8-1/02

DEBORAH A. STRANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

Respondent.

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

Melvin Randall, Esq., for respondent (Love and Randall, attorneys)

Record Closed: March 11, 2005 Decided: March 14, 2005

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 15, 2002, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement, which was received by the undersigned on March 11, 2005

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

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

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

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

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

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

March 14, 2005
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

3-16-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 21 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL

MARVIN L. COMICK
CHANDRA RAINEY COLE

JOHN C. LOVE - 1964-1989

57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017

(973) 674-6000
FAX: (973) 674-8813

March 10, 2005

loveandrandallesqs@verizon.net

Via Facsimile (973) 648-6124 and Regular Mail
Office of Administrative Law
33 Washington Street
Newark, NJ 07102
Attention: Judge Edith Klinger

RE: Deborah A. Strano v. Board of Education of the City of Orange, Essex County
OAL Docket No. EDU 1794-02

Dear Judge Klinger:

I am in receipt of your letter dated March 7, 2005 wherein you request a copy of the settlement agreement with regards to the above captioned matter.

Enclosed, please find the follcwing:

- A copy of the cover letter sent to Ms. Oxfeld Kanef;
- A copy of the fully executed Release and Settlement Agreement;
- A copy of the check tendered by the Board to Petitioner; and
- A copy of the Voucher which Ms. Strano is required to sign and return.

Should you have any questions or concerns, please do not hesitate to contact my office.

Very Truly Yours,

LOVE & RANDALL, ESQS.

Chandra R. Cole, Esq.

Enclosure(s)

CRC:sp

Via Regular Mail
CC: Gail Oxfeld Kanef, Esq.

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL

MARVIN L. COMICK
CHANDRA RAINEY COLE

JOHN C. LOVE - 1964-1989

57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017

(973) 674-6000
FAX: (973) 674-8813

loveandrandallesqs@verizon.net

February 22, 2005

VIA FACSIMILE (973)802-1055 & LAWYERS SERVICE
Gail Oxfeld Kanef, Esq.
60 Park Place, 6th Floor
Newark, New Jersey 07102-4003

RE: Debra Strano v. Orange Board of Education

Dear Ms. Kanef:

Enclosed please find an original fully executed Settlement Agreement and Release with regards to the above captioned matter. In addition, please find Check #017233 in the amount of $10,000.00 as per the agreement.

Please immediately return to this office the executed yellow copy of the voucher signed on behalf of your client upon receipt.

Should you have any additional questions, please do not hesitate to contact my office.

Very Truly Yours,

Love & Randall, Esqs.

Chandra R. Cole, Esq.

CRC:sp

Enclosure(s)
VIA FACSIMILE
CC: Dr. Nathan Parker, Superintendent of Schools
Mr. Adekunle James, Business Administrator
Ms. Belinda Scott-Smiley, Director of Special Services

RELEASE

This Release, dated **January , 2005** is given

BY the Releasor, **Ms. Debra Strano**, a person formerly employed by the Orange Board of Education as a Physical Education Teacher, referred to as "I,"

TO the **Orange Board of Education**, 451 Lincoln Avenue, Orange, New Jersey. This Release also extends to all of the Board's employees, successors and assignees; referred to as "You."

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 that has happened up until now. I specifically release the following claims in addition to those previously mentioned: any and all claims related to or arising out of the course of employment with the Orange Board of Education which include, but is not limited to issues concerning having a tenured position within the district.

2. **Consideration.** I agree that in consideration of this Release, I will be paid the sum of ten thousand dollars ($10,000.00). I understand that the parties agree that in response to any inquiries made, no Board employee or member will make any statements with regard to the details of my employment, with the exception of dates of employment and title. I understand that under the terms of the agreement, the district shall place a memorandum in my file which will indicate to Board employees that this agreement exists and shall be followed. I agree that I will not seek anything further including but not limited to monetary payments or continued employment. In addition, I understand that neither the Board or anyone employed by the Board will make any statements with regard to the details of my employment, with the exception of dates of employment and title. I also understand that I will be precluded from instituting any and all other actions against you. I also agree to formally withdraw my Petition of Appeal (OAL Docket # EDU 01794-02N) now pending before the Commissioner of Education with prejudice.

3. **Confidentiality.** All terms of this Release are to remain confidential between the two parties.

4. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities.

5. **No Past Practice or Precedent.** I understand that with regard to this Release there is no past practice or precedent established, and that the terms herein cannot be used by any individual or group in any grievance, action or judicial proceeding.

6. **Signatures.** I understand and agree to the to the terms of this Release. I acknowledge same by affixing my signature hereto.

Witnessed or Attested by:

Debra Strano

Dated: 1/29/05

STATE OF NEW JERSEY, COUNTY OF ~~ESSEX~~ Morris

Sworn and Subscribed before me on this

29th day of January, 2005

KIRSTEN H. MARINO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 30, 2007

SETTLEMENT AGREEMENT

The **Orange Township Board of Education**, Essex (hereinafter the "District" or "Board") with its principal place of business located at 451 Lincoln Avenue, Orange, New Jersey 07050, and **Ms. Debra Strano** (hereinafter "Strano") represented by counsel, desiring to settle this matter in an amicable way, hereby set forth their complete agreement as follows:

WITNESSETH

Whereas, Petitioner, Debra Strano, is a former Physical Education Teacher of the Orange Board of Education; and

Whereas, the Orange Board of Education dismissed her from her position; and

Whereas, Petitioner has filed a Petition of Appeal with the Commissioner of Education (OAL Docket # EDU 01794-02N) alleging violation of her tenure rights. Specifically she alleges that her employment was terminated in violation of N.J.S.A. 18A:28-5; and

Whereas, The Board's position is that Petitioner did not achieve tenure within the intendment of N.J.S.A. 18A:28-5, and as such was properly dismissed; and

Whereas, there is a dispute with regard to the foregoing, however in light of the potential exposure, the parties have reached a settlement; and

Now Therefore, for the consideration specified below, set forth the following mutual covenants and agreements:

1. The parties agree that Strano gives up any and all claims and rights which she may have against the Board. This agreement also includes those of which Strano is not aware if and those not mentioned in this Settlement Agreement. This Settlement Agreement applies to claims resulting from anything that has happened up until now. In addition to the claims previously mentioned, the Settlement Agreement includes: any and all claims related to or arising out of the course of employment with the Orange Board of Education which include, but is not limited to issues concerning having a tenured position within the district. The parties agree that Strano gives up all of the foregoing claims.

2. The Board agrees that in consideration for Strano giving up all claims and rights which she may have against the Board, the Board will pay Strano the sum of ten thousand dollars ($10,000.00). The parties agree that in response to any inquiries made, no Board employee or member will make any statements with regard to the details of Strano's employment, with the exception of dates of employment and title. The district shall place a memorandum in Ms. Strano's file which will clearly indicate to Board employees that this agreement exists and shall be followed. The parties agree that Strano will not seek anything further including but not limited to monetary payments or continued employment. In addition, the parties agree that Strano will be precluded from instituting any and all other actions against the Board. The parties also agree to formally withdraw

her Petition of Appeal now pending before the Commissioner of Education (OAL Docket # EDU 01794-02N) with prejudice.

3. The parties agree that all terms of this Settlement Agreement are to remain confidential between the two parties.

4. The parties agree that both are bound by the terms of this Settlement Agreement. Anyone who succeeds either parties' rights and responsibilities, such as heirs, successors or the executors of estates, are also bound. This Settlement Agreement is made for the parties' benefit and all who succeed the parties' rights and responsibilities.

5. The parties agree that with regard to this Settlement Agreement, there is no past practice or precedent established, and that the terms herein cannot be used by any individual or group in any grievance, action or judicial proceeding.

6. The parties understand and agree to the to the terms of this Settlement Agreement and acknowledge same by affixing signatures hereto.

Witnessed or Attested by:

Dr. Nathan Parker, Superintendent

Dated:

Ms. Debra Strano

Dated: 1/24/05

STATE OF NEW JERSEY, COUNTY OF ESSEX

Sworn and Subscribed before me on this

11th day of February, 2005

Chandra L. Ramey Cole, Esq.
Attorney At Law – State of New Jersey

017233

ORANGE BOARD OF EDUCATION Orange, New Jersey 07050 WARRANT NO.

BUDGET ACCOUNT NUMBER	P.O. NUMBER	INVOICE NUMBER	AMOUNT
11-000-230-590-Z-BL-	504786	030805	$10,000.00
		TOTAL AMOUNT	$10,000.00

THIS DOCUMENT HAS A COLORED BACKGROUND, FLUORESCENT FIBERS, FLUORESCENT WATERMARK AND BLEED THRU MICR/ARABIC NUMBERS - MISSING A FEATURE INDICATES A COPY

ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE, NEW JERSEY 07050
GENERAL CUSTODIAN ACCOUNT

Bank of America

55-33
212

017233

02/11/05

PAY TO THE ORDER OF DEBORAH STRANO $ *****$10,000.00

*Ten Thousand And 00********** DOLLARS

Arthur J. Griffin PRESIDENT

SECRETARY

TREASURER

DEBORAH STRANO
15 HIGHVIEW TRAIL
WHARTON NJ 07885-

⑈017233⑈ ⑆021200339⑆ 04612 84851⑈

NDOR:

DEBORAH STRANO (DOST)
15 HIGHVIEW TRAIL
WHARTON NJ 07885

IIP TO: ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE, N. J. 07050 ATTN:BUSINESS OFF.

ACCOUNT NO.	AMOUNT
11-000-230-590-2-BL-	$10,000.00

DATE	DEPARTMENT
02/11/05	BOARD

QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT
1	RESOLUTION #G04-014 SETTLEMENT IN THE CASE OF A FORMER ORANGE BD OF ED EMPLOYEE - 10/19/98 - 10/9/01 DOCKET # EDU-01794-02N INPUTmA	10000.000	$10,000.00
	Total for lines		$10,000.00

HIS VOUCHER MUST BE SIGNED AND RETURNED FOR PAYMENT

VENDOR'S DECLARATION

re that the goods or services itemized in this bill have been delivered or rendered; that no bonus has been given or d by any person or persons with the knowledge of the dependent; and that the above bill is true and correct.

SIGNATURE & TITLE

DATE

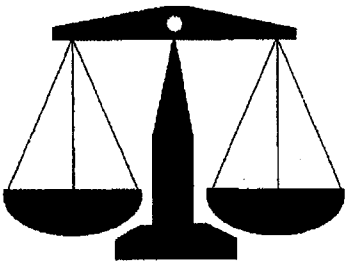
NOTE FOR BILLING
WHERE ORDER SHOWS ITEM NUMBER
BE SURE YOUR INVOICE SHOWS SAME

BY

BOARD SECRETARY

Mar 11 05 07:19p Love And Randall 9736748813 p.9

LOVE & RANDALL, ESQ.
57 Washington Street
East Orange, New Jersey 07017
Phone: (973) 674-6000 Fax: (973) 674-8813
Melvin C. Randall, Esq.
Marvin L. Comick, Esq.
Chandra Rainey Cole, Esq.



To:	Judge Edith Klinger	From:	Chandra R. Cole, Esq./Sharlynda
Fax:	973-648-6124	Pages:	9 including cover page
Phone:		Date:	3/11/2005
Re:	Deborah A. Strano v. Board of Education of the City of Orange, Essex County OAL Docket No. EDU 1794-02	CC:	

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

● Comment

152-05

OAL DKT. NO. EDU 1164-05
AGENCY DKT. NO. 374-10/04

JACK CORTEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF JACK CORTEZ, SCHOOL DISTRICT OF THE CITY OF GARFIELD, BERGEN COUNTY.	:	

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

Initially, the Commissioner observes that this matter involves tenure charges cross-filed as an Answer to the Petition of Appeal. Notwithstanding the unusual procedural posture of these charges, pursuant to *N.J.A.C.* 6A:3-5.6(a), once they have been certified to the Commissioner, they may be settled only with his approval, and any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled *In re Cardonick*, 1990 *S.L.D.* 842, 846. Under that standard, the proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal;

3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C.* 6A:3-5.6. In the present instance, none of the applicable standards have been met.[1]

Additionally, the Commissioner observes that the Board Secretary/Business Administrator signed the Settlement Agreement on behalf of the Board. In that neither the file nor the agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign on its behalf, and, in that the agreement is not, in the alternative, signed by the Board attorney as the Board's duly authorized representative in litigation, this, too, prevents the Commissioner's approval.

While the Commissioner does not preclude the possibility of settlement in this or any other contested matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement of a tenure matter is consistent with appropriate standards as expressed in *Cardonick*, *supra*, and that any settlement to which a board of education is a party has been duly approved by the board.

Accordingly, the proposed settlement is rejected for the reasons expressed herein, and this matter is hereby remanded to the OAL for expansion of the record and/or

[1] The provision regarding Board of Examiner notification does not apply to petitioner, who is not a teaching staff member.

revision of the settlement document 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 on the merits.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/05

Date of Mailing: 4/27/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01164-05

AGENCY REF.NO.374-10/04

JACK CORTEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY and IN THE MATTER OF THE TENURE HEARING OF JACK CORTEZ, GARFIELD SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Bruce D. Leder, Esq., for petitioner (Cohen, Leder, Montalbano & Grossman, attorneys)

Toni Belford Damiano, Esq., for respondent

Record Closed: March 10, 2005 Decided: March 15, 2005

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 12, 2005 for determination as a contested case. A hearing was scheduled for February 1, 2005, which was adjourned because Ms. Damiano's father passed away. It was rescheduled to February 24, 2005.

On the date of the hearing the parties were able to resolve the matter. On March 1, 2005, the parties submitted the attached typewritten Settlement Agreement indicating the terms of the agreement. On March 10, 2005, court received the original handwritten signed agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

3/15/05
DATE

CAROL I. COHEN, ALJ

Receipt Acknowledged:

3-21-05
DATE

DEPARTMENT OF EDUCATION

MAR 24 2005
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

COHEN, LEDER, MONTALBANO & GROSSMAN

A LIMITED LIABILITY COMPANY
COUNSELLORS AT LAW
1700 GALLOPING HILL ROAD
(AT GARDEN STATE PARKWAY, EXIT 138)
KENILWORTH, N.J. 07033

(908) 298-8800

FIRM E-MAIL
laborlaw@coopmail.net

FAX
(908) 298-9333

EDWARD A. COHEN
BRUCE D. LEDER[1]
PAUL A. MONTALBANO
DAVID GROSSMAN[1]

DONALD RAYMAR
MICHAEL A. McLAUGHLIN[1]

[1] ALSO N.Y. BAR

DIRECT E-MAIL
COHEN: edcohenesq@yahoo.com
LEDER: UNIONLEDER@YAHOO.COM
MONTALBANO: MONTALBANOEMAIL@YAHOO.COM
GROSSMAN: davegrossmanesq@yahoo.com
MCLAUGHLIN: mclaughlinesq@yahoo.com

February 28, 2005

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR -1 P 1:53

Honorable Carol I. Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Jack Cortez v. City of Garfield Board of Education
Docket No. EDUOA 01164-2005N

Dear Judge Cohen:

Enclosed please find typewritten Settlement Agreement in this matter.

Should you have any questions, please feel free to contact.

Very truly yours,

COHEN, LEDER, MONTALBANO & GROSSMAN

By: _____
BRUCE D. LEDER

BDL:cs
encl.
cc Toni Damiano, Esq.
Jack Cortez
Ken Bohan (L. 560)

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR -1 P 1:53

SETTLEMENT AGREEMENT

In the matter of Jack Cortez v. Garfield Board of Education
OAL Docket No. EDU01164-05

WHEREAS, the Garfield Board of Education and Jack Cortez are parties to a matter pending before the Office of Administrative Law, Docket No. EDU-01164-05; and

WHEREAS, both parties desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter;

IT IS HEREBY AGREED AS FOLLOWS:

1. Jack Cortez will file a disability retirement application. Jack Cortez understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education. The Garfield Board of Education takes no position as to whether or nor Jack Cortez is eligible for a disability retirement. The Garfield Board of Education agrees to provide reasonable assistance to Jack Cortez in the preparation of the disability pension application.

2. Jack Cortez shall receive from the Garfield Board of Education a lump sum settlement equivalent to five and one-half (5.5) months of his present salary ($49,600.00) in return for the following release. Jack Cortez releases now and forever any and all claims, causes of action, petitions or demands against the Garfield Board of Education and its individual Board members arising out of his employment, his termination, his tenure charges, his retirement and/or the end of his employment with the Garfield Board of Education. Notwithstanding this release, Jack Cortez has the right to pursue his workers compensation claim.

3. Jack Cortez acknowledges that he has already received one and one-half (1.5) months of salary. This sum, in addition to the amount set forth in paragraph 2, shall be the total amount payable by the Garfield Board of Education to Jack Cortez for any claims. Upon receipt of the five

and one-half (5.5) months as set forth in paragraph 2, Jack Cortez acknowledges that the Garfield Board of Education has completed its obligation to Jack Cortez and Jack Cortez agrees that the Garfield Board of Education will have satisfied its monetary obligations to him for any and all claims.

4. Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter.

5. The Garfield Board of Education will withdraw its cross petition in this matter.

Garfield Board of Education

/s/ Jack Cortez
Jack Cortez

/s/ Dennis R. Frohnapfel

Dated: February 24, 2005

Dated: February 24, 2005

COHEN, LEDER, MONTALBANO & GROSSMAN

A LIMITED LIABILITY COMPANY
COUNSELLORS AT LAW
1700 GALLOPING HILL ROAD
(AT GARDEN STATE PARKWAY, EXIT 138)
KENILWORTH, N.J. 07033

(908) 298-8800

FIRM E-MAIL
laborlaw@coopmail.net

FAX
(908) 298-9333

EDWARD A. COHEN
BRUCE D. LEDER[1]
PAUL A. MONTALBANO
DAVID GROSSMAN[1]

DONALD RAYMAR
MICHAEL A. McLAUGHLIN[1]

[1]ALSO N.Y. BAR

DIRECT E-MAIL
COHEN: edcohenesq@yahoo.com
LEDER: UNIONLEDER@YAHOO.COM
MONTALBANO: MONTALBANOEMAIL@YAHOO.COM
GROSSMAN: davegrossmanesq@yahoo.com
MCLAUGHLIN: mclaughlinesq@yahoo.com

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR 10 A 7:52

March 2, 2005

Honorable Carol I. Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Jack Cortez v. City of Garfield Board of Education
Docket No. EDUOA 01164-2005N

Dear Judge Cohen:

Pursuant to your request, enclosed please find copy of the original Settlement Agreement in this matter.

Very truly yours,

COHEN, LEDER, MONTALBANO & GROSSMAN

By: _____
BRUCE D. LEDER

BDL:cs
enc.
cc Toni Damiano, Esq.
Ken Bohan (L. 560)
Jack Cortez

Whereas the Garfield Board of Education and Jack Carter are parties to a matter pending before the Office of Administrative Law, Docket EDU-01164-05 and

Whereas both parties ~~are desirous~~ desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter

It is hereby agreed as follow:

(1) Jack Carter will file a disability retirement application. Jack Carter understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR 10 A 7:52

no position as to whether or not Jack Carter is eligible for a disability retirement. The GBE agrees to provide reasonable assistance to Jack Carter in the preparation of the disability pension application

(2) Jack Carter shall receive from the GBE a lump sum settlement equivalent to five and ½ (5.5) months of his present salary ($49,600), ~~a retroactive~~ for the following release. Jack Carter releases now and forever any and all claims, causes of action, petitions or demands against the GBE and its individual ~~and~~ board members arising out of this employment

this agreement and/or the end of his employment with the GBE. Notwithstanding this release, Jack Carter has the right to pursue his lawsuit or compensation claim

③ Jack Carter acknowledges that he has already received one and one half (1.5) months of salary. This sum in addition to the amount set forth in paragraph 2 shall be the total amount payable by the GBE to Jack Carter for any claims. Upon receipt of the five and one half (5.5) months as set forth in paragraph 2, Jack Carter acknowledges that the GBE has completed its obligation to Jack Carter

h

to him for any

(4) Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter

(5) GBE will withdraw its cross petition in this matter

Jack Cortez
Jack Cortez

Dennis N Zwarenpfeil
Garfield Board of Education

Feb 24, 05
Date

will have satisfied its monetary obligations to him for any and all claims

(4) Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter

(5) GBE will withdraw its cross petition in this matter

Jack Cortez
Jack Cortez

Dennis R Zuckerbell
Garfield Board of Education

Feb 24, 05
Date

his retirement and/or [redacted] the end of his employment with the GBE. Notwithstanding this release, Jack Carter has the right to pursue his worker compensation claim

③ Jack Carter acknowledges that he has already received one and one half (1.5) months of salary. This sum in addition to the amount set forth in paragraph 2 shall be the total amount payable by the GBE to Jack Carter for any claims. Upon receipt of the five and one half (5.5) months as set forth in paragraph 2, Jack Carter acknowledges that the GBE has completed ~~this~~ its obligation to Jack Carter

no position as to whether or not Jack Carter is eligible for a disability retirement. The GBE agrees to provide reasonable assistance to Jack Carter in the preparation of the disability pension application

(2) Jack Carter shall receive from the GBE a lump sum settlement equivalent to five and ½ (5.5) months of his ~~present~~ salary ($49,600) in return for the following release. Jack Carter releases now and forever any and all claims, causes of action, petitions or demands against the GBE and its individual Board members arising out of his employment,

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAR 10 A 7:52

Whereas the Garfield Board of Education and Jack Carton are parties to a matter pending before the Office of Administrative Law, Docket EDU-01164-05 and

Whereas both parties ~~are desirous~~ desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter

It is hereby agreed as follow:

(1.) Jack Carton will file a disability retirement application. Jack Carton understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education

153-05

OAL DKT. NO. EDU 5802-99 (ON REMAND FROM EDU 7081-98)
AGENCY DKT. NO. 206-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF REGIS IDEC,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION ON REMAND
BOROUGH OF ROSELLE,	:	
UNION COUNTY.	:	
	:	

The Initial Decision of the Office of Administrative Law (OAL) and the record of this matter, remanded to the OAL because the previously proposed settlement agreement contained no indication of approval by the Board of Education notwithstanding that its terms on their face provided for voiding of the agreement in the absence of Board ratification, have been reviewed.

Upon such review, the Commissioner notes that this matter has been pending on remand since June 1999, that settlement monies were paid by the Board on March 16, 2001, that since that time the matter has awaited nothing more than submission of a duly executed settlement agreement by the Board, and that the Administrative Law Judge (ALJ) last contacted the parties in writing in June 2002, advising that if an agreement was not received in 14 days, the matter would be dismissed or re-listed for full evidentiary hearing. Although counsel for respondent replied to the ALJ indicating that respondent had executed the agreement and had provided it to counsel for the petitioner to sign, as of the date of this decision, no duly executed agreement was ever submitted by the Board, either to the ALJ or to the Commissioner, and no evidentiary hearing was conducted.

Notwithstanding the Commissioner's reluctance to approve a settlement in the absence of either a Board resolution or signature of the Board Attorney as the Board's duly authorized representative in litigation, especially where the settlement terms on their face require ratification by the full Board, under the circumstances here present, no purpose would be served by ordering further proceedings.* The Board presumably authorized the payment made to respondent in March 2001, and subsequent correspondence on record, together with the Board's silence in response to the ALJ's communications and the Initial Decision, sufficiently demonstrates that the parties considered the matter ended at that time.

Accordingly, the Commissioner approves the settlement terms, which comport with the *Cardonick* standards for review of settlements in tenure matters, and he adopts the settlement as the final decision in this matter, which is hereby dismissed. (*In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a)) In so doing, however, the Commissioner chastises the Board for its dilatoriness in properly concluding this matter, thereby causing substantial waste of administrative and adjudicative time by both the ALJ and the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/05

Date of Mailing: 4/27/05

* A certification of counsel, signed by Neil M. Cohen, Esq., which was submitted to the ALJ in July 1999 in support of petitioner's motion to enforce the settlement agreement, recites that the Board did ratify the original settlement agreement on May 15, 1999. Mr. Cohen acknowledges therein: "It should have been communicated by me to the Commissioner's Office."

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5802-99
AGENCY DKT. NO. 206-6/99
ON REMAND FROM
OAL DKT. NO. EDU 7081-98
AGENCY DKT. NO. 206-6/98

IN THE MATTER OF THE TENURE HEARING OF REGIS IDEC, BOARD OF EDUCATION BOROUGH OF ROSELLE, UNION COUNTY,

---

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Neil M. Cohen, Esq, for respondent
(Gill & Cohen, P.C., attorney)

Record Closed: March 1, 2005 Decided: March 15, 2005

BEFORE **IRENE JONES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 15, 1998, petitioner, Roselle Board of Education ("Petitioner" or "Board") filed tenure charges against the respondent, Regis Idec, ("Responent" or "Idec") a custodial worker, alleging conduct unbecoming, insubordination and other just cause.

The matter was transmitted to the Office of Administrative Law (OAL) on July 23, 1998 and assigned OAL Docket No. EDU 7081-98. On February 14, 1999, the parties entered into a settlement agreement wherein Idec agreed to resign effective July 31, 1999. The Board agreed to dismiss the tenure charges and to place Idec on leave of absence with full-pay through July 31, 1999. Additionally, the Board agreed to continue to pay Idec his full salary; provide full insurance coverage through July 31, 1999; and to pay Idec for five (5) weeks of accumulated vacation days. The agreement was filed before the undersigned on March 30, 1999 and an Initial Decision issued on April 16, 1999. (Exh. A).

On July 14, 1999, the matter was remanded by the Commissioner, Department of Education for modification consistent with his June 7, 1999 decision that rejected the settlement agreement, because there was not a final ratification attached to the agreement. The matter was assigned OAL Dkt. No. EDU 7081-98.

On June 22, Idec, pursuant to the terms of the Stipulation, moved to restore the matter to the active case list. Further, he moved to compel payment of his salary and benefits. The Board filed a Cross Motion on July 7, 1999 requesting that the settlement be given full force and effect.

An Order compelling the Board to pay Idec's salary and benefits was signed on March 15, 2001. On March 16, 2001, the Board faxed copies of its payments to Idec. (Exh. B). On March 28, 2001, counsel for Idec advised that settlement monies were received on March 19, 2001 and a settlement agreement was forwarded to counsel for the Board for signature. (Ex. C).

Subsequently, numerous letters and phone calls were made to obtain the signed settlement agreement. Despite these efforts, due to Board counsel's busy schedule, the settlement agreement has not been filed.

On March 1, 2005, the undersigned, *sua sponte*, closed the record.

FINDINGS

Having reviewed the record in this matter, I **FIND** the parties now reached a settlement in this matter. I further **FIND** that the terms of the settlement have been complied with. Thus I **FIND** that this matter is not a contested case and this matter shall 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

3/15/05
DATE

Irene Jones
IRENE JONES, ALJ

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

3/16/05
DATE

Mailed to Parties:

MAR 17 2005
DATE

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

sej

154-05

J.W.A., on behalf of minor children, A.A., N.A. and J.A.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that his children, A.A., N.A. and J.A., were not eligible for a free education in the Hamilton Township School District.

Respondent Board filed an answer to the petition, and asserted a counterclaim for payment of tuition. The matter was transmitted to the OAL as a contested case, and a hearing was scheduled for February 1, 2005. Notwithstanding Petitioner's failure to appear, testimony was taken pertaining to the minor children's domicile and the cost of their education provided by respondent Board. The Board provided certification of the district's daily per student tuition rate for school year 2002-2003 ($44.81), and school years 2003-2004 and 2004-2005 ($48.70). The ALJ concluded that the Board's proofs as to ineligibility for attendance and as to the tuition rates were convincing and satisfied its burden of proof for the counterclaim, and that J.W.A. must pay the respondent tuition calculated at the rates set forth in the Board's certification.

Upon careful review of the record in this matter and the Initial Decision, the Commissioner concurred that the petitioner's appeal must be dismissed for failure to prosecute, and that the Board's counterclaim for tuition for the 2004-2005 school year be granted. However, the Commissioner found no evidence in the record to support tuition assessment on petitioner for the 2002-2003 and 2003-2004 school years. Accordingly, the Initial Decision is adopted as modified above, and the petitioner is directed to pay the Board at the per diem rate of $48.70 per child for the period of ineligible attendance during the 2004-2005 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.

April 29, 2005

OAL DKT. NO. EDU 10157-04
AGENCY DKT. NO. 349-10/04

J.W.A., on behalf of minor children, A.A., N.A. and J.A.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

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

Upon his full and independent review,[1] the Commissioner concurs with the Administrative Law Judge that petitioner's appeal here is appropriately dismissed for failure to prosecute and the Board's counterclaim for tuition for the 2004-2005 school year is appropriately granted. However, the Commissioner finds no evidence in the record before him to support an assessment on petitioner in this matter for the 2002-2003 and 2003-2004 school years. Consequently, tuition claims for these school years are dismissed without prejudice.

Accordingly, the recommended decision of the OAL is adopted, as modified above. Petitioner is hereby directed to compensate the Board, at the per diem rate of $48.70 per child, for the period of A.A., N.A. and J.A.'s ineligible attendance in the Board's schools during the 2004-2005 school year and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/29/05

Date of Mailing: 4/29/05

[1] It is noted that the instant record included an audiotape of the proceedings conducted at the OAL wherein the Board offered evidence and made arguments in support of its tuition claim.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10157-04

AGENCY DKT. NO. 349-10/04

J.W.A. ON BEHALF OF MINOR CHILDREN

A.A., N.A. AND J.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF HAMILTON, MERCER COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: March 8, 2005 Decided: March 21, 2005

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, respondent, Board of Education of Township of Hamilton (BOE), conducted a hearing and determined that A.A., N.A. and J.A., children of J.W.A., were not domiciled within the BOE's school district, although they continued to attend school therein. Consequently, BOE ordered the children be removed from their respective schools and J.W.A. pay tuition for the children.

Via appeal J.W.A. alleges that his children are domiciled within the district and claims that the BOE was and is required to provide them with a free public education. The BOE submits that J.W.A. has not met his burden of proof and counterclaims for an order requiring J.W.A. to pay tuition.

PROCEDURAL HISTORY

On September 22, 2004, the BOE informed J.W.A. and C.A. that they were required to withdraw A.A., N.A. and J.A. as students from the Hamilton Township School District and enroll them in the City of Trenton School District, where the BOE determined that C.A. was domiciled. (Exhibits R-8 and R-9). On October 1, 2004, petitioner, J.W.A., filed a residency appeal with the Commissioner of Education. (Exhibit C-1). By document dated November 1, 2004, the BOE filed an answer to the petition November 4, 2004, including a counterclaim for tuition. *N.J.S.A.* 18A:6-9, 38-1. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on November 16, 2004, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b) under Docket No. EDU 10157-04. A case management conference was scheduled for February 1, 2005, however, it was revised to a plenary hearing date in order to expedite the case. As scheduled, respondent appeared, however, petitioner, J.W.A., failed to appear. Notwithstanding, testimony was taken pertaining to A.A., N.A. and J.A.'s domicile and the cost of their education provided by the BOE.

FINDINGS OF FACT

Petitioner bears the burden to prove that the children in question are domiciled in the Township of Hamilton, Mercer County. Failure to sustain that burden leaves in place and effect the findings of BOE at its hearing regarding domicile of the children. By petitioner's failure to appear at the plenary hearing, he fails to prosecute his appeal and there is no basis to consider overturning the finding of BOE.

In support of its counterclaim for tuition, BOE produced evidence in the form of testimony from Maryanne Rivera, Residency Officer for BOE for the past year and a half.. She

testified regarding the results of her investigation supporting the finding that children are domiciled out-of-district, but continue to attend public schools in the school district of BOE.

BOE also provided certification that the per student tuition rate for school year 2002-2003 is $44.81 and for school years 2003-2004 and 2004-2005, the daily rate is $48.70. BOE has sustained its burden of proof with respect to its counterclaim for tuition as to each child for the number of days of attendance at the public schools of BOE.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1(b)(2) in pertinent part reads 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.

N.J.A.C. 1:1-14.4(a) requires the withholding of any action for one day "if, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the clerk or judge." Thereafter, the matter maybe returned to the transmitting agency for appropriate disposition.

Petitioner has failed to appear and to appropriately prosecute the matter brought by him. He has also failed to advise the reason for the nonappearance. Therefore, I **CONCLUDE** that the findings by BOE that the children in question are not domiciled in the Township of Hamilton is undisturbed and remains in full force and effect.

N.J.S.A. 18A:38-1(b)(1) reads in pertinent part as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

BOE's proofs as to ineligibility for attendance and as to the tuition rate are convincing and satisfy its burden of proof for the counterclaim. Therefore, I **CONCLUDE** that J.W.A. must pay BOE a tuition calculated at the rates previously referenced for each child as to their attendance at BOE's public school during their ineligibility period.

ORDER

It is **ORDERED** that petitioner's appeal be **DISMISSED**. It is further **ORDERED** that petitioner pay to BOE as tuition the sum equal to the daily tuition rates per child per day of ineligibility to be calculated as set forth 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

3/21/05
DATE

JAMES W. FAISON, III, ALJ

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

3/22/05
DATE

MAR 30 2005
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBITS IN EVIDENCE:

For Petitioner:

None

For Respondent:

R-1 Parent's Affidavit

R-2 Host Family Affidavit

R-3 Pupil Enrollment Form for A.A.

R-4 Pupil Enrollment Form for N.A.

R-5 Pupil Enrollment Form for J.A.

R-6 Anonymous Letter July 20, 2004

R-7 Anonymous Letter July 25, 2004

R-8 Notice of Ineligibility addressed to Trenton

R-9 Notice of Ineligibility addressed to Hamilton

WITNESSES:

For Petitioner:

None

For Respondent:

Maryanne Rivera

155-05

OAL DKT. NO. EDU. 3803-04
AGENCY DKT. NO. 45-2/04

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, Initial Decision and Stipulation of Dismissal With Prejudice transmitted by the Office of Administrative Law have been reviewed. Upon review of the file, the Commissioner accepts the Stipulation and hereby dismisses this matter.

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

Date of Decision: 4/29/05

Date of Mailing: 5/2/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

STIPULATION OF DISMISSAL

OAL DKT. NO. EDU 3803-04

AGENCY DKT. NO. 45-2/04

BOARD OF EDUCATION OF THE
BOROUGH OF MOUNTAIN LAKES,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF BOONTON,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner
(Porzio, Bromberg & Newman, attorneys)

Lance J. Kalik, Esq., for respondent
(Riker, Danzig, Scherer, Hyland, Perretti, attorneys)

Record Closed and Decided: March 28, 2005

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 27, 2004, 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.

Hearings were scheduled on February 1 & 2, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to dismiss the matter and have prepared a Stipulation of Dismissal with Prejudice, which is attached and fully incorporated herein.

I have reviewed the record as well as the dismissal and I **FIND**:

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

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

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

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

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

March 28, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

4-1-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 06 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner Mountain Lakes Board of Education

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDU 3803-04 Agency Dkt No.: 45-2/04 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between petitioner Mountain Lakes Board of Education, and respondent Boonton Township Board of Education it is hereby stipulated and agreed by and between these respective parties, that this action, including all claims asserted herein, be and is hereby dismissed with prejudice and without costs in favor of or against any party.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner Mountain Lakes Board of Education

By: Vito A. Gagliardi
Vito A. Gagliardi, Jr.
An Attorney of the Firm

Date: 12-15-04

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP.
Attorneys for Boonton Township Board of Education

Lance J. Kalik
An Attorney of the Firm

Date: 3/23/05

881358

156-05

AGENCY DKT NO. 91-4/05

IN THE MATTER OF BRUCE FREILICH, :

WASHINGTON TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, BURLINGTON COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that Washington Township Board of Education member Bruce Freilich violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he sent an unauthorized letter to a private donor. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Bruce Freilich be reprimanded as a school official found to have violated the School Ethics Act.

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

May 2, 2005

AGENCY DKT NO. 91-4/05

IN THE MATTER OF BRUCE FREILICH, :
WASHINGTON TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, BURLINGTON COUNTY. : DECISION
:

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding Washington Township Board of Education member Bruce Freilich violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he sent an unauthorized letter to a private donor and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, Mr. Freilich was provided thirteen days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were filed either by Mr. Freilich or counsel on his behalf.

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

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/05

Date of Mailing: 5/2/05

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

RECEIVED BY
CONTROVERSIES
AND DISPUTES
05 APR -8 AM 9:59

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
BRUCE FREILICH	:	**Docket No. C18-04 and C19-04**
WASHINGTON TOWNSHIP	:	**Consolidated**
BOARD OF EDUCATION	:	
BURLINGTON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from two complaints alleging that Bruce Freilich, a member of the Washington Township Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Complainant Kathleen A. Phelan filed C18-04 on March 30, 2004, alleging that Mr. Freilich violated N.J.S.A. 18A:12-24(c) when, at the December 22, 2003 Board meeting, he voted in the affirmative on a bill list that included a $375.50 reimbursement for aid in lieu of transportation for himself. She also alleges that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) when he asked her to deliver a letter prepared by him to a private donor, who was also her employer. She further alleges that Mr. Freilich violated N.J.S.A. 18A:12-24.1(d) because no teacher, staff, parent or citizen was asked to be on the Technology Committee of which Mr. Freilich was the chair. Finally, she alleges that Mr. Freilich violated N.J.S.A. 18A:12-24(d) when he volunteered his computer company to install and network computers and printers, and to configure Internet security for the Washington Township School District (District).

Complainant Diana Ackerman filed C19-04 on April 1, 2004, alleging that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the School Ethics Act when he prepared a letter, signed it in his capacity as chair of the Technology Committee and had it delivered to a private donor. She further alleges that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) when he attended a meeting of the Construction Committee with the intent of disrupting the meeting.

Mr. Freilich submitted a response by way of counsel, Patrick J. Madden, Esquire wherein he admitted that he voted in the affirmative to approve the payment of over 60 warrants, one of which was a check to him in the amount of $375.50 for aid in lieu of transportation. He answered that his action was an oversight. He averred that he was not advised by the business administrator, the superintendent or the Board solicitor that the check was included with the warrants, nor was he asked to recuse himself. He further responded that, as chair of the Technology Committee, he prepared a letter to be sent to a private donor. He then provided the letter to the superintendent and asked for it to be included in the agenda for discussion at the next Board meeting. He also contends that the letter did not contain any personal promises and should not be construed as a private action that may compromise the Board. Mr. Freilich responded that the letter has not compromised the Board in violation of N.J.S.A. 18A:12-24.1(e) since this particular

donor has not provided funds to the school for three years and there has been no evidence provided regarding the donor's reaction to the letter. Furthermore, Mr. Freilich denies that the letter contained information that was inaccurate in violation of N.J.S.A. 18A:12-24.1(g).

Mr. Freilich also responded that his actions could not constitute a violation of N.J.S.A. 18A:12-24.1(d) and that Ms. Phelan did not articulate how this section had been violated. Mr. Freilich responded that he had proposed that his company provide installation and internet security services at no cost to the District. In response to Ms. Alexander's allegation that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) when he attended the Construction Committee meeting, he denies that he attended the meeting for the purpose of disrupting the meeting. He testified and indicated in his answer that he believed that the Construction Committee meeting was being held in violation of the Open Public Meetings Act (OPMA). He believed that the meeting violated the OPMA because at the April 2003 reorganization meeting, the Board had agreed that they would disband their existing committees and act as a "Committee of the Whole" for all matters. Mr. Freilich believed that the Construction Committee had been disbanded since it had pre-dated the April 2003 meeting. Further, he was aware that Ms. Ackerman, Board President, agreed that David West, another Board member, could attend the meeting.

The Commission invited the parties to attend its August 24, 2004 meeting to present witnesses and testimony to aid in the Commission's investigation, but did not require that they be present. Due to scheduling conflicts, the matter was rescheduled for the November 23, 2004 Commission meeting. The parties attended the meeting and presented testimony. Mr. Freilich was represented by Patrick J, Madden, Esquire. On November 23, 2004, due to lack of a quorum, the Commission could not open a meeting. At that time, the Commission's chairperson appointed a committee to take testimony on this matter and make a recommendation to the Commission for its determination at its December 21, 2004 meeting. The committee consisted of Robert Bender, Randy Beverly, Rosalind Frisch and Paul Garbarini. The parties were asked if they consented to this procedure and they all agreed.

At the December 21, 2004 meeting, the Commission voted to find probable cause to credit the allegations that Bruce Freilich violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he voted on a bill list that included a $375.50 reimbursement for aid in lieu of transportation for himself. The Commission also voted to find probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he sent an unauthorized letter to a private donor. However, the Commission found no probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24(d) or N.J.S.A. 18A:12-24.1(d). The Commission also found no probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24.1(e) when he attended the Construction Committee meeting. The reasons for this decision were set forth in the probable cause decisions dated January 6, 2005.

The Commission found that the material facts were not in dispute with respect to the issues upon which it found probable cause and, therefore, the Commission advised respondent that it would decide the matter on the basis of written submissions. Respondent was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24(c) for voting on a bill list that included a $375.50 reimbursement for aid in lieu of transportation for himself and N.J.S.A. 18A:12-24.1(e) and (g) for sending an unauthorized letter to a private donor. He was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

By correspondence dated February 7, 2005, Mr. Madden advised the Commission that Mr. Freilich would be responding directly to the Commission's probable cause determination. Mr. Freilich submitted a timely response on February 7, 2005 wherein he responded that he is not in conflict with N.J.S.A. 18A:12-24(c) because N.J.S.A. 18A:12-24(h) applies to his vote on the aid in lieu of transportation. He argued that no material or monetary gain could accrue to him or his family to any greater extent than any gain could reasonably be expected to accrue to any family from Washington Township that receives aid in lieu of transportation from the Board. He noted that N.J.S.A. 18A:39-1 created a group of families with the right to either have their children transported to the non-public school they attend or choose to accept aid in lieu of transportation, which is an amount set by that statute.

In his submission, Mr. Freilich disagreed with the Commission's determination that the materials facts were not in dispute. However, he failed to specify which material facts were in dispute. Mr. Freilich merely set forth additional facts that were not material to the Commission's determinations in this matter.

Mr. Freilich further responded that he did not violate N.J.S.A. 18A:12-24.1(e) or (g) when he sent the letter to a private donor. He maintained that the third paragraph of the letter accurately represents the plan as a "proposed plan." He noted that there is no Board policy requiring that all communications be approved by the Board and no policy addressing the procedure to follow with respect to committee communications. He argued that he did not need Board approval to send the letter to the private donor because it only thanked the donor for his donation and did not appeal to the donor for money. He also noted that he had written and sent other letters in his capacity as chair of the Technology Committee that did not need Board approval.

Mr. Freilich maintained that his sending of the letter was not a private action because it was on letterhead that included, in 14 point typeface, the words "Technology Committee," and was signed by him in his capacity as chair of the Technology Committee. He also maintained that these facts show that the letter was not written on behalf of the Board, but was written on behalf of the Technology Committee. He argued that even if his sending of the letter was a private action, it did not compromise the Board, because one month later, in March 2004, the recommendations that were included in the letter were approved unanimously by the Board for inclusion in the 2004-2005

budget and were eventually incorporated into the Long Range Technology Plan for 2004 – 2007. Mr. Freilich further submitted that if the Commission found a violation that the lowest form of penalty should be imposed because none of the alleged acts lead to any personal gain to him or his family, and, with respect to the letter, he did attempt to present same to the Board through the superintendent.

The Commission discussed Mr. Freilich's response at its February 22, 2005 meeting and tabled the matter for further discussion. The Commission discussed the matter again at its April 4, 2005 meeting and voted to find Mr. Freilich in violation of N.J.S.A. 18A:12-24.1(e) and (g) and recommended a penalty of reprimand. It found no violation of N.J.S.A. 18A:12-24(c) and dismissed that charge.

FACTS

The Commission based its findings of probable cause on the following facts:

Mr. Freilich became a member of the Board in April 2003. Ms. Phelan is an employee of Mr. William Haines, Sr., a private donor to the District. At the December 22, 2003 Board meeting, the Board unanimously voted to approve a list of over 50 bills. Included in that list was a warrant for Bruce Freilich in the amount of $375.50 for aid in lieu of transportation. Mr. Freilich voted to approve the bill list which included a warrant with his name on it. He was not advised that the list included a warrant in his name nor was he asked to recuse himself from voting on that warrant. Mr. Freilich testified that he was aware that he would be receiving reimbursement from the District at some time for aid in lieu of transportation.

Mr. Freilich was the chair of the Technology Committee that was formed by the Board in the fall of 2003. In his role as chair, he was seeking funds to help pay for the District's technology needs. In discussions with the Superintendent, Mr. Freilich came to understand that some funds from a December 2000 donation from a private donor had not been allocated and were available for use. The Technology Committee then developed a short-range technology plan, which was based on expenditure of those unallocated funds. The short-range technology plan included the purchase of 10 new desktop computers and 50 Microsoft Certified Engineering hours offered as a donation by Mr. Freilich at the rate of $80 an hour to the District by Jersey Data, a consulting company owned by Mr. Freilich.

In his role as chair of the Technology Committee, Mr. Freilich prepared a letter to Mr. Haines. On January 20, 2004, he faxed the letter and a copy of the short-range technology plan to the superintendent asking that, "at a minimum I would like these included in the packets for the next week's meeting." He also noted that if the letter to Mr. Haines was acceptable, he would "consider hand delivering to him tomorrow at the Planning Board meeting." The Superintendent never responded to Mr. Freilich's fax.

The letter, dated January 19, 2004, with a simulated Board letterhead was prepared and signed by Bruce Freilich, Technology Committee Chair. The letter began by noting that the Board thanked Mr. Haines for his generosity. The letter continued:

> "We would like to share with you our plans to initiate a bold technology program enabling our children access to modern computer and research skills. Beginning with our Middle School (6-8th graders) we have decided to purchase (10) new desktop computers along with some necessary components and software. All installations and internet security configurations will be performed by Washington Twp. Technology Committee volunteers."

In the third paragraph, Mr. Freilich indicated that an outline of the proposed plan is attached for review. It also indicated that the donor's contribution had never been utilized and that, after the lengthy delay, "we would like to begin making a difference, giving our children every advantage." He ended the letter by asking for suggestions or directions.

The January 2004 Board meeting was cancelled. At the February 2, 2004 Board meeting, during the Board committee reports, Mr. Freilich presented the short-range technology plan. The letter and short-range technology plan that he had faxed to the Superintendent was not included in the Board agenda, as he had requested. Mr. Freilich had made some copies of the letter and short-range technology plan for the Board members to review during the discussion. No formal action was taken by the Board on the plan. After the meeting, Mr. Freilich handed the letter to Ms. Phelan and asked her to deliver it to Mr. Haines. Ms. Phelan delivered the letter to Mr. Haines. Mr. Freilich never received any response from Mr. Haines.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Freilich violated N.J.S.A. 18A:12-24(c) when, at the December 22, 2003 Board meeting, he voted in the affirmative on a bill list that included a $375.50 reimbursement for aid in lieu of transportation for himself. N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In its probable cause determination, the Commission found probable cause that Mr. Freilich had a direct financial involvement in voting on the bill list because the

reimbursement of $375.50 was for him and the bill warrant listed that reimbursement under his name. In making its determination, the Commission noted that Mr. Freilich could have reviewed the bill list prior to the Board meeting to determine if his name was on the list since he was aware that he would be receiving reimbursement for aid in lieu of transportation.

The Commission then considered whether Mr. Freilich's direct financial involvement might reasonably be expected to impair his objectivity or independence of judgment. The Commission noted that it previously found that a sending district board member's objectivity or independence of judgment might reasonably be expected to be impaired where the board member voted on the payment of tuition to the Mercer County Vocational School where he was employed as a principal. See I/M/O Bruce White, C01-01 (July 24, 2001). In its probable cause determination, the Commission found that when a Board member has a direct financial involvement on an item listed in a lengthy bill list that is voted on in a block it is reasonable to expect that his objectivity or independence of judgment might be impaired due to the direct financial interest.

In his submission in response to the probable cause determination, Mr. Freilich argues that N.J.S.A. 18A:12-24(h) applies to his vote on the aid in lieu of transportation. N.J.S.A. 18A:12-24(h) provides:

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

There are two previous matters in which the Commission found N.J.S.A. 18A:12-24(h) to be applicable to alleged violations of the Act. In Hoboken Education Association v. David Anthony, C11-00 (December 19, 2000), the Commission found that N.J.S.A. 18A:12-24(h) applied and a board member did not violate the Act when he negotiated a lease with a charter school in which his children were enrolled. The Commission reasoned that no material gain could be said to accrue to the board member as a member of the group of charter school parents to any greater extent than any gain could reasonably be expected to accrue to any other parents of children who attend the charter school. The Commission further found "N.J.S.A. 18A:12-24(h) to be particularly applicable when issues arise concerning proposals that come before a board from which a school official's child can benefit." The Commission noted the difficulty that could arise if school officials had to remove themselves from all decisions that affected their children as students in the district. The Commission further concluded that "where the policy, lease or other board decision does not benefit that school official's children more than the other students, the Commission will consider applying N.J.S.A. 18A:12-24(h)."

The Commission also applied N.J.S.A. 18A:12-24(h) in *Advisory Opinion A01-98* (February 27, 1998). The Commission was asked whether certain board members can

participate in the discussion and vote on a proposal to give greater weight to certain more rigorous academic courses when their children are enrolled in those courses without violating the Act. In applying N.J.S.A. 18A:12-24(h), the Commission reasoned that the board members did not stand to gain more than other parents in deciding to weight grades, which is a matter of policy and similar to any other curriculum decision. However, the Commission found that N.J.S.A. 18A:12-24(h) did not apply to the same board member's vote to make the weighted grades retroactive. The Commission noted that by voting in favor of making the policy retroactive, the board members in question would be voting to make their own children's transcripts look better for their application to college. The Commission noted that the general proposal affects every parent of a student in the district, while the retroactive application of the proposal affects those parents who have had children in more rigorous academic courses who are now college bound. The Commission advised that the board members had a personal involvement in determining whether to weight the courses retroactively that could impair their objectivity and N.J.S.A. 18A:12-24(h) would not provide an exception to allow them to participate.

In this matter, Mr. Freilich notes that N.J.S.A. 18A:39-1 et seq. created a group of families with the right to either have their children transported to the non-public school they attend or to choose to accept aid in lieu of transportation, which is an amount set by that statute. Based on the fact that the aid in lieu of transportation amount is set by N.J.S.A. 18A:39-1a, he argues that no material or monetary gain could accrue to him or his family to any greater extent than any gain could reasonably be expected to accrue to any family from Washington Township which receives aid in lieu of transportation from the Board.

The Commission agrees with Mr. Freilich that N.J.S.A. 18A:12-24(h) applies to the distinct facts of this case. Mr. Freilich is a member of a group created by N.J.S.A. 18A:39-1 et seq. and, as a member of that group, he receives aid in lieu of transportation the amount of which is set by N.J.S.A. 18A:39-1a. If a parent qualifies for aid in lieu of transportation, the Board has no discretion in the amount of aid that parent will be entitled to receive. Mr. Freilich testified that the district had notified him that he qualified for aid in lieu of transportation. Since the amount of aid is set by statute, Mr. Freilich could not have received aid in lieu of transportation in an amount greater than any member of the group that received such aid from the Board. Furthermore, as a board member, he had no discretion in setting the amount of the aid that he would receive.

The Commission finds the facts in I/M/O White, supra, to be distinguishable from the facts of this case, because the board member in White was not a member of a distinct group. The Commission also finds that *A01-98* can be distinguished from this case in two ways. First, Mr. Freilich did not vote for a retroactive approval of aid in lieu of transportation. He had already been approved by the district to receive aid in lieu of transportation and his actual receipt of the amount of aid was perfunctory. Second, Mr. Freilich did not have the same type of personal involvement as the board members in *A01-98*. Mr. Freilich could not be expected to accrue monetary gain to any greater extent than could be expected to accrue to any other parent receiving aid in lieu of

transportation, while the board members in *A01-98* had a personal involvement whereby their children's transcripts could look better for their application to college.

The Commission finds that, in this case, where Mr. Freilich's vote did not benefit him or his child to any greater extent than the other parents or children receiving aid in lieu of transportation, it is appropriate to apply N.J.S.A. 18A:12-24(h). Therefore, the Commission finds that Mr. Freilich cannot be deemed in conflict with N.J.S.A. 18A:12-24(c) because of his vote in the affirmative on a bill list that included a $375.50 reimbursement for aid in lieu of transportation and it dismisses this charge.

The Commission also found probable cause that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members for sending an unauthorized letter to a private donor. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In its probable cause determination, the Commission found that Mr. Freilich took private action that may compromise the Board when he sent the letter to the private donor. In determining that Mr. Freilich took private action, the Commission noted that the body of the letter gave the impression that the letter was written on behalf of the Board. The Commission disagrees with Mr. Freilich's contention that because the letterhead included, in 14 point typeface, the words "Technology Committee" and was signed by him in his capacity as chair of the Technology Committee that it shows that the letter was written on behalf of the Technology Committee and not the Board. The letter begins by noting that the Board would like to thank Mr. Haines for his generosity. In subsequent paragraphs, the term "we" is used. Since the letter begins with a reference to the Board as a whole, it is reasonable to conclude that the term "we" refers to "we" the Board, not "we" the Technology Committee.

In determining that the sending of the letter was a private action, the Commission also noted that Mr. Freilich did not have authorization to send the letter on behalf of the Board. The Board had not reviewed the letter and the Superintendent had not approved it. Furthermore, the Board had taken no action on the short-range technology plan, components of which were included in the letter. The Commission disagrees with Mr. Freilich's contention that he did not need Board authorization to send out the letter. Even though the Board may lack policy regarding the approval procedure, Mr. Freilich should have waited to send out the letter until after it had been discussed and approved by the Board. Mr. Freilich contends that the letter only thanked the donor and did not ask for money and for that reason he did not need Board authorization. However, in actuality the letter did more than thank the donor; it provided details of the short-range technology plan on which the Board had taken no formal action. Specifically, the letter referenced one component of that plan when it indicated that "...we have decided to purchase (10) new desktop computers along with some necessary components and software." The Board did not approve such a purchase. The letter also refers to the fact that installations

and internet security configurations would be performed by the Technology Committee volunteers, which was also included in the short-range technology plan, that was never approved of by the Board.

In determining that Mr. Freilich's private action was such that it may compromise the Board, the Commission noted that the letter could have compromised the Board because it included information regarding the short-range technology plan that had not been approved for implementation. Mr. Freilich maintains that it did not compromise the Board because one month later the recommendations in the letter were approved unanimously by the Board for inclusion in the 2004-2005 budget and were eventually incorporated into the Long Range Technology Plan for 2004 – 2007. However, it is immaterial whether the recommendations in the letter were eventually approved by the Board or not. The fact that the recommendations were not approved by the Board when the letter was sent to the private donor could have compromised the Board. Therefore, the Commission finds that Mr. Freilich violated N.J.S.A. 18A:12-24.1(e) when he prepared and sent a letter to a private donor.

The Commission also found probable cause that Mr. Freilich violated N.J.S.A. 18A:12-24.1(g) of the Code of Ethics for School Board Members for sending an unauthorized letter to a private donor. N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

In its probable cause determination, the Commission found the letter to be inaccurate in at least two aspects. First, the body of the letter gave the impression that the letter was written on behalf of the Board when it had not been reviewed or approved by the Board. The first paragraph thanking the donor from the Board, the use of the term "we" throughout the body of the letter, and the fact that the letterhead began with the name of the Board gave the impression that the letter was written for the Board. Second, the letter also gave the impression that the technology plan had been approved by the Board when it had not. The letter included more than one reference to the short-range technology plan as though it was an approved Board plan.

In his response, Mr. Freilich maintains that the letter did not inaccurately represent that the Board had approved the short range technology plan because the third paragraph refers to the plan as a "proposed plan attached for your review." However, the preceding paragraph references two major components of the plan, i.e. the purchase of 10 desktop computers and the installation and configuration of same by Technology Committee volunteers, as though the Board had already decided to implement those components. The subsequent reference to the "proposed plan" merely highlights the previous paragraph's indication that two components of the plan had already been

decided upon. Therefore, the Commission finds that Mr. Freilich violated N.J.S.A. 18A:12-24.1(g) when he prepared and sent a letter to a private donor.

DECISION

For the reasons discussed above, the Commission finds that Bruce Freilich violated N.J.S.A. 18A:12-24.1(e) and (g) when he prepared and sent a letter to a private donor. The Commission recommends that the Commissioner of Education impose a penalty of reprimand for because he had been a member of the Board for less than a year when he sent the letter and the Board had no policy regarding direct correspondence being sent from a Committee.

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

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C18-04 and C19-04

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

Whereas, at its meeting of February 22, 2005 the Commission found that Bruce Freilich violated N.J.S.A. 18A:12-24.1(e) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

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

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

Paul C. Garbarini

Paul C. Garbarini
Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on April 4, 2005.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C18-04 & C19-04v

157-05

OAL DKT. NO. EDU 740-05
(EDU 8380-04 ON REMAND)
AGENCY DKT. NO. 310-9/04

L.G., on behalf of minor children, K.W., B.S. and T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that petitioner, who did not appear for the hearing, has failed to carry her burden of proof that her children were entitled to a free public education in the Ewing Township School District for the 2003-04 school year. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $13,769.35 for the 127 days that K.W. and B.S. illegally attended school in the District during the 2003-04 school year.[1]

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/05
Date of Mailing: 5/2/05

[1] As noted by the Administrative Law Judge, the Board did not submit a tuition calculation for T.W.'s ineligible attendance in the District.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 740-05

AGENCY DKT. NO. 310-9/04

(ON REMAND FROM EDU 8380-04)

L.G. ON BEHALF OF MINOR CHILDREN,
K.W., B.S. AND TW,

Petitioner,

v.

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

Respondent.

L.G., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent

Record Closed: March 14, 2005 Decided: March 21, 2005

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Board of Education of the Township of Ewing, Mercer County (BOE) conducted a hearing August 5, 2004, at which petitioner L.G.'s minor children were found not to be domiciled in the Township of Ewing and therefore not entitled to a free public education. BOE passed a resolution disenrolling the students from the school district. (R-1). Petitioner appealed (R-2) the order of removal to the Commissioner of Education who transmitted the

matter as a contested case to the Office of Administrative Law (OAL) where it was filed October 5, 2004, under Docket No. EDU 8380-04. BOE filed an answer to petitioner's petition and also asserted a counterclaim for the payment of tuition by petitioner to BOE for the unlawful attendance of the minor children to the public school. (R-3).

Petitioner failed to appear at a duly scheduled conference on December 2, 2004, 2:00 p.m., at the OAL facility in Mercerville, New Jersey, whose absence was informed to the Commissioner. BOE failed to submit timely certification in support of its counterclaim for tuition. Commissioner dismissed petitioner's petition for the failure to appear and remanded the counterclaim to OAL under Docket No. EDU 740-05, where it was filed February 22, 2005. BOE'S certification in support its tuition counterclaim was filed at the Office of Administrative Law, March 11, 2005. (R-4).

ISSUE

Whether petitioner's minor children were domiciled somewhere other than the Township of Ewing, County of Mercer while attending that municipality's public school system without having paid proper tuition in contravention of *N.J.S.A.* 18A:38-1(b) which provides that the parent or guardian "shall have the burden of proving by a preponderance of the evidence before the Commissioner that the child is eligible for a free education under the criteria listed in this subsection."

DISCUSSION AND CONCLUSION OF LAW

A factual hearing was conducted before the Ewing Township Board of Education August 5, 2004, to permit petitioner the opportunity to prove her minor children are domiciled in the Township of Ewing. Petitioner and witnesses on behalf of petitioner testified before BOE. One of the findings of fact by BOE stated: "Surveillance was conducted on ten (10) occasions in this matter. All ten (10) of the surveillances clearly demonstrated that B.S. and K.W. were leaving a Trenton, New Jersey address to attend school in Ewing." At the conclusion of the hearing BOE found: "Based upon the evidence produced at the residency hearing, the Board has determined

that B.S. and K.W. are domiciled on a permanent basis with their mother in Trenton, New Jersey."

Petitioner did not file an answer to the counterclaim for tuition claimed by BOE and failed to attend a conference scheduled by OAL to consider the case.

BOE has submitted a certification (R-4) authored by David Mikalauskas, the Attendance and Resident Officer for the Ewing Township Board of Education. The certification sets forth his familiarity with the facts of the case. Although the caption of the case refers to three minor children, K.W., B.S. and T.W., the certification addressed tuition claimed only with respect to K.W. and B.S. Each of the children illegally attended the school district 127 days. The per diem tuition for the Ewing School District pursuant to the New Jersey Department of Education for elementary students was $54.21 per day each. Tuition claimed as to each student is $6,884.67 for a total tuition owed by the petitioner to BOE of $13,769.34.

The certification is proper is uncontroverted.

ORDER

It is **ORDERED** that petitioner pay BOE the tuition sum of $13,769.34.

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

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

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

3/21/05

DATE

JAMES W. FAISON, III, ALJ

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

3/22/05

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 30 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBITS IN EVIDENCE:

For Petitioner:

None

For Respondent:

R-1 BOE Resolution

R-2 Appeal

R-3 Answer and Counterclaim

R-4 Certification

WITNESSES:

For Petitioner:

None

For Respondent:

None

158-05

OAL DKT. NO. EDU 3357-04
AGENCY DKT. NO. 12-1/04

F.C., on behalf of minor child, C.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of the parties' failure to appear, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, have been reviewed. There being no explanation filed by petitioner in response to the notification sent to the parties by OAL on April 7, 2005, providing them with ten days to submit an explanation for their nonappearance, and the record showing that the respondent Board of Education believed petitioner's claim to be moot and withdrew its opposition on that basis by letter dated December 9, 2004,[1] the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/05
Date of Mailing: 5/2/05

[1] The Board indicates that C.V. did not attend its schools subsequent to the filing of the appeal (the family appears to have moved), and that it is, therefore, not seeking tuition. However, the Board reserves its right to review, and contest if appropriate, any future attempt by C.V. to enroll in the district.

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

159-05

OAL DKT. NO. EDU 9280-04
AGENCY DKT. NO. 272-8/04

LESLEY ETHERIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner notes that, notwithstanding disposition of this matter as a withdrawal by the OAL, the record contains a fully executed settlement agreement, which is attached hereto and made a part hereof; moreover, petitioner's counsel, by letter dated March 30, 2005 and copied to the Board, attests to the Board's ratification of the agreement. The Commissioner, therefore, has reviewed this matter as a settlement pursuant to *N.J.A.C.* 1:1-19.1, and, having done so, approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, this matter is dismissed with prejudice, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/05

Date of Mailing: 5/2/05

ED4
9280-04

Springstead & Maurice

Attorneys at Law

Practice Limited to Labor Relations
39 Hudson Street, Hackensack, NJ 07601
(201) 487-1414 OR (201) 343-0003
APR 1 10:30 AM '05 *Telecopier (201) 487-0212*

ALFRED F. MAURICE
N.J. & Fl. Bars

HAROLD N. SPRINGSTEAD, L.L.M.
(certified criminal trial attorney)

LAUREN E. MCGOVERN

March 30, 2005

Honorable Jeffrey A. Gerson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Lesley Etheridge v. Passaic County Technical Institute Bd. Of Educ.
Agency Ref. No. 272-8/04

Dear Judge Gerson:

The respondent Board of Education has ratified the settlement placed on the record before you on March 11, 2005. As such, would you please consider the matter as being withdrawn by the petitioner.

Thank you for your efforts and courtesies in this matter.

Very truly yours,

HAROLD N. SPRINGSTEAD

HNS:mb
Cc: Mary Pat Gallagher, Esq.
Ms. Lesley Etheridge
Ms. Carol Pierce, NJEA

Subject to approval by the Board, the matter of Etheridge v. PCTI, Docket No. EDU 09280-2004 is settled as follows:

1. Leslie Etheridge will return to work on Monday, April 4, 2004.
2. Leslie Etheridge will have her own electronics class.
3. An Entrance Conference will take place at which time all professional responsibilities and expectations will be outlined in writing and signed. Mrs. Etheridge will bring NJEA representation of her own choosing to that conference.
4. Leslie Etheridge will attend one of management classes. The classes will be paid for by the Board. The Board will identify course options from which Mrs. Etheridge will choose. Classes will be completed by September 2005 ** To be attended on Leslie Etheridge's own time.
5. No increment withholding presented in year 2004-2005 re the 2005-2006 school year.
6. For the balance of the 2004-2005 school year, Vice-Principal Frank Peray will supervise the Electronics Department instructors.
7. No tenure charges will be brought for events occurring in 2003-2004. However, in the event ~~of a~~ future actions result in tenure charges, the events of 2003-04 and before may be used.
8. The Board will withdraw the ~~psych~~ request for a psychiatric examination ~~and~~ and remove the statement of reasons from Leslie Etheridge's personnel file.
9. The petition of appeal will be withdrawn

upon approval By the Board of the terms of settlement.

10. The Board represents as of March 10, 2005, it has no present plans to eliminate the electronics program in its entirety in 2005-2006.

3/10/05 Lesley Ethridge 3/10/05

3/10/2005 Harold N. Spruce Esq 3/10/05

Attorneys for Respondents ATTORNEY FOR PETITIONER

163-05

OAL DKT. NO. EDU 10205-04
AGENCY DKT. NO. 369-10/04

IN THE MATTER OF THE TENURE	:	
HEARING OF BETTY HERRING,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

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

Initially, the Commissioner points out that, pursuant to *N.J.A.C.* 6A:3-5.6(a), once tenure charges are certified to him, such charges may be settled only with his approval; any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, the proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C.* 6A:3-5.6.

to same, are a matter of public record. *See Williams v. The Board of Educ. of the Atlantic City Public Schools et al.*, 329 *N.J. Super.* 308 (App. Div. 2000). Moreover, pursuant to *N.J.A.C.* 1:1-14.1(a), records of all hearings shall be open for public inspection unless, for good cause shown, the ALJ orders the sealing of the record, or any part thereof. Furthermore, the Commissioner cautions the Board that any action it may take with respect to disclosure of information regarding this tenure matter must fully comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further expansion of the record and 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 a hearing on the merits.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/3/05

Date of Mailing: 163-05

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

Because the proposed agreement does not comport with these standards, the Commissioner is compelled to reject it and remand this matter, as specified below.

First, it is noted that the parties fail to set forth the nature of the charges and the circumstances justifying the proposed settlement. It is well-established that, having once taken up the burden of tenure charges, the agency may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County,* decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 420; *affirmed with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489; *affirmed* N.J. Superior Court, Appellate Division, January 30, 1986.)

Moreover, there is no indication in the proposed agreement that the within teaching staff member was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of her certificate, where the teaching staff member has retired subsequent to the filing of tenure charges. *N.J.A.C.* 6A:9-17.6(a)1[1]

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Finally, the Commissioner is compelled to comment on Term #9 of the herein proposed Settlement Agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, it does not in any way alter the fact that the filing of tenure charges, tenure charge documents, and any record of or determination related

[1] Formerly codified at *N.J.A.C.* 6:11-3.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10205-04

AGENCY DKT. NO. 168-10/04

CAMDEN BOARD OF EDUCATION,

Petitioner,

v.

BETTY HERRING,

Respondent.

Jennifer Mazawey, Esq., for petitioner

James Katz, Esq., for respondent

Record Closed: March 18, 2005 Decided: March 22, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on March 17, 2005, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to a settlement, which is attached hereto and incorporated herein.

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

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

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

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

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

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

March 22, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

3-24-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

Rec'd OAL
3-18-05
lom

CAMDEN CITY BOARD OF EDUCATION

AND

BETTY JANE HERRING

AGREEMENT

This Agreement, is made and entered into this 31 day of JANUARY, 2005, by and between Betty Jane Herring, and the Camden Board of Education (hereinafter referred to as the "Board"), collectively, "the parties", and is intended to amicably resolve all pending matters related to the employment of Betty Jane Herring by the Board as follows:

1. Betty Jane Herring agrees to retire from employment with the Board effective July 1, 2005. Ms. Herring's irrevocable letter of resignation from employment with the Board effective July 1, 2005 as a result of her retirement is attached hereto as Exhibit 1. She further understands that in entering into this settlement agreement, her letter of retirement is irrevocable.

2. The Board agrees to withdraw the tenure charges which have been filed against Betty Jane Herring and to remove from her files any and all references to such charges.

3. Betty Jane Herring will continue to be paid her contractual salary and all available contractual benefits as a Board employee through June 30, 2005. Her records with the Board will reflect that she was on a paid leave of absence through June 30, 2005.

4. As a result of her retirement from the Board, the Board agrees to pay Betty Jane Herring for her unused accumulated sick leave days and her earned but unused vacation days and any other benefit to which she is entitled upon retirement, pursuant to and in accordance with the terms of the collective bargaining agreement between the Camden Board of Education and the Camden City Federation of School Administrators, Local 39.

5. The Board agrees that upon request for a reference from any prospective employer, the only information provided will be Ms. Herring's dates of employment with the Board, her titles and positions held; and salary information.

6. In consideration for the above, Ms. Herring agrees to waive any and all claims she has against the City of Camden Board of Education with regard to the subject matter of this Agreement, including any claims for pay beyond the scope of paragraphs 3 and 4, counsel fees or other monetary relief.

7. The parties agree that they have been duly represented by their respective attorneys and that they have voluntarily, without coercion, agreed to the resolution of the matters related to Ms. Herring's employment by the Board of Education as set forth above.

8. This Agreement contains all of the terms of the parties' Agreement and cannot be modified or changed unless all parties agree to do so in writing.

9. The parties agree that this Agreement shall be non-precedential and shall not be evidence of past practice or policy of the Board; shall be kept confidential, except nothing herein shall permit Herring from disclosing the terms of this agreement to her lawyer, accountant, tax adviser, and immediate family, as long as they agree to keep its terms confidential, and that the agreement has been entered into without any admission of liability or wrongdoing by either party, and shall not be used by any party in any other litigation or forum.

IN WITNESS WHEREOF, the parties have signed, delivered and acknowledged this Agreement.

For the Camden Board of Education

By: Philip E. Freeman Sr.
President of the Board

Dated: February 16, 2005

By: [signature]
Board Secretary

Dated: 2/17/05

For Betty Jane Herring

By Betty Jane Herring

Dated: February 2, 2005

Witness: Mindy C Shenk

Dated: 2/2/05

CERTIFICATION

I, **LEE E. BROCKINGTON, RSBO**, SCHOOL BUSINESS ADMINISTRATOR/ BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **MONDAY, JANUARY 31, 2005** HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE* BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 3RD DAY OF MARCH, 2005*

LEE E. BROCKINGTON, RSBO
SCHOOL BUSINESS ADMINISTRATOR/
BOARD SECRETARY

RESOLUTION
#157-SY '04
AGREEMENT BETWEEN CAMDEN CITY BOARD OF EDUCATION AND BETTY HERRING

WHEREAS, at the Camden City Board of Education meeting on October 12, 2004, the Board voted to certify tenure chares against its employee Betty Herring; and

WHEREAS, Betty Herring has informed the Camden City Board of Education of her intention to retire at the conclusion of the 2004-2005 school year; and

WHEREAS, the parties, Ms. Herring and the Camden City Board of Education, wish to amicably resolve their differences.

NOW, THEREFORE, BE IT RESOLVED, that the Board approves the Agreement between Camden City Board of Education and Betty Herring which is attached hereto as Exhibit "A".

Adopted: January 31, 2005

February 3, 2005

Annette D. Knox
Superintendent of Schools
City of Camden
201 N. Front Street
Camden, NJ 08102

Dear Superintendent Knox:

This is to inform you that I am retiring from employment with the Camden Board of Education effective July 1, 2005 and as a result, I am resigning my employment with the Board effective the same date.

Sincerely,

Betty Jane Herring

Betty Jane Herring

146862-1

164-05

OAL DKT. NO. EDU 739-05
(EDU 6665-04 ON REMAND)
AGENCY DKT. NO. 253-7/04

STEPHEN J. BLEISTINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the record now indicating the Board's approval of the settlement agreement in accordance with the requirements of the Commissioner's prior decision and the stipulation's own terms, the Commissioner approves the terms of the agreement and adopts them as the final decision in this matter.

Accordingly, the matter is dismissed with prejudice, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/3/05

Date of Mailing: 164-05

RECEIVED BY
CONTROVERSIES
AND DISPUTES
05 APR -6 AM 11: 15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT

INITIAL DECISION

OAL DKT. NO. EDU 739-05

AGENCY DKT. NO. 253-7/04

(On Remand from EDU 6665-04)

STEPHEN J. BLEISTINE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BLACKHORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

John D. Wade, Esq., for respondent

Record Closed: March 14, 2005 Decided: March 18, 2005

BEFORE **JAMES W. FAISON, III,** ALJ:

The original matter under Docket No. EDU 6665-04 was transmitted to the Office of Administrative Law on August 20, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Initial Decision Settlement and proposed Stipulation of Settlement were forwarded to the Commissioner of Education January 5, 2005, pursuant to *N.J.A.C.* 1:1-19.1. The Commissioner, via decision dated February 1, 2005, remanded the case for supplementation of the record to the Office of Administrative Law where

it was filed February 22, 2005. The parties reconfirmed settlement and have resubmitted the Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. The parties also confirmed that Stipulation of Settlement has been approved by respondent by resolution. I have reviewed the record and the terms of settlement and supplemented the record as required by the Commissioner of Education and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures dated October 1, 2004, and October 18, 2004, respectively, on the Stipulation of Settlement.
2. Minutes of Executive Session Meeting September 23, 2004, of the Board of Education of the Black Horse Pike Regional School District, Camden County, verify approval of the Stipulation of Settlement as required at Paragraph 18 therein.
3. The settlement fully disposes of all issues and 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 are concluded.

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

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

3-18-05
DATE

JAMES W. FAISON, III, ALJ

Receipt Acknowledged:

4-1-05
DATE

M. Kathleen Duncan/ER
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 01 2005
DATE

DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW

cmo

MINUTES OF EXECUTIVE SESSION MEETING
SEPTEMBER 23, 2004

Mr. Joseph Baldino called the Executive Session Meeting of the Board of Education to order at 6:10 p.m. in the Library Media Center at Triton Regional High School, 250 Schubert Avenue, Runnemede, NJ.

Roll Call: Present—Mrs. Margaret Jackson, Mr. Thomas Concannon (6:15 p.m.), Mr. John Custodio, Mr. Carl Gross, Mr. Louis Vizoco, Mrs. Patricia Wilson (6:12 p.m.), and Mr. Joseph Baldino.

Also Present—Mr. Ralph Ross, Dr. Dennis Vespe, Ms. Kathleen Forsythe, Dr. Richard Hollinshead, Dr. Marcia Leek, and Mr. John Wade.

Item #2: The Board of Education discussed redistricting. The Board decided that this is a possibility in the future and would like to phase this in slowly, starting with awareness in the middle schools. The Board will start with the statistics of numbers in the eighth grade. The Board will keep it to themselves for now.

Item #3: The Board of Education discussed a possible referendum and Garrison Architects. Triton High School is in dire need. The Board will identify the problems in the three high schools and address and revisit the long range facility plan. A Board Member suggested that the parents can make the request at the Board Meetings so this is not initiated by the Board.

Item #1: The Board of Education discussed the medical leave for Steve Bleistine. His effective resignation would be 6-30-05. The Board will reinstate increment. He will receive full pay and benefits. If he is employed elsewhere, the letter of resignation would have to be amended. On the motion of Mrs. Jackson, seconded by Mr. Custodio, the Board move to accept the settlement agreement if the Board receives the signed agreement from Steve Bleistine by the end of the business day on October 1, 2004.

Roll Call Vote: YES—Mrs. Jackson, Mr. Concannon, Mr. Custodio, Mr. Gross, Mr. Vizoco, Mrs. Wilson, and Mr. Baldino.

CARRIED

Item #6: Dr. Vespe presented to the Board of Education the need to purchase laptop computers and the computer recycling program. He stated that this was put on hold last year.

Item #4: Dr. Leek presented to the Board of Education, the results of the survey she conducted regarding Project Graduation. The Board will have to decide by October.

Item #5: The Board of Education discussed the survey that Dr. Leek conducted regarding the School Resource Officers. She wanted to see how other Districts paid for them. Three were paid by the school district, five were paid by the municipalities, three were paid by both the

municipality and school district, and three had no resource officers.

Item #7: The Board of Education received their Tri-County Conference Tickets.

Respectfully Submitted,

Ms. Kathleen Forsythe
Assistant Business Administrator

RECEIVED
2005 JAN -4 P 4:54
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, STEPHEN J. BLEISTINE

STEPHEN J. BLEISTINE, Petitioner, v. BLACKHORSE PIKE REGIONAL SCHOOL DISTRICT Respondent.	BEFORE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDU-06665-2004S Agency Ref. No.: 253-7/04 CIVIL ACTION STIPULATION OF SETTLEMENT

05 APR -6 AM 11:15
OFFICE OF CONTROVERSIES AND DISPUTES

The Blackhorse Pike Regional School District, hereinafter referred to as "Board," with offices located at 580 Erial Road, Blackwood, New Jersey 08012, represented by John D. Wade Esq., at 1250 Chews Landing Road, Laurel Springs, New Jersey 08021 and Stephen J. Bleistine, hereinafter referred to as Mr. Bleistine, whose residence is located at 4 Greenbriar Road, Mullica Hill, New Jersey 08062, represented by Robert M. Schwartz, Esq. with offices located at 12 Centre Drive, Monroe Township, New Jersey 08831, by way of this Stipulation of Agreement say:

WHEREAS, on or about July 23, 2004 Mr. Bleistine initiated a contested case in the Office of Administrative Law with the filing of a Petition of Appeal challenging the Board's withholding of increment for the 2004-2005 school term, which took affect on July 1, 2004, and

WHEREAS, the outcome of this matter is uncertain, and

WHEREAS, both parties are expected to incur further extensive litigation, and

WHEREAS, both parties believe that an amicable settlement is in their respective best interests,

NOW, THEREFORE, in consideration of the agreements and covenants and conditions contained herein, the adequacy and sufficiency of which is hereby expressed and acknowledged by the parties hereto, the parties agree as follows:

1. Mr. Bleistine shall withdraw his petition of appeal contesting the Board's increment withholding for the 2004-2005 school term.

2. Mr. Bleistine shall forward to the Board a letter of resignation to be made effective at the end of the day on June 30, 2005.

3. In consideration therefore, the Board agrees to immediately reinstate Mr. Bleistine's employment and adjustment increment, consisting of $4,500.00, retroactive to July 1, 2004.

4. Commencing on September 7, 2004 Mr. Bleistine shall begin a medical leave of absence. In this regard, Mr. Bleistine shall provide to the Board a physician's note explaining the need for the medical leave of absence, and by execution of this Agreement, upon receipt of a physician's note requesting same, the Board agrees to provide Mr. Bleistine the requested medical leave of absence.

5. For the balance of the 2004-2005 school term, commencing on or about September 7th, 2004 through June 30, 2005, Mr. Bleistine shall remain on a medical leave of absence during which time he shall receive his full

compensation, inclusive of the increment withheld by the Board for the 2004-2005 school term, together with all benefits and emoluments he is entitled to in accordance with his contract and collective bargaining agreement, with the exception of vacation days, sick days and personal days,

6. In the event that Mr. Bleistine obtains other employment with another school district requiring his release of employment with the Board, the Board agrees to provide such release of employment, which shall result in a commensurate modification of his termination date of June 30 with any balance of his salary compensation to be paid by the Board in no more than two installments, the last installment of which to be paid no later than August 1, 2005.

7. The Board further agrees that if any prospective employee requests a reference from the Board, or from any agent of the Board, it will provide a reference for and on behalf of Mr. Bleistine, in accordance with the central office policy which is to provide the date(s) of employment, position held, certificate required and the salary paid. In no event shall the Board, or any of its agents, transmit or communicate in any way whatsoever a negative reference of Mr. Bleistine, the commission of which shall be a material breach of this Agreement. Agents of the Board shall mean the/a person acting in an official capacity sanctioned by the Board to give references to prospective employers.

8. In consideration of the benefits and payments made pursuant to this Agreement, Mr. Bleistine, personally and for his estate and/or his heirs, and the Board, on behalf of its collective officials, agents, administrators, employees and representatives, each waive, release and give up any and all claims, demands,

obligations, damages, liabilities, causes of action and rights in law or in equity, known or unknown, each may have against the, based upon any act, event or omission occurring before the execution of this stipulation, including, but not limited to any events related to, arising from or in connection with Mr. Bleistine's employment and/or association with any of the parties subject to this release. Specifically, as to the release to the Board by Mr. Bleistine it shall include the Board's agents, employees, and officers, in their official capacity and in their individual capacity.

9. It is expressly understood that neither the execution of this stipulation, nor any other action taken in connection with the release provided by both parties and this settlement agreement constitutes an admission.

10. This stipulation contains the sole and entire agreement among the parties hereto, and fully supercedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding, unless in writing, signed by the parties hereto and expressly stated to represent an amendment to this stipulation.

11. This stipulation shall be governed by and be construed in accordance with the laws of the State of New Jersey.

12. This stipulation may be executed in counter parts. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey, venued in Camden County.

13. Mr. Bleistine and the Board acknowledge that they have been represented by and have consulted with counsel throughout the negotiations of the terms of this Stipulation and that they have each have reviewed the Stipulation in detail with their respective counsel and that they each fully understand its requirements and limitations.

14. Mr. Bleistine hereby states that he is signing this Stipulation voluntarily, of his own free will, and not under duress or coercion of any kind. Mr. Bleistine also states that he is satisfied with the representation provided by his counsel.

15. This Stipulation shall be construed fairly and according to the plain language of its terms.

16. If its determined that a specific clause(s) of this Stipulation is/are illegal under Federal or State Law, then the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

17. This Stipulation and each of its provision binds the parties to this Stipulation. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns also are bound. This Stipulation is made for the benefit of all parties hereto and all who may succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

18. This Stipulation must be approved by the Board by resolution prior to being effective and final.

IN WITNESS WHEREOF, the parties hereto set their hands to the Stipulation as follows:

October 1, 2004 — Stephen J. Bleistine
WITNESS DATE STEPHEN J. BLEISTINE

October 18, 2004
WITNESS DATE BOARD OF EDUCATION

The below signed attorneys of record hereby Stipulate and Agree to the Settlement of the above matter without attorney's fees or costs.

ROBERT M. SCHWARTZ

JOHN D. WADE, ESQ.

165-05

OAL DKT. NO. EDU. 5290-01
AGENCY DKT. NO. 134-4/01

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, Initial Decision and Stipulation of Dismissal With Prejudice transmitted by the Office of Administrative Law have been reviewed. Upon review of the file, the Commissioner accepts the Stipulation and hereby dismisses this matter.

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

Date of Decision: 5/4/05

Date of Mailing: 5/4/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5290-01

AGENCY DKT. NO. 134-4/01

MOUNTAIN LAKES BOARD OF EDUCATION

Petitioner,

v.

BOONTON TOWNSHIP BOARD OF EDUCATION

MORRIS COUNTY,

Respondent.

Vito Gagliardi, Esq., for petitioner
(Porzio, Bromberg and Newman, attorneys)

Lance J Kalik, Esq, for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorney)

Record Closed: March 30, 2005 Decided: April 4, 2005

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on June 15, 2001 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1

to -13. The matter was scheduled for hearing on several occasions but the dates were adjourned and telephone conferences were conducted because the parties were discussing settlement. The parties agreed to dismiss the matter on December 15, 2004. A signed Stipulation of Dismissal was forwarded to the undersigned on March 30, 2005 and is attached hereto.

I have reviewed the Stipulation of Dismissal and **FIND**:

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

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

I further **FIND** that this matter is no longer a contested case 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 4 05
DATE

JEFFREY A. GERSON, ALJ

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

4/5/05
DATE

Mailed to Parties:

APR 06 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner Mountain Lakes Board of Education

OFFICE OF ADMIN LAW
FILED
2005 MAR 29 A 10:49

MOUNTAIN LAKES BOARD OF EDUCATION, Petitioner, v. BOONTON TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDUOT 05290-2001N Agency Dkt No.: 134-4/01 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between petitioner Mountain Lakes Board of Education, and respondent Boonton Township Board of Education, it is hereby stipulated and agreed by and between these respective parties, that this action, including all claims asserted herein, be and is hereby dismissed with prejudice and without costs in favor of or against any party.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner Mountain Lakes Board of Education

By: Vito A. Gagliardi
Vito A. Gagliardi, Jr.
An Attorney of the Firm

Date: 12-15-04

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP.
Attorneys for Respondent Boonton Township Board of Education

Lance J. Kalik
An Attorney of the Firm

Date: 3/23/05

167-05

AGENCY DKT. NO. 17-1/05

TOWNSHIP OF MAPLEWOOD, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECLARATORY JUDGMENT
TOWNSHIP OF SOUTH ORANGE VILLAGE, ESSEX COUNTY, AND BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

This matter was initiated by a Petition for Declaratory Judgment wherein petitioner requested that the provisions of *N.J.S.A.* 18A:22-5, relating to Boards of School Estimate in Type II districts, be construed and clarified. The dispute centers on the nature of the secondary majority requirement set forth by the Legislature at *N.J.S.A.* 18A:22-5, which states:

> When it is required by law that any action shall be taken by at least a majority of the full membership of the board of school estimate, such majority must include a majority of the members, representing the respective municipal governing bodies and the action shall be certified accordingly.

Pursuant to *N.J.S.A.* 18A:4-33, this matter has been delegated to the Deputy Commissioner for decision. Upon a thorough and thoughtful review, the Deputy Commissioner finds that *N.J.S.A.* 18A:22-5 mandates that when it is required by law that any action shall be taken by at least a majority of the full membership of the BSE, both a majority of the full membership including the Board's representatives *and* a majority of all of the representative members of the municipalities is required.

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 9, 2005

167-05

AGENCY DKT. NO. 17-1/05

TOWNSHIP OF MAPLEWOOD, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECLARATORY JUDGMENT
TOWNSHIP OF SOUTH ORANGE VILLAGE, ESSEX COUNTY, AND BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

For Petitioner, Roger J. Desiderio, Esq. (Bendit Weinstock)

For Respondent Township of South Orange Village, Edwin R. Matthews, Esq. (Bourne, Noll & Kenyon)[1]

For Respondent Board of Education of the South Orange-Maplewood School District, Sidney A. Sayovitz, Esq. (Schenck, Price, Smith & King, LLP)

This matter was initiated by a Petition for Declaratory Judgment, filed January 13, 2005, wherein petitioner requests that the provisions of *N.J.S.A.* 18A:22-5 be construed and clarified to determine whether both a majority of the municipality representatives of South Orange and a majority of the municipality representatives of the Township of Maplewood (Maplewood) are required for any resolution of the Board of School Estimate (BSE)

[1] South Orange Village (South Orange) did not submit an Answer or brief indicating its position with respect to the interpretation of the statute at issue in this matter. In its sole submission, dated March 9, 2005, counsel for South Orange states:

> ...The Board has requested that I monitor this matter and obtain copies of letter briefs filed on behalf of those two parties. The Board may then join in the position advocated by one of the parties...

to pass or whether only a majority of all of the members of the two municipalities is required to pass any resolution.

The BSE, which considers and approves the South Orange-Maplewood School Board's (Board) budget in this Type II school district, is composed of eight members, pursuant to *N.J.S.A.* 18A:22-4, consisting of three representatives from each of the two municipalities and two representatives from the board of education. The parties concede that *N.J.S.A.* 18A:22-26 requires that a majority of the full membership of the BSE must vote affirmatively to pass a measure. The dispute centers on the nature of the secondary majority requirement the Legislature set forth at *N.J.S.A.* 18:22-5, which states:

> When it is required by law that any action shall be taken by at least a majority of the full membership of the board of school estimate, such majority must include a majority of the members, representing the respective municipal governing bodies and the action shall be certified accordingly.

Maplewood contends that the language of the statute dictates that not only is a majority of the full board required to pass a measure, but such "majority must consist of a majority of elected officials of *each* municipality" (emphasis in text) (Maplewood's Brief at 2) The Board's interpretation is that "when a majority vote by the Board of School Estimate is required, not only must a majority of the full board support a measure, but such majority must also include a majority of the members of the Board of School Estimate that are appointed by the two municipalities." (Board's Brief at 2)

In support of its position, Maplewood points to *McCann v. Clerk of Jersey City*, 167 *N.J.* 311, 321 (2001) *referring to Gabin v. Skyline Cabana Club*, 54 *N.J.* 550 (1969) in asserting that a cardinal rule of statutory construction is that full effect should be given to every word of a statute "because the legislature cannot be assumed to have used meaningless

language." (Maplewood Brief at 4-5) In this regard, Maplewood notes that, in describing how the BSE is to determine the amount of money necessary to be appropriated for the use of a district's public schools, *N.J.S.A.* 18A:22-26 states that the BSE will "'fix and determine the amount of monies necessary by a recorded roll call *majority vote of its full membership.*'" (emphasis in text) (*Id.* at 5) Additionally, Maplewood notes that, in the same sentence when discussing how the BSE shall make a certificate of the amount, *N.J.S.A.* 18A:22-26 states that the signatures required for the certificate are to be "*at least a majority of all members*" of such board. (*Ibid.*) Maplewood thus concludes that the language used in *N.J.S.A.* 18A:22-26 regarding the signature requirement of a majority of all members is obviously different from the requirement set forth in *N.J.S.A.* 18A:22-25 which states that the majority of its full membership is required. (*Id.* at 6)

A basic reading of the statute at issue, Maplewood submits, is that "'such' majority must include a majority of the members representing the 'respective' municipal govern[ing] bodies," claiming that the word "respective" is the most essential word in the statute at issue. (*Ibid.*) If the Board's interpretation is correct, Maplewood argues, there would be no reason for the word "respective" to appear in the statute. (*Ibid.*) To underscore its point, Maplewood poses that, under the Board's view, the word "respective" would be ineffective and redundant in that the majority of the BSE could be all three members representing Maplewood, one member representing South Orange and one member representing the Board. (*Id.* at 6-7) Maplewood contends that this would clearly not be a majority under the statute because a majority of the representatives of the municipal body of South Orange would not have concurred in the result, and that this construction is contrary to the idea of a representative government as it

would mean that either Maplewood or South Orange could be bound by a decision made by elected officials who are not accountable to such taxpayers. (*Ibid.*)

According to Webster's Deluxe Unabridged Dictionary, Maplewood contends, the word "respective" means "each" and the one synonym for "respective" listed in Merriam Webster's online dictionary/thesaurus is the word "several." (*Ibid.*) Maplewood, therefore, opines that "the word 'respective' refers to an individual or specific element which goes to make up the whole as opposed to the whole itself." (*Id.* at 8) In conclusion, Maplewood argues that its interpretation gives full effect and meaning to the statute, produces a system more amenable to compromise and consensus, and assures that actions which impose financial burdens on the taxpayers of a municipality are actions that have been agreed upon by the municipality's elected officials. (*Ibid.*)

The Board sets forth its position as follows:

> [I]n order for the Board of School Estimate to pass a measure, two majorities are required: (i) a majority of the full Board of School Estimate (at least five of eight) must vote affirmatively; and (ii) a majority of the municipal members (at least four of six) must also vote affirmatively. (Board Brief at 3)

In support of this interpretation of the statute, the Board asserts that Maplewood ignores the fact that the language of the statute refers to "a *majority* of the members," not to the "*majorities* of the municipal sub-groups." (emphasis in text) (*Ibid.*) The Board also takes issue with Maplewood's contention that there can only be one meaning to the word "respective" as it appears in the statute, pointing out that Webster's Dictionary also defines "respective" as "severally connected or belonging." (*Id.* at 4) In the Board's view, when respective is considered in the context of the statute, the use of "respective" simply provides a way to compare a majority of the municipal members with a majority of the full membership of the

BSE. (*Ibid.*) The Board thus contends that "respective" appears in the statute in order to emphasize that a majority of the aggregate municipal members is required in addition to a majority of the full membership. (*Ibid.*) Moreover, the Board points to the Legislature's Statement accompanying the laws of 1933, c. 232, the predecessor law to *N.J.S.A.* 18A:22-5, as providing conclusive support for the Board's interpretation:

> The purpose of this bill is to change the composition of the board of school estimate in school districts comprising more than one municipality in counties of the first class in the State and having a population in such school district of more than 30,000 inhabitants. In such school district, the board of school estimate is now composed of two members from the governing body of each municipality and two members from the Board of Education. This bill gives greater representation and voting power on the board of school estimate to the governing bodies of each of the municipalities with said district and *requires that at least a majority of the representatives of the municipal governing bodies shall approve the budget.* (emphasis supplied by the Board) (*Id.* at 4-5)

The Board points out that, although the Legislature's expressed intent is to increase the voting power of the municipal members relative to the votes of the school board members, it did not require majority approval by each sub-group from each municipality for passage of a measure, but, instead, added the requirement that "at least a majority of the representatives of the municipal governing bodies shall approve the budget." (*Id.* at 5) If it was the Legislature's intent to require separate majorities from each of the municipal governing bodies, the Board argues, it would have made references to such separate majorities. (*Ibid.*)

The Board also claims that its past practice interpretation of *N.J.S.A.* 18A:22-5 is entitled to substantial deference, noting that between May 1996 and April 2000, the BSE voted to approve measures that included a majority vote by four members appointed by the two municipalities, but without a majority vote by the members representing each municipality.

(*Ibid.*) Arguing that consistent and uniform interpretations of a statute by an agency are entitled to deference, the Board points out that, in each of these instances where the BSE was confronted with interpretation of the statute at issue, the BSE interpreted the statute as advocated herein by the Board. (*Id.* at 6) Additionally, the Board argues that under an interpretation that a majority of each municipality is required for passage of a measure, two members from either group of representatives from a municipality can prevent passage of the school budget even when 75 percent, or all six of the remaining members of the BSE, vote in support of the budget. (*Id.* at 7)

In response, Maplewood emphasizes that the statute defines "majority of the members" by including the language "representing the *respective* municipal governing bodies" and asserts that the Legislature had no reason to have included that phrase unless it intended the majority of the members to mean a majority of each of the respective municipal governing bodies. (emphasis in text) (Maplewood's Reply Brief at 2) Maplewood claims that no other interpretation makes sense because one municipality could be taxed even where the majority of its representatives had not concurred if interpreted otherwise. (*Id.* at 2-3)

With respect to the Board's reliance on the legislative history of the predecessor statute, Maplewood sets forth its position that resort to legislative intent for statutory interpretation is only necessary if the statute is ambiguous and claims that, in this case, the statute is not ambiguous, but, rather, it is the Legislature's statement that is ambiguous. (*Id.* at 3-5) In support thereof, Maplewood contends that the first clause of the last sentence, *e.g.*, "[t]he bill gives greater representation and voting power on the board of school estimate to the governing bodies of each of the municipalities within said district" supports Maplewood's position, but the second clause, *e.g.*, "and requires that at least a majority of the representatives

of the municipal governing bodies shall approve the budget," supports the Board's interpretation. (*Id.* at 5) However, the legislative statement is not what controls the interpretation of the statute, Maplewood maintains, because there would have been no need to amend the statute to increase municipal membership from two to three members under the Board's reading. (*Id.* at 6)

Maplewood emphasizes its contention that the reason it was necessary to change the municipal representation from two to three was so there could always be a majority of each municipal delegation to avoid municipalities being taxed without their consent. (*Id.* at 5) Under the original statute, in a four member municipality BSE with a total of ten votes, Maplewood poses, the board of education, with two votes, and two of the municipalities, with two votes each, could have out-voted the other two municipalities by achieving the six votes needed for passage of a measure without the other two municipalities' consent. (*Id.* at 4) Under the current law, Maplewood points out, the same BSE with four municipalities would have fourteen votes. (*Id.* at 4-5) Maplewood contends that two municipalities could still be out-voted under the current law using the Board's interpretation if two municipalities voted three each for a measure, one member of one of the municipalities' representatives voted with the majority and one member of the school board voted in the majority. (*Ibid.*) Thus, two municipalities would be taxed without their consent, which, Maplewood asserts, is the situation the Legislature sought to avoid by changing the statute. *Id.* at 4-6)

Finally, Maplewood takes issue with the Board's claim that past practice is critical in interpreting the statute, averring, *inter alia*, that the cases upon which the Board relies are those involving administrative agencies, not elected governmental agencies like a BSE, and arguing that an elected body's incorrect interpretation does not change what the Legislature enacted. (*Id.* at 6)

N.J.S.A. 18A:22-5 and the parties' positions on the meaning of the language therein have been thoroughly and thoughtfully reviewed by the Deputy Commissioner to whom this matter has been delegated for decision, pursuant to *N.J.S.A.* 18A:4-33. Initially, the Deputy Commissioner reiterates that the parties concede that *N.J.S.A.* 18A:22-26 requires that a majority of the full membership of the BSE must vote affirmatively to pass a measure and the only issue is the secondary majority requirement the Legislature set forth at *N.J.S.A.* 18A:22-5:

> When it is required by law that any action shall be taken by at least a majority of the full membership of the board of school estimate, such majority must include a majority of the members, representing the respective municipal governing bodies and the action shall be certified accordingly.

In viewing this statute's plain meaning and in light of the Legislature's Statement accompanying the laws of 1933, c. 232, the Deputy Commissioner construes *N.J.S.A.* 18A:22-5 as mandating that a majority of all of the representative members of the municipalities is required to pass any resolution, *e.g.*, in this instance, at least four of the six members representing the two municipalities. In so determining, the Deputy Commissioner observes that, when *N.J.S.A.* 18A:22-5 was changed in 1933 to expand the number of municipal representatives from two to three for each municipality, the Legislative Statement indicated that the intent was to provide greater representation and voting power to the municipalities and to require a majority vote of the aggregate voting municipal members, specifically stating that "[t]his bill gives greater representation and voting power on the board of school estimate to the governing bodies of each of the municipalities with said district and requires that at least *a majority of the representatives of the municipal governing bodies shall approve the budget.*" (emphasis supplied) If the Legislature had intended the revised statute to require separate majorities from each of the municipal governing bodies' representatives as petitioner contends, it is reasonably inferred that

specific references to such separate majorities would have appeared in the revised statute and in the Legislature's Statement as this requirement would represent a significant departure from the previous requirement.

Moreover, the Deputy Commissioner finds that the use of the word "respective" in this statute is not definitive so as to require a separate majority requirement for each of the municipalities, but, instead, is simply used to differentiate and emphasize that a majority of the aggregate municipal members is required in addition to a majority of the full membership. Additionally, the representative scheme set forth in *N.J.S.A.* 18A:22-5 to assure that municipalities will not be taxed without representation is entirely consistent with that established for regional school districts where the total vote of the entire regional district is counted without regard to municipal boundaries in determining the result of an election or the passage of a school budget. See *N.J.S.A.* 18A:13-5.

Accordingly, the Deputy Commissioner finds that *N.J.S.A.* 18A:22-5 mandates that, when it is required by law that any action shall be taken by at least a majority of the full membership of the BSE, both a majority of the full membership including the Board's representatives *and* a majority of all of the representative members of the municipalities is required.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 5/9/05

Date of Mailing: 5/9/05

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

168-05

OAL DKT. NO. EDU 2085-05
(EDU 4860-04 ON REMAND)
AGENCY DKT. NO. 144-4/04

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ESTHER BAITA AND WILLIAM NATERONE,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 05/09/05

Date of Mailing: 05/10/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2085-05

(ON REMAND EDU 4860-04)

AGENCY DKT. NO. 144-4/04

SOUTH PLAINFIELD

BOARD OF EDUCATION,

Petitioner,

v.

ESTHER BAITA AND

WILLIAM NATERENO,

Respondents.

Marc H. Zitomer, Esq., for the petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Diane K. Smith, Esq., for respondents

Record Closed: March 17, 2005 Decided: March 30, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was remanded to the Office of Administrative Law (OAL) on March 17, 2005, for further proceedings consistent with the Commissioner's March 10, 2005 Order.

The parties agreed to a settlement in the original matter (EDU 4860-04) and the undersigned rendered an Initial Decision Settlement on January 27, 2005. However, this Stipulation of Settlement and Release which was attached to the January 27, 2005 Initial Decision Settlement did not include a Board Resolution. For this reason, the mater was remanded to the undersigned.

On March 15, 2005, the undersigned received the Board's resolution, which is attached and fully incorporated herein. However, the record closed on the March 17, 2005, the date the matter was transmitted, since the March 15, 2005 receipt of the Resolution preceded OAL's receipt of the remanded case file.

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

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

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

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

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

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

March 30, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

4-6-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 11 2005

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

S S E & K
ATTORNEYS·AT·LAW

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP

RECEIVED
2005 MAR 15 P 4:37
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

March 14, 2005

Reply to Florham Park

VIA LAWYERS SERVICE
Honorable Douglas H. Hurd, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road
P.O. Box 049
Mercerville, NJ 08625-0049

Re: South Plainfield Board v. Ester Baita & William Natereno
OAL Docket No.: EDUOS 04860-2004S
Agency Ref. No.: 144-4/04

Dear Judge Hurd:

As you know, this matter was remanded to Your Honor because we neglected to provide the Commissioner with a certified copy of the Board Resolution approving the settlement and authorizing the Board President and Interim Board Secretary/Business Administration to execute the Agreement on behalf of the Board.

Accordingly, I am enclosing herewith a certified copy of the Board Resolution. In addition, although the Commissioner's decision states that it has to be executed by the Board's attorney, I conferred with the Department of Education and they informed me that the Agreement does not have to be signed by the undersigned so long as the subject Resolution is provided.

Thank you for your consideration.

Respectfully,

Marc H. Zitomer

MHZ:jd
Encl.
c: Diane K. Smith, Esq. (Via Lawyers Service)

Lawrence S. Schwartz ▪▪
Stephen J. Edelstein
Nathanya G. Simon ▲
Nicholas Celso, III
Donald A. Kessler ▪▪
Burton Zitomer ▲
Allan P. Dzwilewski
Paul H. Green
Andrew B. Brown
Marc H. Zitomer ▲
Michael H. Cohen
Stefani C. Schwartz ✦
Denis G. Murphy
Matthew I. Kane ▲

Jacob Green
Alan J. Schnirman
Joan M. Damora
Brad M. Kaplan ▲
Gregory G. Johnson ■
Hope R. Blackburn
Philip B. Whitcomb ▲ ✦
Ronald J. Ricci
Charles E. Falk ❖
counsel

Christopher R. Welgos
Carol R. Smeltzer
Jason J. Lavery ▲
Heidi M.G. Hanley
Kathleen W. Holstetter
Stephanie M. Kolb
Peter J. Vazquez, Jr. ▲
Christopher R. Kehrli ■
Paul A. Andersen ● ★ ▲
Jacquelyn A. Pelosi ■
Meghan C. Goodw
Michael C. Kovacs
Susan W. D'Angelo ■
Nuris E. Portuondo ✱ ▲
Robin S. Ballard ■
Rachel A. Davis ▲
Jason J. Waldstein
Peter H. Tanella
Michelle Wu ▲
Danielle Disporto ▲
Mitchell J. Dexter

Glenn C. Gumitzky ▲
Scott A. Elk ◆
Miguel A. Maza ●
of counsel

Hamilton Office:
2277 Route 33 Suite 4[illegible]
Hamilton Square, NJ 08690
Tel: 609 . 890 . 4364

New York Office:
400 Park Ave. Suite 1[illegible]
New York, NY 10022-[illegible]
Tel: 212 . 688 . 5900

Florida Office:
Boca Raton, FL 33[illegible]
Tel: 561 . 368 . 8800

✦ [illegible]
◆ [illegible]
▲ [illegible]
■ [illegible]
● [illegible]
★ [illegible]
❖ [illegible]
✱ [illegible]

This is a certified copy of the minutes of the meeting of the South Plainfield Board of Education held on January 18, 2005.

Robert H. Davis
Interim Board Secretary/Business Admin.

Regular Public Meeting
January 18, 2005

11. Affirmation of Agreement with Phone Review and Results of Said Agreement (continued)

BE IT FURTHER RESOLVED that the fee due to Phone Review now be paid, and

BE IT FINALLY RESOLVED that this resolution shall take effect immediately.

MOTION: Mr. Morgan SECOND: Ms. Peck VOTE: 8-0
Absent: Mr. Kelly

12. Approval of Settlement Agreement in the Matter of South Plainfield Board of Education vs. Esther Baita, et at.

RESOLVED, that the Board hereby approves the settlement in the matter of South Plainfield Board of Education vs. Esther Baita, et al., OAK Docket No.: EDUOS 04860-0224S, Agency Docket No.: 144-4/04 in accordance with the terms and conditions set forth in the Stipulation of Settlement and Release between the parties dated January 14, 2005, a copy of which shall be included in the permanent minutes of this meeting; and

BE IT FURTHER RESOLVED, that the Board President and Interim Board Secretary/Business Administrator are hereby authorized to execute this Agreement on behalf of the Board.

MOTION: Mr. Morgan SECOND: Ms. Peck VOTE: 8-0
Absent: Mr. Kelly

XV. FINANCE/REFERENDUM

XVI. PUBLIC ADDRESS

Mr. Mikorksi asked what does a Budget mean? He read Dr. Rosado's cover memos on the Budget presentation to the public and pointed out several areas of concern and areas that should have been included, such as Capital outlay, surplus usage and textbook lease.

Mr. Davis said we were aware of $900,000 budgeted for surplus, but we were not aware that we needed to use the remaining $680,000 to offset shortfalls in the Budget. He also explained the need for the district to go for five-year leases for purchases such as copy machines, busses, equipment, etc., since the cost will be too high to be paid in one year and must be spread over five years.

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Petitioner,
South Plainfield Board of Education

RECEIVED
2005 JAN 20 P 3:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SOUTH PLAINFIELD BOARD OF EDUCATION,

Petitioner,

vs.

ESTHER BAITA and WILLIAM NATERENO,

Respondents.

OFFICE OF ADMINISTRATIVE LAW
DEPARTMENT OF EDUCATION

OAL DKT. NO.: EDUOS 04860-0224S
Agency Dkt. No.: 144-4/04

Civil Action

STIPULATION OF SETTLEMENT AND RELEASE

This Stipulation of Settlement is made by and between the South Plainfield Board of Education ("Board"), with administrative offices located at 125 Jackson Avenue, South Plainfield, New Jersey 07080 and Esther Baita, 3 Cooper Street, Manville, New Jersey 08835. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, the Board has filed a Petition of Appeal with the Commissioner of Education against Ms. Baita and Mr. Natereno, jointly and severally, seeking $8,880.96 in back-tuition, plus interest, costs and counsel fees for the alleged ineligible attendance of Ms. Baita's children, B.N.H. and B.A.H., in the South Plainfield School District; and

WHEREAS, Mr. Natereno also was named as a respondent in this action for allegedly allowing his South Plainfield address to be used for the purpose of enrolling Ms. Baita's children in the District; and

WHEREAS, a hearing in this matter has been scheduled for January 26 & 27, 2005; and

WHEREAS, the parties desire amicably to resolve the matter without the necessity of further litigation;

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

1. Ms. Baita will pay the Board back-tuition in the amount of $2500.00 in full and complete satisfaction of the alleged amount which is due and owing.

2. This $2500.00 tuition amount will be paid to the Board's legal counsel, Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932, with a certified check made payable to the "South Plainfield Board of Education", by no later than June 30, 2005. If said amount is not received by the Board's legal counsel by that date, the Board will provide Ms. Baita and her legal counsel, Diane K. Smith, Esq., in writing, with a final fifteen (15) days notice period to pay the amount before the Board institutes any collection action.

3. Ms. Baita understands that if she fails to remit the agreed-upon amount by June 30, 2005, the Board will take whatever legal action is necessary to enforce this Agreement and collect the sum set forth herein.

4. Ms. Baita agrees to pay the Board's attorney's fees and costs, in addition to all collection fees, in the event that the Board must take action to collect the aforesaid sum of money.

5. Ms. Baita, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever,

which have been brought, or could be brought, arising under or relating in any way to B.N.H. and B.A.H.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.

6. The Board, in consideration of this Agreement, hereby releases Ms. Baita from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to B.N.H. and B.A.H.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.

7. Ms. Baita acknowledges that she has reviewed this agreement with independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Agreement and the duties and obligations enumerated herein.

8. The Board, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal against both respondents.

9. Nothing contained in this agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

10. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

SOUTH PLAINFIELD BOARD OF EDUCATION

By: _____
Pio ~~Pennisi~~, Board President

By: _____
Robert Davis, Int. Bd. Sec./Bus. Admin.

_____
Esther Baita

Sworn and subscribed before me this
14th day of January, 2005

_____

MARGARET LATTRELL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires December 3, 2006

169-05

OAL DKT. NO. EDU 10011-04
AGENCY DKT. NO. 338-9/04

BONNIE TUTTLE, MARK SEREBRANSKY, JANET CONNELL, STACY ROCHIN AND NANCY STEVENS,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were untimely filed and are, therefore, not considered herein.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge that the consultant retained by the Board for medical review of student requests for transfer from Orchard Valley Middle School for environmental reasons was not serving as a school physician so as to require him to meet the statutory and regulatory specifications for that position. The Commissioner further concurs that petitioners have not met their burden of proving that the Board, in adopting a protocol for the handling of such requests, violated the Open Public Meetings Act, school law within the purview of the Commissioner, or its own established policies and procedures. Finally, the Commissioner concurs that he lacks jurisdiction over petitioners' claims as they relate to the Individuals with Disabilities Education Act (IDEA) and other special education law.

[1] Pursuant to *N.J.A.C.* 1:1-1.4, exceptions would have been due 13 days from the April 14, 2005 mailing date of the Initial Decision. Petitioners' submission bears a face date of May 4, 2005, and was filed on May 6, 2005, with no request for extension having been made in accordance with applicable rule.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/10/05

Date of Mailing: 5/10/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10011-04

AGENCY DKT. NO. 228-9/04

BONNIE TUTTLE, MARK SEREBRANSKY, JANET CONNELL, STACY ROCHIN AND NANCY STEVENS,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHIGNTON, GLOUCESTER COUNTY,

Respondent

Carol Rogers Cobb, Esq., for the petitioners (Giansante & Cobb, attorneys)

Michael E. Heston, Esq., for the respondent (Capehart & Scatchard, attorneys)

Record Closed: March 29, 2005 Decided: April 12, 2005

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9, alleging that the Board of Education acted improperly when it adopted a certain protocol regarding student transfers, and when it hired Dr. Howard M. Sandler. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to

N.J.S.A. 52:14B-1 to -12. The parties have filed cross-motions for summary decision pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995).

The relevant facts are undisputed. A longstanding mold problem existed at the District's Orchard Valley Middle School, and in response to complaints the Board undertook interim remediation efforts prior to commencement of the 2004/05 school year. The District plans to replace the HVAC system in the building, which it expects will be a more permanent solution. The parties are at odds concerning the current safety of the building and a few of the parents who are petitioning here have also sought relief under the Individuals with Disabilities Education Act (IDEA), 20 USC§ 1400-87 [1]; suit has also been filed in the Superior Court.

In the spring of 2004 the Board contracted with Dr. Howard Sandler and his company, Sandler Occupational Medicine Associates, Inc. to consult regarding students seeking transfers from Orchard Valley for environmental reasons. Dr. Sandler's resume reflects an expertise in this area. On August 24, 2004, the Board adopted a protocol for evaluating such requests and Dr. Sandler was designated as the Board's consulting physician. He would review the medical records of transfer applicants, consult with their physicians, investigate student homes for air quality as necessary, and provide the Board with advice regarding the application. Dr. Sandler is not licensed in New Jersey, nor did he undergo a criminal history background check. This is the substance of the record.

Petitioners maintain initially that Dr. Sandler is serving as a school physician and as such must be licensed in New Jersey and must submit to a background check. The issue is governed by *N.J.A.C.* 6A:16-2.1, which outlines the role of a school physician. The regulation contemplates someone with experience in child and adolescent health that provides an array of general medical services and oversees other District health personnel. Subparagraph (b) requires a criminal history background check "on any physician before entering into an agreement for delivery of services", and subparagraph (c) requires licensure in New Jersey. It appears, however, that these restrictions are limited to school physicians and probably do not extend to consultants hired for limited purposes. Dr. Sandler, who practices in Maryland, has been given a

[1] The related docket numbers, EDS 8095-04 and 8096-04, are currently before me. The parties agreed that the issues presented by the instant matter are distinct and might be resolved separately in these cross-motions.

narrow mandate, i.e., to assess students seeking transfers for environmental health reasons, largely to do with mold susceptibility. No rule has been cited that imposes like preconditions on consulting physicians.

Petitioners argue also that the Board violated the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, when it adopted the protocol in question, as it was not on the August 24, 2004 meeting agenda, citing *Crifasi v. Governing Body of Oakland*, 156 *N.J. Super.*, 182 (App. Div. 1978). The holding of *Crifasi*, however, is that plaintiffs must establish not only the omission, but that it was intended to deceive the public. The appellate division reasoned that since no agenda is even required under the Sunshine Law, a district that happens to prepare an agenda ought not generally to be punished for omitting an item. Petitioners suggest that the Board wanted to adopt this protocol quietly on August 24, 2004. An emergent motion was to be argued the following day in Superior court on the very question of student transfers from Orchard Valley Middle School and it would be advantageous to have the protocol in place without public dissent. That the district may have wanted the protocol in place by the next day for strategic reasons is not inherently dubious and the inference sought concerning the Board's intent is largely conjecture. No transcript of the meeting was submitted.

Petitioners argue as well that adoptions customarily go through a second reading, which was not done here. However, no by-law or other governing procedure of the Board was presented, and even if second readings are typical the district may have rules governing decisions that require expedition.

Petitioners maintain finally that the protocol regarding transfers from the home school violates the IDEA, which has procedures for assessing whether a placement is appropriate. Petitioners are correct that the IDEA is centrally concerned with this theme however the protocols extend to all students in the district, not merely to classified students. Although I see no conflict on the face of it, to the extent that the protocol does not mesh with IDEA requirements, it is a matter for the pending due process proceeding.

Based on the foregoing, I **CONCLUDE** that the Board's August 2004 protocol adoption did not violate the Sunshine Law and that Dr. Sandler need not meet conditions established for school physicians. It is **ORDERED** that this petition be **DISMISSED**.

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

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

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

4/12/05
DATE

SOLOMON A. METZGER, ALJ

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

4/12/05
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 14 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

174-05

OAL DKT. NO. EDU 6164-03
AGENCY DKT. NO. 154-5/03

RALPH McCULLOUGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions object, *inter alia*, to the Administrative Law Judge's (ALJ) interlocutory Letter Order determination of July 22, 2004 in this matter, which concluded that principles of mitigation were applicable to any back-pay award received by petitioner. Citing *Goodman v. London Metals Exchange,* Inc., 86 *N.J.* 19 (1981), he again maintains, as he did below, that because mitigation was not raised as an affirmative defense by the Board, who bears the burden of proof on this issue, or in any way addressed in any of the previous proceedings in this matter, it must be deemed waived. (Petitioner's Exceptions at pp. 1-4) Petitioner, additionally, claims entitlement to an award of interest on the monies owed him by the Board due to the protracted period of time the Board took to compensate him. (*Id.* at 4)

Upon his full and independent review, the Commissioner determines to adopt the Initial Decision and the ALJ's July 22, 2004 Letter Order, as modified below. Initially, the Commissioner observes that it appears that petitioner harbors a misapprehension as to how principles of mitigation affect this matter. In this regard, it is noted that petitioner claims entitlement to back-pay pursuant to *N.J.S.A.* 18A:6-30, which specifies:

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension***.

The court in *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App. Div. 1963), in reviewing *N.J.S.A.* 18:5-49.1, the precursor to this statutory provision, found that "the Legislature must be taken as having meant that all claims made by illegally dismissed persons under [this statute] be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word 'compensation'," such being the case because damages under this statute have been determined to be "compensatory" in nature, and, thus, an individual should not be awarded more damages than actually sustained. (at 159.) Therefore, under common law principles, petitioner here was under a duty to mitigate his damages during the period of his improper termination by making reasonable efforts to secure alternative employment, notwithstanding that he was improperly terminated from his position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Miele v. McGuire*, 31 *N.J.* 339 (1960). This obligation is not predicated on any action on the part of the Board or any other individual or entity involved in adjudication of the case in chief. The record here reflects that, upon receipt of petitioner's demand for back-pay, the Board requested that he

submit evidence of any and all monies he received from unemployment compensation and alternative employment during the period at issue. Such information was subsequently provided and this amount is appropriately offset from petitioner's monetary award, thereby according him the full measure of his *actual* damages. To find otherwise would violate public policy as petitioner would be provided compensation in excess of his economic loss at public expense. However, while it is without question that the amount of petitioner's award here must be reduced by his actual earnings during the time of his removal, *Goodman, supra.,* at 36, it is, similarly, well settled that a charge of *failure to mitigate* is an affirmative defense and the burden to demonstrate that petitioner did not put forth reasonable efforts to secure employment during the period of his improper termination rests with the employer. With respect to such a contention, the Supreme Court in *Goodman, supra,* stated:

> The employer may establish a prima facie case [in this regard] by first showing that comparable employment opportunities were available and, if the lower sights doctrine is applicable, that there were other suitable jobs. The burden of going forward would then shift to the employee who may introduce evidence that comparable employment did not exist, that reasonable and diligent efforts on his part had not been successful, or that the circumstances did not justify acceptance of a dissimilar job. Whether the individual sought a job or not would be irrelevant in the absence of the existence of a position. ***So, if the proofs show that jobs were not available, if the complainant had unsuccessfully expended reasonable efforts and lowered his sights, if appropriate, no reduction in the back-pay award would be warranted. The ultimate burden of persuasion rests on the employer. (at 41)

Under the facts in this matter, the Board did not plead, nor was it required to plead, failure to mitigate as such a contention was not at issue herein.

Turning to calculation of damages actually due petitioner in this matter, the Commissioner finds that clarification is necessary here as the Initial Decision is replete with mathematical inaccuracies and inconsistencies. The instant record establishes the following:

> The contracted salary for petitioner's position during the time of his improper termination was:
>
> 1999-2000 school year - $22,698
> 2000/2001 school year - $24,100
> July 1, 2001 – January 15, 2002 - $15,801.92[1]
> For a total of $62,599.92
>
> From this amount should be deducted $30,680.58[2] for actual wages earned by petitioner during this period and $6,725 in unemployment compensation he received,[3] leaving a balance of $25,194.34. The Board previously issued a check to petitioner in the amount of $22,554.79, **leaving a remaining unpaid back-pay balance of $2,639.55, minus required employment deductions.**
>
> Additionally, petitioner was entitled to a refund, in the amount of $1,987.86 for certain out-of-pocket costs incurred ($1,537.80 medical and dental insurance, $393.06 for prescriptions and $57.00 for medical payments). The Board has previously tendered a check to petitioner in full satisfaction of his $1,987.86 out-of-pocket costs.

Finally, the Commissioner finds that the instant record provides no showing that the criteria for the award of pre and/or post-judgment interest pursuant to *N.J.A.C.* 6A:3-1.17 have been satisfied, in that there has been no showing of bad faith as a result of the Board's denial of petitioner's claims or a deliberate violation of a statute or a rule. Rather, the denial of the full extent of the back-pay award on the part of the Board was predicated at this juncture upon a dispute over what the precise amount of the award should have been.

Accordingly, the Initial Decision of the OAL and the ALJ's July 22, 2004 Interlocutory Order are adopted, as modified herein. The Board is hereby ordered to remit to

---

[1] The Commissioner concurs with the ALJ's determination that petitioner's claim of shift differentials is appropriately included here.

[2] It is noted that the record contains W-2's for wages earned by petitioner during the period at issue in the amounts of $6,313.44, $12,461.58, $1,191, $1,000, $2,446.44, $316.68, $2,732.74, $184.61 and $4,034.09 which totals $30,680.58 rather than the Initial Decision figure of $30,959 or the Board's May 19, 2004 Motion for Summary Decision figure of $30,950.58.

[3] Although the Board is entitled to offset petitioner's monetary award by the unemployment compensation he received, the Board is reminded of its obligation, pursuant to *N.J.S.A.* 43:21-5(b), to transmit to the Department of Labor monies offset for reimbursement for unemployment compensation.

petitioner the sum of $2,639.55, minus required employment deductions, in satisfaction of the back-pay award due him as a result of petitioner's improper termination during the period at issue here. A copy of this decision will be forwarded to the Department of Labor so as to facilitate prompt reimbursement of offset unemployment benefits by the Board.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/11/05

Date of Mailing: 5/12/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06164-03S
AGENCY DKT. NO. 154-5/03

RALPH McCULLOUGH,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner and Hunter, attorneys)
Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George and Dortch, attorneys)

Record Closed: February 8, 2005 Decided: March 29, 2005

BEFORE **JEFF S. MASIN,** ALJ:

Ralph McCullough filed a Verified Petition with the Commissioner of Education on May 19, 2003, seeking an order directing the respondent Trenton Board of Education to pay him back-pay for a period from July 1999 through January 2002. The claim was based upon the fact that the Board had suspended Mr. McCullough in July 1999 without pay and, as a result of a decision of the Commissioner issued on January 15, 2002, which concluded that he was a tenured employee, that suspension and any attempt to terminate him from his position as a janitor in the district could only be accomplished in accordance with the requirements of the tenure statute. The Board ultimately did file tenure charges against McCullough on February 15, 2002, and the Commissioner sustained a portion of the charges and ordered that Mr. McCullough forfeit 120 days salary. This decision was affirmed by the State Board of Education on April 2, 2003. In his Petition, Mr. McCullough claimed that the Board owed him $62,599, plus lawful interest, as well as the out-of-pocket cost for medical and dental insurance, $1,537.80, $393.06 for prescriptions and $57 for medical payments. In its answer the Board claimed that the petition was untimely

filed, but it later determined not to continue this objection. The Board has also asserted that Mr. McCullough had the obligation to seek to mitigate any economic damages purportedly caused by the Board's improper suspension of him. In a Letter Order dated July 22, 2004, I rejected McCullough's claim that the failure of the administrative law judge to mention mitigation in his initial decision in the tenure case, or of the Commissioner to mention mitigation in his Final Decision in that case, precluded any claim by the Board in this case that McCullough's back-pay claim was subject to a mitigation requirement. In doing so, I also determined that Mr. McCullough's motion for summary decision had to be denied. The determination of the Board's cross-motion was held, pending further discussions by counsel in light of the holding that the subject of mitigation was not precluded from the case, and, if needed, the presentation of arguments regarding the nature of any mitigation requirement that might exist in the case.

Argument and testimony was received on December 21, 2004. Following the completion of testimony, I agreed at the request of counsel to allow until January 31 for the filing of briefs. As the question had arisen whether mitigation applied, I wrote to counsel on December 22, concerning my preliminary research into that question, citing several decisions that appeared to make it entirely clear that the Commissioner has recognized that "reasonable diligence and ordinary care" are required by one seeking to recover back-pay. Further, the case law clarified that the Commissioner understands that mitigation income can include unemployment compensation benefits, of which Mr. McCullough received $6,725 during the period for which he seeks back-pay. *West Orange Supplemental Instructor's Assoc. et al., v. Bd. of Ed. of the Twsp. of West Orange,* 92 *N.J.A.R. 2d* 287, 298. I invited any further submissions, but none were received by the end of January 2005, at which time the record was closed.

Prior to the hearing date, the Board had tendered to Mr. McCullough a check for $22,554.. It determined this amount by deducting the $30,959 gross income shown on W-2's admittedly received by Mr. McCullough for work during the period in question from the $60,230 that it contended McCullough would have earned if his employment with the Board had continued uninterrupted by the improper suspension without pay, leaving a balance of $29,279. It then deducted the $6,725 unemployment compensation from this balance. The Board does not dispute that Mr. McCullough is in fact owed this $22,554.

Mr. McCullough was a twelve-month employee. According to each party, the contracted salary for his position for the school year 1999/2000 was $22,698. For school year 2000/2001, the salary was $24,100. The parties further agreed that the contracted salary for the 2001/2002 school year was $27,390. The Board believes that the total pay for the period from July 1, 2001, through the date of the Commissioner's decision on January 15, 2002, is $13,957.63; however, Mr. McCullough believes that with shift differentials the number should be $16,075.80. Thus, the Board contends that the total wages would have been $60,230, McCullough argues for a figure of $62,592.92.

Since I **CONCLUDE** that the principle of mitigation of damages applies, the first element to be considered as possible mitigation is the unemployment benefits received by Mr. McCullough. As the Commissioner has said in *Scott and Yarnell v. Bd. of Ed. of the City of Trenton et al., and Pupalaikis, Spagnola and Schmidt v. Bd. of Ed. Of the City of Trenton, et al,* EDU 10333-96 and EDU 6748-97 (consolidated), http://www.state.nj.us/njded/legal/commissioner/2002/sep /352-02.pdf, (September 30, 2002), in the instance where an employee has received unemployment compensation and is now to receive back-pay covering a period congruent with the time for which the back-pay was received, the employee should not be unjustly enriched by receiving the same sum of money twice, once from unemployment funds and once from the Board. In *Scott*, the Commissioner cites numerous other decisions in which both the Commissioner and the State Board have directed an offset of the amount of back-pay awarded to an employee by the amount of unemployment compensation received. Therefore, I **CONCLUDE** that mitigation is appropriately required, and the Board should also not be unjustly enriched. It must pay back the mitigation amount to the unemployment system. Thus, it is **ORDERED** that Mr. McCullough's back-pay award will be offset by $6,725, and the Board is to remit that amount to the unemployment system.

The remaining topic for discussion relates to the various jobs that Mr. McCullough held while he was suspended from his job with the respondent during the period from July 1999 through January 2002. From the record it appears that in 1999 he did not receive any income from any employment after he was suspended, receiving instead only the unemployment benefits previously addressed. In 2000 and 2001, he was employed at various jobs. In determining how these earnings should be treated for mitigation purposes, questions can arise as to how to treat

monies earned in employment that occurred during the same hours as the employment from which McCullough was improperly suspended as well as monies earned in jobs that did not fully, or even partially, overlap with the hours he worked for the Trenton Board. Issues of how to mitigate earnings are fact sensitive, but a good guide to how to treat earnings appears to be set forth in the rules governing Merit System Board cases, which rule, while not binding in this education case, is nevertheless a helpful guide. That rule, *N.J.A.C.* 4A:2-2.10(d)3, provides that

> The award of back pay shall be reduced by the amount of money which was actually earned or could have been earned during the separation. If an employee also held other employment at the time of the adverse action, the earnings from such other employment shall not be deducted from the back pay. However, if the employee increased his or her work hours at the other employment during the back pay period, earnings from such additional hours shall be subtracted from the back pay award.

In this case, the evidence does not show that Mr. McCullough was otherwise employed in 1999 when he was suspended. He later became employed in 2000. Applying the principles of *N.J.A.C.* 4A:2.10(d)3 to this case makes sense. The logic of its analysis of how to treat earnings is perfectly reasonable. Thus, since I **FIND** that all of McCullough's earnings in 2000 and 2001 constitute earnings from positions that he did not hold when suspended and since his earnings at the time just before suspension were all from his Trenton Board of Education position, all of the 2000 and 2001 earnings should be treated as mitigation income. These earnings total $30,959. This total shall be deducted from the total earnings that McCullough would have received had he remained employed with the Board from his 1999 suspension through January 2002. Combined with the unemployment benefits, the total mitigating income is $37,684.

As noted, there is a difference between the Board's conception of how much McCullough would have earned and what he thinks he would have earned. The difference between these figures, $16,75.80 versus $13,57.63, is $2,118.17. Mr. McCullough said that this difference represented shift differentials and the Board did not present anything to refute that such differentials would have applied. The proofs on this point are slender, but I **FIND** that McCullough's unchallenged version seems credible. Thus, deducting the mitigation total of $37,684 from the total lost earnings of $62,592 leaves a difference of $24,915. To this should be added certain out-of-pocket expenses, including $1,537.80 for medical and dental insurance,

$393.06 for prescriptions and $57 for medical payments, totaling $26,902.86. The Board previously tendered checks to Mr. McCullough through his attorney, one for $22,554.79, minus appropriate employment deductions, and one for $1,987.86 for out-of-pocket expenses. The Board is therefore **ORDERED** to forward the remaining unpaid back-pay of $2360.21, minus required employment deductions.

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

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

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

March 29, 2005
DATE

JEFF S. MASIN, ALJ

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

March 29, 2005
DATE

Mailed to Parties:

MAR 29 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

Jeff S. Masin
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

Thomas W. Sumners, Jr., Esq.
Sumners George
849 West State Street
P.O. Box 0630
Trenton, NJ 08604

LETTER ORDER

Steven E. Klausner, Esq.
Klausner & Hunter
63 East High Street
P.O. Box 1012
Somerville, NJ 08876

Re: Ralph McCullough v. Board of Education of the City of Trenton, Mercer County
OAL DKT. NO. EDU 06164-03
AGENCY DKT. NO. 154-5/03

Dear Counsel:

This matter was opened to the Office of Administrative Law following its transmission from the Commissioner of Education as a contested case. The dispute arises in connection with a petition filed by Mr. McCullough seeking payment of monies purportedly due to him from his employer, the Board of Education, for a period of time between his termination from service with the Board on June 30, 1999 through January 22, 2002, the date of an order from the Commissioner of Education which rejected an initial decision issued by an Administrative Law Judge that had determined that the petitioner had not obtained tenure. As a result of that decision, tenure charges were then filed against the petitioner. These charges led to an ultimate determination by the Commissioner, suspending the petitioner for a period of 120 days without pay.

In his motion for summary decision, Mr. McCullough argues that in neither Administrative Law Judge Martone's July 22, 2002 initial decision suspending Mr. McCullough for 90 days without pay, nor the Commissioner of Education's final decision

on November 6, 2002, which extended that suspension without pay from 90 days to 120 days, nor in the State Board of Education's affirmance of the Commissioner's Final Decision, did any of those ruling upon the tenure charges ever address the issue of mitigation of damages. As such, Mr. McCullough contends that, to the extent the Board of Education seeks to limit the amount of back pay for any period of time due to Mr. McCullough, the Board has waived any claim for mitigation. Thus, he is due $62,599, plus interest.

In response to this motion, the Board filed a cross motion for summary judgment, claiming that the petitioner is only entitled to retroactive wages totaling $22,554.79. This figure purportedly represents back pay due after applying mitigation.

Counsel for Mr. McCullough is correct that in Judge Martone's Initial Decision he ordered only that "the appropriate penalty to be imposed upon respondent (McCullough) for the finding of guilty as to the tenure charge of unbecoming conduct is a 90-day suspension." It is additionally correct that neither the Commissioner's decision or the State Board of Education's decision addresses the issue of mitigation. The Commissioner's decision specifically modified Judge Martone's recommended order and provides, "accordingly, the Commissioner finds that a portion of charge V as set forth herein, is sustained and orders that respondent shall forfeit his 120 days salary already withheld pursuant to N.J.S.A. 18A:6-14." In support of his motion counsel argues that under *Hackensack v. Winner*, 82 *N.J.* 42-43 (1980), the single controversy rule is applicable to administrative proceedings and that it is therefore appropriate in some situations to apply such rule. He argues that the Board had its "chance to litigate the issue of mitigation in the prior proceeding. The issue of mitigation was part of its burden of proof. He chose not to litigate that issue." In support of his allegation regarding the burden of proof, he cites *Goodman v. London Metal Exchange*, 86 *N.J.* 19 (1981), in which the Supreme Court held that "mitigation, including the lower sights principle, is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case, the employer."

Goodman was a civil rights proceeding in which the respondent was charged with violating Mr. Goodman's civil rights and was determined to have engaged in wrongdoing. In such a case, to the extent that the petitioner sought damages against the respondent for violations of his civil rights, the respondent clearly had reason to affirmatively defend against both the allegation that such violations occurred as well as the claim as to the amount of damages that should be recovered by the petitioner if the violations were proven. However, in the case of Mr. McCullough and the tenure proceeding, it is hardly fair to characterize the Board of Education as the "wrongdoer." In the tenure proceeding, the Board, as the petitioner, charged that Mr. McCullough had violated the standards that apply to a tenured employee and sought his removal. Clearly, the Board was not seeking damages against the respondent, who instead was defending against the charges, seeking to preserve his job status, and, only to the extent that he was successful in his defense, seeking to obtain any monetary recovery from the Board in respect to back pay. While it is certainly true that the Board of Education might have requested of Judge Martone that, if he were to determine that the charges against Mr.

McCullough had not been sustained, or were sustained but did not support removal of tenure as opposed to a suspension, the judge should then order that any damages be paid to Mr. McCullough be mitigated. However, it appears that the issue of mitigation was not raised, and when Judge Martone imposed a penalty upon Mr. McCullough, who surely was the wrongdoer in the case, he did not mention anything with respect to whether back pay was subject to mitigation. Indeed, when, after the completion of review proceedings, Mr. McCullough made a demand on the Board of Education for what he believed to be the full amount of money owed to him as back pay, the Board responded and discussions ensued to attempt to resolve the issues in dispute. A petition was ultimately filed with the Commissioner seeking payment for the period between McCullough's termination and the Commissioner's decision finding that Mr. McCullough had acquired tenure. In response to that claim, the Board contends that the total amount of money must be reduced by appropriate mitigation.

Under the circumstances of this case, I do not believe that the Board should be prevented from seeking mitigation simply because the decisions in the previous matter failed to identify whether damages should be mitigated. Unlike *Goodman*, where respondent could have raised an affirmative defense to his claim for damages by arguing for mitigation, in the tenure matter the Board, as petitioner, certainly had no obligation to identify affirmative defenses. Thus, while it might well have been appropriate for those who decided the disputes to have addressed the mitigation issue, they did not do so, but that fact does not mean that a proceeding to determine the appropriate amount of back pay in any way interferes with, or in any way overrules, the decisions entered by the judge, the Commissioner or the State Board. It is common enough in proceedings of this type, where, following the issuance of the decision on the merits of underlying disciplinary charges, disputes arise over the amount of back pay due, for there first to be negotiations between the parties and then, if such negotiation are unable to resolve the matter, for the matter to be decided either directly by the agency head upon the presentation of affidavits, or where necessary, by reference to the Office of Administrative Law.

For the reasons expressed, the motion for summary decision filed by Mr. McCullough is denied. With respect to the cross motion for summary decision, the determination on that subject will be withheld pending consultation with counsel as to whether, in light of this decision, agreement can be reached on the amount of back pay and, if not, until the presentation of such arguments as would be necessary on the exact nature of any legally mandated mitigation that may apply.

This order may be reviewed by the Commissioner of the Board 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.

July 22, 2004
DATE

JEFF S. MASIN, ALJ

ns

c: Clerks office

176-05

Y.A.L.E. SCHOOL NORTH, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning private school for the disabled appealed the Department's determination to disallow certain pension costs within the tuition rate charged to public school districts during the 2001-2002 and 2002-03 school years, the first as the result of an audit and the second as a prospective directive. The school contended that the costs at issue, which represented employer contributions to the pensions of certain employees over and above the level of contributions made on behalf of all others, were not a fringe benefit, but a legitimate means, acceptable under federal tax law, of compensating higher-paid employees for the proportionally smaller value of their social security payments.

The ALJ recommended dismissal of the petition, concurring with the Department that the disputed costs were properly disallowed under applicable State Board of Education rules for determining private school tuition charged to public school districts. The ALJ found retirement plans to be a fringe benefit within the meaning of the controlling rules, so that petitioner's pension plan was subject to the rule requiring "equitable distribution" and failed to meet that standard because it had the effect of favoring a few select employees over all others.

The Commissioner adopted the findings and conclusions of the Initial Decision and dismissed the Petition of Appeal.

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 18, 2005

176-05

OAL DKT. NO. EDU 4356-04
AGENCY DKT. NO. 105-3/04

Y.A.L.E. SCHOOL NORTH, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, petitioner filed exceptions to which respondent (the Department) duly replied.

In its exceptions, petitioner urges the Commissioner to reject the Initial Decision in its entirety. Arguments on exception primarily take issue with the Administrative Law Judge's (ALJ) conclusion that its pension plan, although permissible under the Employment Retirement Income Security Act and the Internal Revenue Code, did not reflect an "equitable standard of distribution" satisfying the requirements of *N.J.A.C.* 6A:23-4.5(a)23(i) because it provided for larger employer contributions to the pensions of certain highly paid employees than to the remainder. Petitioner contends that, in reaching this conclusion, the ALJ confused "equitable" with "equal," erroneously rejecting petitioner's plan because it did not treat all employees exactly alike, when he should have accepted it as a just means of compensating higher-income employees for the smaller proportional value of their employer pension contributions; according to petitioner, by effectively precluding fringe benefits that recognize the

value of employees based on the nature and extent of their duties, the ALJ's interpretation of *N.J.A.C.* 6A:23-4.5(a)23(i) will "significantly undermine the ability of private schools for the disabled to attract and maintain capable and experienced supervisory and administrative personnel***." (Petitioner's Exceptions at 2-4, quotation at 4) Additionally, petitioner asks for an explicit legal finding that its pension plan satisfies the requirements of *N.J.A.C.* 6A:23-4.5(a)31, a conclusion which, petitioner contends, the ALJ inferred but did not expressly state. (*Id.* At 2)

In reply, the Department contends that a finding with respect to *N.J.A.C.* 6A:23-4.5(a)31 is immaterial, since petitioner has failed to satisfy the conditions of *N.J.A.C.* 6A:23-4.5(a)23(i), and compliance with both is necessary in order for the disputed costs to be allowable. The Department further counters that the ALJ did not reject petitioner's pension plan because its employer contributions were not equally distributed, but because its standard of distribution effectively favored a select few employees over all others, a result that cannot be characterized as "just." Finally, the Department rejects petitioner's argument with respect to the ability of private schools for the disabled to attract and retain competent employees, noting that the rule in question is restrictive only in the sense that it limits the amount of money such schools may charge sending public school districts to those costs which are "determined in a reasonable manner." (Department's Reply Exceptions at 1-4, quotation at 4)

Upon careful and independent review, the Commissioner concurs with the analysis and conclusions of the Initial Decision.

Initially, the Commissioner concurs that, regardless of how they may be categorized in other contexts, within the context of State Board of Education rules controlling the operation of private schools for the disabled, *N.J.A.C.* 6A:23-4.1 *et seq.*, pension plans are

clearly considered fringe benefits, and as such are subject to the requirements of *N.J.A.C.* 6A:23-4.5(a)23. As it existed during the time pertinent to this matter, N.J.A.C. 6A:23-4.4(f) expressly required private schools for the disabled to establish and maintain employee handbooks containing "an outline of all employee fringe benefits that shall include***: health insurance coverage, life insurance, *type(s) and qualification for pension(s)* and sick day benefits" (emphasis supplied). This list remains the core of the expanded list contained in the rule currently in effect, and the policy underlying N.J.A.C. 6A:23-4.4(f) has been additionally emphasized by subsequent amendment to *N.J.A.C.* 6A:23-4.5(a)31 specifically linking pension plans to the requirements of the fringe benefit rule. Furthermore, the Commissioner is not persuaded by petitioner's argument to the effect that, because pension plans are specifically addressed by *N.J.A.C.* 6A:23-4.5(a)31, the State Board did not intend them to be additionally subject to other applicable provisions of *N.J.A.C.* 6A:23-4.5(a): Then and now, fringe benefits addressed by specific sections of rule in addition to *N.J.A.C.* 6A:23-4.5(a)23 also include life insurance (*N.J.A.C.* 6A:23-4.5(a)22) and retiree health benefits (*N.J.A.C.* 6A:23-4.5(a)56).

The Commissioner further concurs that petitioner's pension plan fails to meet the "equitable standard of distribution" requirement of *N.J.A.C.* 6A:23-4.5(a)23(i) because of the manner in which employees of different salary levels are treated with respect to employer pension contributions. While petitioner's plan might well be acceptable in some contexts, within the sole context at issue here—implementation of State Board rules for determining the amount of tuition private schools for the disabled may charge to public school districts—the Commissioner cannot find that the Department's judgment was unsound as a matter of law or policy. Petitioner's plan clearly has the effect of favoring a small number of highly paid

employees, so that the Department's determination to disallow the tuition costs resulting from that disparity falls well within both the rule's requirement for equitable distribution and its intent to ensure reasonability of charges to public school districts; moreover, it is entirely consistent with current State Board policy on this issue, as reflected in the amendment to *N.J.A.C.* 6A:23-4.5(a)23(i), adopted in August 2004, expressly prohibiting distribution of fringe benefits by class of employee. [1]

Accordingly, for the reasons set forth therein and above, the Commissioner adopts the Initial Decision of the OAL, dismissing the Petition of Appeal, as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

[1] The Commissioner notes that this policy inherently addressed petitioner's argument on exception with respect to the acceptability of disproportionately rewarding classes of employees based on the nature and extent of their duties.

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

178-05

ANDREA M. BONETTE	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST AMWELL, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that the Board violated *N.J.S.A.* 18A:42-4 when it included an article promoting the passage of the District's budget in the monthly newsletter given to students to take home. Petitioner sought an order for the Board to cease and desist distributing literature that promotes any public question to students.

The ALJ found, *inter alia,* that: 1) there are no genuine issues of material fact; 2) the newsletter in question did contain language that violated *N.J.S.A.* 18A:42-4; and 3) there is a lack of proof in the record to satisfy the requirement for the issuance of a cease and desist order. The ALJ concluded that respondent Board's motion for summary decision should be granted, and that petitioner's request for a cease and desist order should be denied, and the petition dismissed.

The Commissioner adopts the findings and determination in the Initial Decision, emphasizing that the petitioner has failed to demonstrate the likelihood that the Board will violate statute and/or policy through the distribution of election materials to students. Therefore, no justification for issuance of a cease and desist order exists. Summary judgment is granted to the Board, and the petition is dismissed.

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

May 18, 2005

178-05

OAL DKT. NO. EDU 6090-04
AGENCY DKT. NO. 164-5/04

ANDREA M. BONETTE	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST AMWELL, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the grant of the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C.* 1:1-12.5(b) and *Contini, supra.* In so determining, the Commissioner finds that petitioner has failed to demonstrate any likelihood that the Board will violate statute and/or policy through the distribution of election materials to students so as to justify the issuance of a cease and desist order.

Accordingly, the Initial Decision of the Administrative Law Judge, which grants the Board's motion for summary decision, denies petitioner's request for a cease and desist order and dismisses the within petition, is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 6090-04
AGENCY DKT. NO. 164-5/04

ANDREA M. BONETTE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST AMWELL HUNTERDON COUNTY,
Respondent.

Andrea M. Bonette, petitioner *pro se*

Vittorio S. LaPira, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: February 22, 2005 Decided: April 5, 2005

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves the question whether the remedy of a cease and desist order should issue based on petitioner's claim that respondent board of education violated *N.J.S.A.* 18A:42-4, which forbids such boards from distributing literature to pupils that favor or oppose, among other things, the adoption of the school budget. Petitioner filed her Verified Petition of Appeal with the Commissioner on April 29, 2004. The Board filed an Answer to the Verified Petition of Appeal on May 19, 2004. By letter dated June 10, 2004, the Director of the Bureau of Controversies and Disputes indicated to Petitioner that much of the relief she was seeking in her Verified Petition of Appeal could not be granted, and that the "sole relief obtainable from the Commissioner is . . .

an order for the Board to cease and desist distribution of literature as to candidacy, bond issues or other public questions to any school pupil." The Director requested petitioner to advise whether she wished to proceed on this limited basis. By letter dated June 17, 2004, petitioner confirmed that she wished to do so. The matter was then transmitted to the Office of Administrative Law (OAL) on July 23, 2004, for hearing as a contested case. The matter was assigned to me on August 9, 2004, and I scheduled the matter for hearing to be held on May 3, 2005.

Telephone conferences were held on September 23, 2004, October 12, 2004, and December 1, 2004, in order to discuss certain procedural issues and to explore the possibility of settlement. When settlement efforts were not successful, attorney for respondent filed a motion for summary decision with a supporting certification and brief, and petitioner responded thereto. After the receipt of a reply letter-brief, the record with respect to the motion closed on February 22, 2005.

FACTUAL DISCUSSION

Respondent submitted the Certification of Edward Stoloski, respondent's Superintendent of Schools (R-2), in support of its motion for summary decision. Petitioner did not submit a responding certification. However, in her Memorandum of Opposition to the Respondent's Motion for Summary Decision (P-1), petitioner stated her position is that while the facts presented in respondent's submissions are essentially, technically correct, there are a number of other relevant facts and clarifications which indicate the appropriateness of injunctive relief. As a result, the following factual discussion is based on Superintendent Stoloski's Certification as clarified by petitioner's Memorandum of Opposition.

Respondent is the Board of Education of the Township of East Amwell, Hunterdon County, and is a public body organized pursuant to *N.J.S.A.* 18A:10-1et *seq.* to govern the school district of the Township of East Amwell. (R-2, ¶1.)

The respondent publishes a monthly school newsletter entitled *The Cougar Courier*, which presents, among other things, news detailing student achievements, school-sponsored

events, field trips, notes from board meetings, and the cafeteria menu. *The Cougar Courier* is distributed to all school district pupils for them to take home to their parent(s) or guardian(s). In addition, courtesy copies of *The Cougar Courier* are hand delivered to the Township offices and the post office. (R-2, ¶2.)

In March 2004, Jim Davidson, the President of a group named "Support Our Kids" expressed to the Superintendent a desire to write an article for The Cougar Courier in order to increase voter participation in the annual school election to be held on April 20, 2004. (R-2, ¶3.) Some time before April 1, 2004, Mr. Davidson submitted the article he wrote for inclusion in *The Cougar Courier*, which was ultimately included on page two in the April 1, 2004 edition thereof. (R-2, ¶4.) On April 1, 2004, school district teachers distributed approximately 300 copies of the April 1 edition of *The Cougar Courier* (R-2, Exhibit 1) to school district pupils, and a limited number of courtesy copies were hand delivered to the post office and the Township offices. (R-2, ¶5.)

On the evening of April 20, 2004, the date of the annual school election, the Superintendent learned that petitioner Andrea M. Bonette had complained to the Board regarding an article contained in the *The Cougar Courier* of April 1, 2004, that she felt was inappropriate. (R-2, ¶6.)

Petitioner asserts in her clarification that she personally complained about the article to Charles Miller, Board President, and that while she cannot recall Mr. Miller's exact response, it assuredly did not indicate any particular concern on his part, and definitely did not indicate any intention of his taking action to rectify the matter. In fact, no action was taken by the respondent until after her petition was filed on May 3, 2004. (P-1.)

In his Certification, Mr. Stoloski states that on the following day, upon further review of the article authored by Mr. Davidson, he realized that the article, which he understood was being written simply to increase voter participation in the school election, could be read as advocating the passage of the 2004-2005 school budget. The Superintendent acknowledges that it was an oversight on his part and that he regrets the error. (R-2, ¶7.)

On May 21, 2004, the respondent mailed a corrective letter to all 1,381 registered voters in the Township of East Amwell (R-2, Exhibit 2), explaining that it had inadvertently allowed the article to be published in *The Cougar Courier*. The Board stated that it should not have published the article, that it regretted that the content of the article was not more carefully scrutinized, and stated that the Board and the Administration would review its policies to prevent any future occurrences similar to the above. (R-2, ¶8.)

Petitioner submitted the clarification that on May 3, 2004, she filed a petition for relief against the individuals who were responsible for the inclusion of admittedly illegal literature in *The Cougar Courier* newsletter in order that they be held accountable for this wrongful act. The petitioner further asserts that Mr. Stoloski contacted petitioner between May 3 and May 21, 2004. On May 21, 2004, respondent mailed its own version of a corrective letter to all registered voters, not the one recommended by petitioner. (P-1.)

In her clarification, petitioner states that when Mr. Stoloski contacted petitioner, he asked if she would consider withdrawing her petition if the board sent a corrective letter, and petitioner offered to do so on the condition that the corrective letter include the statement from the article about "people who don't have children in the school." (P-1.)

In her clarification, petitioner states that she has repeatedly stated that any such corrective letter would need to go beyond that of the respondent. The article included the statement that "As parents we cannot allow people who do not have children in the school to dictate their education." This is the statement that petitioner finds particularly offensive and deleterious to the proper functioning of the democratic electoral process as a blatant attempt to disenfranchise a large segment of the voting population of East Amwell Township. Petitioner disagrees with the position of attorney for respondent that it would not be appropriate for respondent to include this information in the corrective letter, and contends that at a time in our history when property taxes are of enormous concern, it is anathema to the public interest for a public entity to express any intention of disenfranchising voters. (P-1.)

Since that time, the Superintendent has reviewed the policies and regulations governing the distribution of literature to pupils (R-2, Exhibit 3). The board has both a policy and a regulation stating that it will not distribute literature to students that advocates the passage of the school budget (R-2, ¶9).

Respondent states that since April 1, 2004, it has not distributed any literature to pupils that promotes, favors or opposes the candidacy of any candidate for reelection and an annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election (R-2, ¶10).

Petitioner does not dispute that respondent has had, for some time, a policy addressing this issue. However, her objection is that even though there has been a policy, this is not the first time the Board has violated its own policy. Petitioner refers to *Pursell v. East Amwell Board of Education,* OAL Dkt. No. EDU 951-98 (P-1, Exhibit B), and contends that in that matter, school personnel allowed a resident, James Davidson, to mail a flier to advocate a position on a school election. The decision of the Commissioner in that matter was that the petition could not be considered because it had not been timely filed. Petitioner acknowledges that the merits of the petition in *Pursell* had not been adjudicated. (P-1.)

Petitioner additionally relies upon Superintendent Stoloski's response to interrogatories wherein he states that there is no official board policy specifically covering the content of *The Cougar Courier,* and this seems to contradict his certification in which he says the Board policy is that no such advocacy literature can be distributed. Petitioner contends that unless respondent agrees that it had a policy prohibiting distribution of the advocacy material and that it violated this policy twice, there is a question of fact regarding these issues. (P-1.)

LEGAL DISCUSSION AND ANALYSIS

This matter involves the question whether the remedy of a cease and desist order should be made available based on petitioner's claim that respondent board of education has violated *N.J.S.A.* 18A:42-4, which forbids such boards from distributing literature to pupils that favor or

oppose, among other things, the adoption of the school budget. Respondent Board of Education of the Township of East Amwell, Hunterdon County, asserts that there is no further relief that the Commissioner can or should grant to the petitioner in this matter. The respondent asserts that it has already issued a corrective letter to all of the registered voters apologizing for its inadvertent distribution of the literature in question, and that it will review its policies to prevent any future occurrences. It is the respondent's position that, in light of the steps that it has taken to remediate the problem, no further relief should be granted and that summary decision should be granted in respondent's favor.

N.J.S.A. 18A:42-4 provides:

> No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

A cease and desist order is in the nature of a restraining order or injunction, and is a court or agency order prohibiting a person from continuing a particular course of conduct. See, *Black's Law Dictionary* (7th Ed., 1999). Respondent argues that based on the language in *Options v. Lawson,* 287 *N.J. Super.* 209, 218 (App. Div. 1996), there is no basis to issue a cease and desist order in the within matter because there are no facts that point to a cognizable danger of recurrent violations of *N.J.S.A.* 18A:42-4.

The *Options* case involved an action by an abortion facility for an injunction restricting protest activities of abortion opponents near the facility. The Appellate Division remanded the matter to the trial court for further proceedings, indicating that any such injunction must be based

on findings that health and safety have been threatened because it involves balancing the restrictions against citizens' constitutional rights.

Several earlier cases give guidance with respect to the issuance of injunctions. In *N.J. State Bar Assn. V. Northern N.J. Mtg. Associates,* 55 *N.J. Super.* 230 (Ch. Div. 1959), affirmed in part, reversed in part, 32 *N.J.* 430, the plaintiff continued its request for injunctive relief against the defendants that had engaged in the unauthorized practice of law, despite the fact that they had been dissolved and were no longer in existence. The Court stated:

> An injunction may issue to prevent an anticipated or threatened injury, either to protect against a repetition of unlawful conduct or to guard against reasonably apprehended misconduct or infringement of legal right. With the dissolution of the original defendants, there can be no anticipated or threatened future injury, nor any repetition of the former unlawful conduct, nor need there be any apprehension of the infringement of any legal right.
>
> *[Id.* At 248-249.]

The Court went on to state that such a writ [an injunction] is a preventative remedy and not punishment for past conduct, and the moving party must satisfy the court that the relief sought is needed and that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. (*Id.* at 249.)

In *Sheahan v. Upper Greenwood Lake, etc., Assn.,* 36 *N.J. Super.* 133 (App. Div. 1955), a dock owner sought a permanent injunction to prohibit defendant's construction of a fence intended to hamper and eventually destroy the dock owner's adjudicated right to use the dock. During the pendency of the case, the defendant made a "tardy" attempt to remove the section of the fence blocking the dock owner's access. The Court stated:

> An injunction may issue to prevent an anticipated or threatened injury, either to protect against a repetition of unlawful conduct or to guard against reasonably apprehended misconduct or infringement of legal right. [Citations omitted.] . . . An appeal to the court's discretion to withhold the injunction on the plea of

> cessation of illegal conduct must be predicated upon a showing of the unlikelihood of its recurrence.
>
> [*Id.* at 136.]

The Court indicated that defendant's conduct prior to as well as during the litigation is not such as to inspire any confidence in its disposition to respect plaintiff's rights, free of the sanction of an injunction. (*Ibid.*)

Based on the guidance given in the foregoing cases, it is clear that the moving party, in this case the petitioner, must satisfy the requirement that the cease and desist order she is seeking is needed because there exists some cognizable danger of a recurrent violation, rather than the mere possibility of such.

Petitioner contends that she personally complained about the article to Board President Charles Miller, and that Mr. Miller's response did not indicate any particular concern on his part, and definitely did not indicate any intention of his taking action to rectify the matter. She points out that, in fact, no action was taken by the respondent until after her petition was filed on May 3, 2004.

Petitioner points out that on May 3, 2004, she filed the petition in this matter, and that Mr. Stoloski contacted petitioner between May 3 and May 21, 2004. He asked petitioner if she would consider withdrawing her petition if the Board sent a corrective letter, and petitioner offered to do so on the condition that the corrective letter include the statement from the article about "people who don't have children in the school." However, *N.J.A.C.* 1:1-15.10 provides, "Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible." I **FIND** that the foregoing discussion amounts to an offer of settlement and is not admissible for any purpose.

Petitioner states that she has repeatedly stated that any such corrective letter would need to go beyond the corrective letter issued by the respondent. The article included the statement that "As parents we cannot allow people who do not have children in the school to dictate their education." This is the statement that petitioner finds particularly offensive and deleterious to the

proper functioning of the democratic electoral process. Petitioner refers to this as "a blatant attempt to disenfranchise a large segment of the voting population of East Amwell Township." Petitioner disagrees with the position of attorney for respondent that it would not be appropriate for respondent to include this information in the corrective letter, and contends that at a time in our history when property taxes are of enormous concern, it is anathema to the public interest for a public entity to express any intention of disenfranchising voters.

The school district has acknowledged that the foregoing language could be read as advocating the passage of the 2004-2005 budget. However, to assert that this language amounts to an attempt to disenfranchise a large segment of the voting population of East Amwell Township is an overstatement. It does not espouse the prevention of voting by people without children in school. Rather, it urges people who have children in school, i.e. parents, to get out and vote. By implication, this amounts to a call to vote by parents of schoolchildren who are more likely to approve the budget. Therefore, I **FIND** that this language tends to favor and promote the approval of the 2004-2005 budget in violation of *N.J.S.A.* 18A:42-4.

Petitioner does not dispute that respondent has had, for some time, a policy complying with the directive of *N.J.S.A.* 18A:42-4 requiring the board of education of each school district to prescribe necessary rules to carry out the purposes of that section. However, petitioner's objection is that even though there has been a policy, this is not the first time the Board has violated its own policy. Petitioner refers to *Pursell v. East Amwell Board of Education,* OAL Dkt. No. EDU 951-98, and contends that in that matter, school personnel allowed a resident, James Davidson, to mail a flier to advocate a position on a school election. However, as is correctly pointed out by petitioner, the decision of the Commissioner in that matter was that the petition could not be considered because it had not been timely filed.

I have reviewed both the Initial Decision dated October 9, 1998, and the Commissioner's Final Decision dated November 17, 1998, in *Pursell.* As stated by petitioner, the merits of the petition in *Pursell* had not been adjudicated. If there had been an adjudication that there was a prior violation of this same policy in 1997, this fact may be significant in deciding whether there should be a cease and desist order to prevent recurring violations. However, the mere filing of a

petition alleging a violation of the Board's policy does not establish the fact that the policy had been violated. Additionally, I do not intend to reopen the question whether the respondent violated its policy in 1997. The time for addressing this question expired in January 1998. In the absence of an administrative or judicial adjudication on that issue, I **FIND** that there is no basis in the record to find that the respondent previously violated Board policy in 1997.

Petitioner additionally relies upon Superintendent Stoloski's response to interrogatories when he states that there is no official board policy specifically covering the content of *The Cougar Courier*, and this seems to contradict his certification in which he says the Board policy is that no such advocacy literature can be distributed. Petitioner contends that unless respondent agrees that it had a policy prohibiting distribution of the advocacy material and that it violated this policy twice, there is a question of fact regarding these issues.

I believe that petitioner has misconstrued Superintendent Stoloski's response to interrogatories when he states that there is no official board policy specifically covering the content of *The Cougar Courier*. I interpret this to mean that there is no official board policy which specifically names *The Cougar Courier* and spells out a policy covering its content. The absence of such a policy specifically covering *The Cougar Courier* would not contradict Superintendent Stoloski's Certification in which he says the Board's policy is that no such advocacy literature can be distributed. Therefore, I **FIND** that Superintendent Stoloski's response to interrogatories as contrasted to the statements contained in his Certification does not raise an issue of fact.

I also disagree with petitioner's contention that unless respondent agrees that it twice violated its policy prohibiting distribution of advocacy material, there is a question of fact regarding this issue. I have previously addressed the petitioner's assertion that there was a prior violation in 1997, holding that the time to establish that prior violation has long since expired.

Finally, petitioner asserts that at this time the respondent is in long standing violation of its formally adopted policy requiring nonresident students to pay tuition. (P-1, Exhibit C.) I **FIND** that this assertion is irrelevant to the question whether a cease and desist order should be

issued ordering the respondent to cease the violation of the statutory prohibition against the distribution of literature as to candidacy, bond issues or other public questions to any school pupil.

I have made the following **FINDINGS** in this matter:

1. In the April 1, 2004 issue of a monthly school newsletter, an article set forth therein contained language which tended to favor and promote the approval of the 2004-2005 budget in violation of *N.J.S.A.* 18A:42-4.
2. There is no basis in the record to find that the respondent previously violated Board policy in 1997.
3. Superintendent Stoloski's response to interrogatories as contrasted to the statements contained in his Certification does not raise an issue of fact.
4. Petitioner's assertion that, at this time, the respondent is in longstanding violation of its formally adopted policy requiring nonresident students to pay tuition, is irrelevant to the question whether a cease and desist order should be issued.
5. There is a lack of proofs in the record of this matter to satisfy the requirement that the cease and desist order requested by petitioner is needed because there exists some cognizable danger of a recurrent violation, rather than the mere possibility of such.

Respondent has submitted a motion for summary decision in this matter, arguing that there are no factual disputes and that respondent is entitled to prevail on the legal issues. *N.J.A.C.* 1:1-12.5(b) sets forth the standard for summary decision by providing that it "may be rendered if . . . 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 New Jersey Supreme Court sustained the validity of *N.J.A.C.* 1:1-12.5, "noting that it is related to and, indeed, essential to the proper conduct of administrative hearings in a contested case." *Contini v. Bd. of Ed. of Newark,* 286 *N.J. Super.* 106, 116 (App. Div. 1995).

Based upon the findings set forth above, I **FIND** that there are no genuine issues of material facts. I have found that there is a lack of proofs in the record of this matter to satisfy the

requirement for the issuance of a cease and desist order. Therefore, I **CONCLUDE** that respondent's motion for summary decision should be **GRANTED** and that petitioner's request for a cease and desist order should be **DENIED.**

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that respondent's motion for summary decision is hereby **GRANTED,** that petitioner's request for a cease and desist order is hereby **DENIED** and the petition is hereby **DISMISSED**.

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

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

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

April 5, 2005
DATE

JOSEPH F. MARTONE, ALJ

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

4-6-05
DATE

APR 12 2005

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

List of Exhibits

For petitioner:

P-1 Memorandum of Opposition to the Respondent's Motion for Summary Decision with the following exhibits attached:

- Exhibit A. E-mails between petitioner and Superintendent Stoloski of May 12 and May 24, 2004
- Exhibit B. Copy of Commissioner's final decision in *Pursell v. East Amwell Board of Education,* OAL Dkt. No. EDU 951-98 (Nov. 17, 1998)
- Exhibit C. Municipal Clerk letter dated November 15, 2004

For respondent:

R-1 Notice of Motion for Summary Decision submitted January 20, 2005

R-2 Certification of Edward Stoloski with the following exhibits attached:

- Exhibit 1. *The Cougar Courier* issue of April 1, 2004
- Exhibit 2. Board of Education letter dated May 2004
- Exhibit 3. Board of Education Policy and Regulation regarding Distribution of Literature

R-3 Memorandum of Law in Support of Motion for Summary Decision

R-4 Reply letter-brief dated February 18, 2005

177-05

OAL DKT. NO. EDU 437-05
AGENCY DKT. NO. 434-12/04

P.H., on behalf of minor children, M.S. and D.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 21, 2005, providing petitioner thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

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

114-05

D.O., on behalf of minor children, E.O. AND R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that two of her children, E.O. and R.O., are not eligible for a free education in the Borough of Clementon School District. Petitioner contended that she has custody of her three children, all of whom are domiciled with her in Clementon. Respondent Board filed an answer to the petition, and submitted a cross petition for payment of tuition for E.O. and R.O.

The ALJ found, *inter alia*, that: based on credible evidence and testimony presented by respondent Board, E.O. and R.O. reside with their father in Maple Shade; petitioner has failed to sustain her burden of proof in this matter; and petitioner is liable to the Board for tuition in the amount of $46.02 per day per child for the period of E.O. and R.O.'s ineligible attendance during the 2004-05 school year. Therefore, the ALJ ordered that: the petitioner's appeal be dismissed; D.O. remove her children, E.O. and R.O., from Clementon Elementary School; and D.O. shall pay tuition to respondent Board for the period of their ineligible attendance, in the amount of $6,810.96, plus $46.02 per day per child for each day E.O. and R.O. continue attendance as non-resident students beyond March 1, 2005.

Upon careful and independent review of the record, the Commissioner adopted the conclusions of the ALJ in this matter, emphasizing that, pursuant to *N.J.S.A.* 52:14B-10(c), the ALJ's credibility determinations are entitled to the Commissioner's deference. Accordingly, the Initial Decision is adopted 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 18, 2005

OAL DKT. NO. EDU 10497-04
AGENCY DKT. NO. 404-11/04

D.O., on behalf of minor children, E.O. AND R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record in this matter, and mindful that the Administrative Law Judge's (ALJ) credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c), the Commissioner determines to adopt the ALJ's conclusion that petitioner has failed to carry her burden of proof that her children were entitled to a free public education in the Clementon School District during the period at issue in the 2004-05 school year. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $6,810.96 for the 74 days that E.O. and R.O. illegally attended school in the District from October 26, 2004 through March 1, 2005 and $46.02 per day, per child, for each day of attendance as non-resident students after March 1, 2005.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10497-04

AGENCY DKT. NO. 404-11/04

D.O., ON BEHALF OF MINOR CHILDREN,

E.O. AND R.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF CLEMENTON, CAMDEN COUNTY,

Respondent.

D.O., petitioner, *pro se*

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay and Criscuolo, attorneys)

Record Closed: March 8, 2005 Decided: April 14, 2005

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE

Acting on information received, respondent Board of Education of the Borough of Clementon, Camden County (BOE) conducted an investigation to determine whether petitioner D.O.'s children resided in the Borough of Clementon. Upon completion of the investigation, BOE notified D.O. of its findings to the contrary and instructed her to remove two of her three children from the public schools. At D.O.'s request, a hearing was conducted by BOE which found that D.O.'s children were not domiciled in the Borough of Clementon. D.O. was again

NEW JERSEY IS AN EQUAL OPPORTUNITY

instructed to remove the nonresident children from the school system. D.O. appeals BOE's finding and contends that all of her children reside with her in the Borough of Clementon.

PROCEDURAL HISTORY

By certified mail dated October 26, 2004, BOE notified D.O. of its conclusion that D.O.'s children, E.O. and R.O., were domiciled in Maple Shade, New Jersey. As a result, D.O. was instructed to remove her children from the public schools. By notice dated November 8, 2004, D.O. appealed BOE's finding to the Commissioner of Education. The form notice was accompanied by a two-page letter from D.O. setting forth her version of the facts of the case. BOE filed an answer to the appeal dated November 23, 2004, and also submitted a cross petition for payment of tuition for both children. The Department of Education transmitted the matter as a contested case to the Office of Administrative Law (OAL) where it was filed December 9, 2004. Hearing was conducted February 28, 2005 at the OAL/Trenton facility. The presentation of evidence concluded same date, however, the record was kept open until March 8, 2005, to allow BOE to present certification with respect to its claim for tuition and D.O. to present any objection thereto.

FACTUAL DISCUSSION

Notwithstanding the burden of proof being upon D.O., BOE agreed to put forward its proofs first. Benjamin Bigelow is a field investigator for Insight Investigations, Inc. Insight Investigations' home office is located in Media, Pennsylvania. It has other offices in the Baltimore, Pittsburgh and Scranton/Wilkes Barre areas. The company was hired by BOE to conduct surveillance to ascertain whether D.O.'s children resided with her in Clementon. After Bigelow conducted the investigation he filed a report (Exhibit R-1) and submitted videotape (Exhibit R-2) regarding the conduct and result of the investigation.

Surveillance commenced Monday, October 4, 2004, and again October 7 and 8, 2004. On the first date investigators simultaneously observed the residents of 348-A White Horse Pike, Clementon, New Jersey (identified as D.O.'s residence) and 123 Frederick Avenue, Maple Shade, New Jersey (identified as D.O.'s husband's (K.O.) address). Surveillance at each location

was between 5:00 and 9:30 a.m. No activity was observed, but vehicles operated by D.O. and K.O. were observed at the respective residences. Thursday, October 7, 2004, Bigelow returned to 348-A White Horse Pike, Clementon at 6:00 a.m. D.O.'s vehicle was in the driveway. Approximately 8:50 a.m., D.O. and a school-aged female exited the residence and got into D.O.'s minivan. Bigelow followed the vehicle to Clementon Elementary School where the child got out of the vehicle and entered the building. At the school, the vehicle immediately in front of D.O.'s minivan was K.O.'s red Expedition. E.O. and R.O. attended school October 7, 2004, although not transported by D.O.

Friday, October 8, 2004, surveillance was conducted between 6:00 and 10:30 a.m. commencing at 123 Frederick Road, Maple Shade. K.O., two school-aged males and one school-aged female entered the Expedition at 8:07 a.m. Due to heavy traffic continuous surveillance was not maintained. However, K.O.'s vehicle was observed departing Clementon Elementary School at 8:50 a.m.

In addition to responding to direct examination, Bigelow narrated the videotape (Exhibit R-2) of the surveillances. D.O. and K.O. (who was present at the hearing) could be identified as subjects on the videotape. Neither, however, contested that they were the ones on the videotape.

Paul Spaventa is the Superintendent of Schools in Clementon. He testified that Clementon is a one-school district and he is in front of the school as the students arrive and depart. Grades range from preschool disability through 8. Most children walk to school. Periodically, he will walk to the corner for an improved view of the students. He has known D.O., K.O. and their three children for six years. Toward the end of the 2003-2004 school year he became concerned and talked to D.O. regarding her residence. D.O. described a litany of problems and was to later meet with Spaventa to discuss the children, but the meeting did not occur. Although D.O. was no longer in the marital home, Spaventa thought the children were staying with relatives within the district. Subsequently, D.O. provided an address correction indicating that she was living in Lindenwold. However, Spaventa allowed the children to finish the school year in Clementon, with the understanding that they would be enrolled in Lindenwold school the following year.

At the beginning of the new school year, D.O.'s children were again attending Clementon schools. After some delay, D.O. provided a lease for the premises at 348 South White Horse Pike. (Exhibit R-3). Because the number of occupants on the lease was listed as two (one adult and one child), Spaventa requested D.O. to have the other children added to the lease. D.O. advised that the landlord would not add E.O. and R.O. to the lease because the apartment was only two bedrooms. The landlord had no objection to the children staying there, but did not want to note them on the lease because the apartment was too small.

Spaventa's general observations were that in the morning D.O. would bring the daughter to school and K.O. would bring the two boys. After failing to get the requested cooperation from D.O., Insight Investigations was hired.

BOE submitted a certification from Joanne Clement, School Business Administrator. (Exhibit R-4). She certified that the per diem tuition rate for the 2004-2005 school year is $46.02 per pupil as established by the Commissioner of Education. As of March 1, 2005, E.O. had attended Clementon Elementary School for 74 days for a total of $3,405.48. E.O. continues to attend Clementon Elementary School and D.O. is liable at the same rate for each school day beyond March 1, 2005. The same circumstance applies to R.O. As of March 1, 2005, D.O. is liable to BOE in the amount of $6,810.96 as tuition for E.O. and R.O. as well as an additional $46.02 per student for each school day thereafter.

D.O. testified on her own behalf. Her testimony was more vitriol, name calling and argumentative than factually enlightening. Her demeanor on the witness stand was very course, to the point that even K.O. apologized for her behavior.

D.O. testified that she has been a Clementon resident for 14 years and that her children have always attended the public schools there. She is separated from K.O. and a hearing regarding the divorce petition was scheduled for March 2, 2005.

Currently she and the three children live at the White Horse Pike address. She explained that Mondays, Tuesdays and Wednesdays the children stay with her; Thursdays and Fridays the children stay with K.O. They alternate weekends with the children and there is no joint custody

agreement. D.O. referred to Spaventa as a liar regarding his testimony. When asked to explain a particular circumstance as testified on behalf of BOE, her response generally was, "I don't know how they can say that."

She offered no different explanation regarding Spaventa's testimony that he observed K.O. bring the children to school on days other than Thursday and Friday. She did not call K.O. as a witness even though he expressed an interest to testify.

FINDINGS OF FACT

Based upon the evidence received at hearing, testimony and exhibits, and having had the opportunity to hear and observe the witnesses, I make the following findings of fact. I **FIND**:

1. E.O., R.O. and S.O. are the children of petitioner D.O. and her husband, K.O. All children were duly enrolled into the Clementon School District initially at a time when the family resided in Clementon.
2. Toward the end of the 2003-2004 school year, D.O. and K.O. lost the Clementon home due to foreclosure. Because of marital problems, the couple separated and D.O. moved to Lindenwold with the children.
3. When BOE became aware that the children were living out of district, it permitted the children to remain in its school until the end of the school year, tuition free.
4. September, 2004, the children were again in BOE's school. D.O. was asked to provide verification that she and the children had returned to live in Clementon.
5. Subsequently, D.O. provided a lease to the premises at 348 South White Horse Pike, Clementon, New Jersey, 08021. The lease listed only two occupants.
6. Although requested, D.O. did not have the names of the children placed on the lease.
7. Superintendent of Schools for BOE observed K.O. generally deliver the boys to school and D.O. deliver the girl. BOE hired an investigative agency who followed D.O. and K.O. The investigation determined that E.O. and R.O. resided with K.O. at 123 Frederick Road, Maple Shade, New Jersey. And S.O. resided with D.O. in Clementon.

8. BOE instructed D.O. to remove the children from the school district and afforded her a hearing upon her request.

9. The hearing was conducted in conformity with New Jersey law and determined that E.O. and R.O. resided out of district and should be removed from the Clementon School.

10. During the period in question, E.O. and R.O. did not live in Clementon, New Jersey, and their attendance at Clementon Elementary School from October 26, 2004, without having paid tuition, is illegal.

11. Daily tuition for attendance at BOE's school by out-of-district students is assessed at $46.02 per day. D.O. is liable to BOE for tuition in that amount for each day of attendance per child.

CONCLUSIONS OF LAW

BOE has meticulously complied with the dictates of *N.J.S.A.* 18A:38-1. D.O. was notified of BOE's initial determination regarding the nonresidency of her children. She was afforded a hearing before BOE at which she was permitted to testify and call witnesses. She was further advised of her right to appeal the adverse finding by BOE to the Commissioner of Education.

The aforementioned statute places the burden of proof upon D.O., the petitioner. The evidence as presented by BOE is compelling and nothing in the presentation of D.O. casts any doubt upon the investigation or the findings.

D.O. has failed to sustain her burden of proof by preponderance of the competent, credible, relevant evidence and her petition should be dismissed.

As to BOE's counterclaim for tuition, the burden of proof there has been sustained. The evidence supports BOE's finding that E.O. and R.O. are not residents of Clementon and, therefore, do not qualify for a free public education in that school district. BOE has further proved that the Commissioner of Education has established a rate of tuition of $46.02 per day per

pupil for students attending schools in Clementon who are not entitled to the free public education.

ORDER

It is **ORDERED** that petitioner D.O.'s appeal is **DISMISSED**. It is further **ORDERED** that D.O remove her children, E.O. and R.O., from BOE's elementary school. It is further **ORDERED** that D.O. shall pay as tuition to BOE the amount of $6,810.96 representing tuition for E.O. and R.O. through March 1, 2005 of the 2004-2005 school year. It is further **ORDERED** that D.O. shall pay as tuition to BOE an amount equal to $46.02 per day, per child for each day D.O.'s children continue in attendance at BOE's Clementon Elementary School as non-resident attendees.

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

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

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

4-14-05
DATE

JAMES W. FAISON, III, ALJ

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

4/15/05
DATE

Mailed to Parties:

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

APR 21 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBITS IN EVIDENCE:

For Petitioner:

P-1 Domestic Violence Restraining Order

For Respondent:

R-1 Insight Investigations' Report

R-2 Videotape

R-3 Lease

R-4 Certification

WITNESSES:

For Petitioner:

D.O.

For Respondent:

Benjamin Bigelow

Paul Spaventa

180-05

OAL DKT. NO. EDU 6709-03
AGENCY DKT. NO. 335-8/03

BARBARA ANTHONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that an unidentified individual, Maureen Flaherty, signed the Settlement Agreement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating Ms. Flaherty to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or the Board resolution approving the settlement and designating Ms. Flaherty to sign on its behalf. 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: 5/18/05
Date of Mailing: 5/18/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6709-03

AGENCY DKT. NO. 335-8/03

BARBARA ANTHONY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

Respondent.

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

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: April 4, 2005 Decided: April 5, 2005

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

This matter was transmitted to the Office of Administrative Law on September 29, 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 matter was originally assigned to Stephen Reback, ALJ. Upon his retirement the matter was reassigned to this administrative law judge, who issued an order regarding summary decision on January 24, 2005.

The matter was scheduled for hearing on April 4 and 6, 2005. At the hearing scheduled for April 4, 2005, the parties entered into successful settlement negotiations. The parties have agreed to a settlement and have prepared a Settlement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

After being placed under oath, the parties stated that they understood agreed to all of the terms of the settlement.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 5, 2005
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

4-18-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 20 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

JRF/lam

WITNESSES

For petitioner:

Barbara Anthony

Robert Anthony

For Respondent:

Dr. Maureen Flaherty

Dr. Maryann Peifly

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

J-1

August 4, 2005

Evidence

BARBARA ANTHONY PETITIONER

AND

HOLMDEL TOWNSHIP BOARD OF EDUCATION RESPONDENT

DOCKET NO

OAL DOCKET NO.

EDUC -06709-2003 S

AGENCY REFERENCE NO. 335-8/03

THE PARTIES IN THE ABOVE CAPTIONED MATTER AGREE TO THE FOLLOWING IN FULL SETTLEMENT OF ALL OF THE ISSUES INVOLVED IN THIS PROCEEDING:

1. PETITIONER BARBARA ANTHONY SHALL BE REEMPLOYED BY THE HOLMDEL TOWNSHIP BOARD OF EDUCATION AS A TENURED SPEECH/LANGUAGE TEACHER EFFECTIVE SEPTEMBER 1, 2003.

2. PETITIONER SHALL BE PLACED AT STEP 10 OF THE MASTER'S plus 15 COLUMN OF THE NEGOTIATED TEACHERS' SALARY GUIDE FOR THE 2005-2006 SCHOOL YEAR.

3. ALL OPEN ISSUES, INCLUDING TAPE PENDING GRIEVANCE, ARE WITHDRAWN.

FOR BARBARA ANTHONY

Barbara M. Anthony

FOR THE HOLMDEL TOWNSHIP BOARD OF EDUCATION

Maureen A. Flaherty

181-05

OAL DKT. NO. EDU 11299-03
(EDU 09074-02 ON REMAND)
AGENCY DKT. NO. 265-8/02

J.K. AND S.K., on behalf of minor child, D.K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11299-03
AGENCY DKT. NO. 265-8/02
Remand from
OAL DKT. NO. EDU 09074-02

J.K. AND S.K. ON BEHALF OF MINOR CHILD D.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Brian J. Halligan, Esq., for petitioners (Crawford & Hillgan, attorneys)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: April 1, 2005 Decided: April 20, 2005

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on November 21, 2003, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

A hearing was scheduled on September 12, 2003. Prior to the date of hearing the parties agreed to settle this matter. The Settlement Agreement submitted by the parties was incorporated by reference in an initial decision issued on September 12, 2003. The Commissioner of the Department of Education considered that decision and remanded the matter on October 27, 2003.

In the initial decision I found that the parties had voluntarily agreed to the settlement as evidenced by their signatures and that the settlement fully disposes of all issues and controversies and is consistent with the law. The Commissioner observed that the Settlement Agreement was signed by the Director of Human Resources of the Ridgewood Board of Education on behalf of the Board, and that neither the file nor Settlement Agreement contained a copy of a Board resolution approving the settlement and designating the Director of Human Resources to sign the agreement on behalf of the Board. The Commissioner also observed that the agreement had not been signed by the Board attorney and determined that the settlement could not be approved. The matter was accordingly remanded for revision of the Settlement Agreement consistent with the commissioner's concerns.

The remand was filed in the Office of Administrative Law on November 21, 2003 as EDU 11299-03 and was assigned to me December 18, 2003. I corresponded with counsel in this matter on December 19, 2003, seeking an original revised agreement consistent with the remand order. As the revised agreement was not forthcoming, this matter was scheduled for hearing on July 1 and July 2, 2004. On June 29, 2004, a revised Settlement Agreement with the Board attorney's signature was received, with an indication that the Board would re-ratify the agreement at its meeting of July 10, 2004 as a final resolution to the matter.

As of March 10, 2005 the Board resolution had not been received. Accordingly, correspondence was directed to counsel advising that as more than six months had elapsed and there was no indication that the Board had acted, the matter would be dismissed. On March 30, 2005, the original revised Settlement Agreement signed by the Board attorney was received, along with the excerpts from the minutes of the

meeting of the Ridgewood Board of Education on July 12, 2004 ratifying the Settlement Agreement and authorizing the Board attorney to sign the agreement on its behalf.

Respondent has submitted a revised Settlement Agreement signed by the Board attorney, as well as the relevant excerpt from the minutes of the Ridgewood Board of Education meeting held Monday, July 12, 2004, approving the settlement and designating the Board attorney to sign the agreement.

Accordingly, having reviewed the record, the settlement terms and the revised agreement I **FIND**:

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

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

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

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

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

April 20, 2005
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

4-22-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 24 day of July, 2003, by and between the Village of Ridgewood Board of Education ("Board"), and J.K. and S.K. o/b/o of minor child, D.K. ("Petitioners").

RECITAL

WHEREAS, the Board and Petitioners have been involved in a Litigation styled, J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M (hereinafter referred to as "the Litigation"); and

WHEREAS, the Board and Petitioners desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledge, the Board and Petitioners agree as follows:

ARTICLE I

WITHDRAWAL OF PETITION

For its obligations pursuant to this agreement, Petitioners hereby withdraw the Litigation styled J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M.

ARTICLE II

TERMS OF SETTLEMENT

2.1 Consideration - As consideration of Petitioner's withdrawal of the Litigation as set forth herein, the Board hereby rescinds the suspension of Petitioners' minor child that is underlying the cause of the Litigation. The Board has signed a letter on its letterhead attached hereto stating that the suspension of the child that took place on or about May 9, 2002, is hereby

3.8 Signature in Counterpart – This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.9 Authorization – The undersigned officer of the Board hereby represents that he/she is fully authorized by the Board to execute this agreement on the Board's behalf.

3.10 Investigations – The parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

3.11 Construction and Enforcement – The terms of this Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

BOARD
Robert A. Weakley
Director of Human Resources

Dated: July 24, 03

PARENT – Susan Knudsen

PARENT – John Knudsen

699244.1

attorney for the Ridgewood Board of Educ

Dated. March 30, 2005

182-05

OAL DKT. NO. EDU 01960-05
AGENCY DKT. NO. 60-2/05

S.K., on behalf of minor child, B.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/05

Date of Mailing: 5/18/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01960-05

AGENCY DKT. NO. 60-2/05

S.K. ON BEHALF OF MINOR CHILD B.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,

Respondent.

John G. Geppert, Jr., Esq., for petitioner (Wiley, Malehorn & Sirota, attorneys)

Thomas O. Johnston, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: April 1, 2005 Decided: April 21, 2005

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 3, 2005, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement and Certified Board Resolution.

Having reviewed the contents of the attached Settlement Agreement and Certified Board Resolution, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement and Certified Board Resolution meet the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings **BE** (and are hereby) **TERMINATED**.

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

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

4/21/05
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

4-27-05
DATE

M. Kathleen Donovan/DR
DEPARTMENT OF EDUCATION

APR 29 2005
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Respondent Mountain Lakes Board of Education

S.K. o/b/o B.M., Petitioner, v. Mountain Lakes Board of Education, Respondent.	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDU 1960-05 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Agreement and General Release ("Agreement") is made and entered into by and between the MOUNTAIN LAKES BOARD OF EDUCATION (hereinafter "the Board") and S.K. individually, F.K. individually, and on behalf of B.M. (collectively "Releasors"), for full settlement of all claims which could have been alleged against the Board by Releasors.

In consideration of the mutual promises contained herein, it is agreed as follows:

1. **Non-Admission By Board.** This Agreement shall not be construed as an admission by the Board of any of the acts or omissions which could have been alleged by Releasors, or of any acts or omissions which could have been alleged against the Board. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by Releasors or which could have been claimed by Releasers relative to B.M.'s attendance at Mountain Lakes High School.

2. **Educational Placement.** The Board agrees to pay the tuition costs for B.M. to attend the Mount Olive High School in Mount Olive Township, New Jersey, effective April 4, 2005 and through B.M.'s scheduled graduation in June 2007. The Board shall make such payments directly to the Mount Olive Township Board of Education. B.M. shall be subject to

the Mount Olive Township Board of Education and Mount Olive High School's policies, rules and procedures while enrolled at Mount Olive High School. In order for B.M. to obtain a Mountain Lakes Board of Education high school diploma, she must satisfy the graduation requirements of the Mountain Lakes Board of Education.

3. **Transportation.** The Board shall transport B.M., at its expense, to and from Mount Olive High School starting the afternoon of April 4, 2005 through the conclusion of the 2004-2005 school year; and during the 2005-2006 school year. The Board shall not be obligated to transport B.M. to Mount Olive High School after June 30, 2006. B.M. shall be transported and accompanied to Mount Olive High School by at least one of her parents the morning of April 4, 2005. The Board shall be permitted to procure a transportation route at the lowest available cost, which may include a route transporting one or more students other than B.M. Said students may be students receiving special education services. The transportation route shall be of a reasonable duration. The Board shall transport B.M. home at the end of the regularly scheduled school day. The Board is not responsible for transporting B.M. home from any after-school extra-curricular activities engaged in by B.M.

4. **Release.** Releasors release and give up any and all claims and rights they may have against the Board as to any events relating to this matter, or B.M.'s attendance at Mountain Lakes High School, that have taken place through the date of this agreement. As used in this Agreement, the term "Board" means: the Mountain Lakes 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. Releasors specifically release the following claims as to the Board:

(a) Any civil, criminal or administrative claims which Releasors could assert now, or in the future, under any provision of any law, common or statutory, of the United States, New Jersey or any other state, city, county, or locality as to any events relating to this matter, or B.M.'s attendance at Mountain Lakes High School; and

(b) Any claim Releasors could assert now, or in the future under any provision of the Individuals with Disabilities Education Act; and

(c) Any claim for assault and personal injury; and

(d) Any claim for any attorney's fees and any other fees and costs; and

(e) Any claim for any act of misfeasance, malfeasance or nonfeasance by the Board as to any events relating to this matter, or B.M.'s attendance at the Mountain Lakes High School that have taken place through the date Releasors sign this agreement; and

(f) Any claim under 20 U.S.C. sec. 1681(a)(1994)(Title IX) for alleged discrimination in B.M.'s education program on the basis of sex; and

(g) Any claim for alleged bullying, verbal, sexual and physical harassment; and

(h) Any claims arising out of facts alleged in the New Jersey Tort Claims Act Notice of Claim filed on behalf of B.M. against the Board.

5. **Agreement Not to Sue.** Releasors agree not to file any lawsuit or claim against the Board, based on any events, whether known or unknown, relating to this matter, or B.M.'s attendance at Mountain Lakes High School, occurring prior to the date of the execution of this Agreement, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality.

6. **Confidentiality.** The Board and Releasors agree that neither they nor their attorneys, nor representatives shall reveal to anyone, or cause to be revealed to anyone, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement or the events giving rise to the instant litigation. Releasors acknowledge that this

confidentiality requirement is a material term to this Agreement. The Board and the Releasors shall give each other written notice, reasonable under the circumstances, of any attempt to have the particulars of this agreement revealed by any legal action.

7. **No Precedent and Non-Admissibility.** The Board and the Releasors agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving the Board and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce same.

8. **Who is Bound.** Releasors and their agents are bound by this Agreement. Those who succeed to their rights and responsibilities, such as heirs, the executors of their estate, or their personal or legal representatives are also bound. B.M. will be bound to the confidentiality provisions of this Agreement.

9. **Non-Domicile.** The Board's obligations set forth in this Agreement shall immediately cease upon B.M. no longer being domiciled in Mountain Lakes during the term of this Agreement.

10. **Withdrawal from the Mount Olive High School.** Releasors shall give prior notice to the Board's Superintendent of Schools, to the extent reasonable under the circumstances, of their intention to withdraw B.M. from the Mount Olive High School. If B.M. is withdrawn from the Mount Olive High School before the June 2007 graduation, Releasors shall promptly meet with Board staff to decide B.M.'s educational placement.

11. **Entire Agreement.** This Agreement contains the sole and the entire agreement between Releasors and the Board, and fully supersedes any and all prior agreements and understandings between Releasors and the Board pertaining to the subject matter of this Agreement. Releasors represent and acknowledge that they have not relied upon any

representation or statement by the Board, or their counsel or representatives, 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 Releasors and the Board, and expressly stated to be a modification of this Agreement.

12. **Student Records.** The Board will expunge B.M.'s student records to remove any reference to the incident underlying this action.

13. **Severability.** If any provision of this Agreement is held to be unenforceable, invalid or illegal by any court of competent jurisdiction, the State Department of Education or the New Jersey Office of Administrative Law, such unenforceable, invalid or illegal provisions shall not affect the enforceability or legality of any remaining portions of this Agreement.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK]

14. **Signatures.**

BY SIGNING THIS AGREEMENT RELEASORS STATES THAT:

A. THEY HAVE READ IT;

B. THEY AGREE WITH EVERYTHING IN IT;

C. THEY HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT AND HAVE DONE SO, NAMELY JOHN GEPPERT, ESQ.; AND

D. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Releasors

Stacy Kanter
S.K.
Mother to B.M.

Dated: 4/1/05

P.K.
Stepfather to B.M.

Dated:

B.M.

Dated:

Mountain Lakes Board of Education

Susan B McCusker
Susan McCusker
Board President
Mountain Lakes Board of Education

Dated:

Michael T. Kismer
Michael Kismer
Board Secretary/Business Administrator
Mountain Lakes Board of Education

Dated 4/12/05

14. **Signatures.**

BY SIGNING THIS AGREEMENT RELEASORS STATES THAT:

A. THEY HAVE READ IT;

B. THEY AGREE WITH EVERYTHING IN IT;

C. THEY HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT AND HAVE DONE SO, NAMELY JOHN GEPPERT, ESQ.; AND

D. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Releasors

Stacy Kanter
S.K.
Mother to B.M.

Dated: 4/1/05

F.K.
Stepfather to B.M.

Dated: 4/1/05

Buttercup Mizak
B.M.

Dated: 4/1/05

Mountain Lakes Board of Education

Susan McCusker
Board President
Mountain Lakes Board of Education

Dated:

Michael Kistner
Board Secretary/Business Administrator
Mountain Lakes Board of Education

Dated

EXTRACT OF MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES MORRIS COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Mountain Lakes in the County of Morris, New Jersey, convened in Regular Session on Monday, April 4, 2005 at 7:30 p.m., in the Mountain Lakes High School, Powerville Road, Mountain Lakes, New Jersey.

The following members of the Board of Education were present:

Mrs. Boertzel	Mrs. McCusker
Mrs. Dawson	Mr. Stokes
Mr. Gentul	Mrs. Wall

Mrs. Pascarella – Boonton Township Representative

The following members of the Board of Education were absent:
Mrs. Brennan, Mr. Cohen, Mrs. Lareau

The following resolution was offered by Mrs. Dawson and seconded by Mr. Gentul and adopted by the Board of Education by the following roll call votes:

MOTION 331-04	Yeas 7
Approval – Settlement Agreement – Docket No. EDU 1960-05	Noes 0
	Abstain 0

Motion, to approve the settlement agreement in the matter bearing Docket No. EDU 1960-05 in accordance with the terms therein.

Motion carried 7-0.
ROLL CALL: as above

STATE OF NEW JERSEY)
)ss.
COUNTY OF MORRIS)

I, Michael T. Kistner, Secretary of the Board of Education of the Borough of Mountain Lakes in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on April 4, 2005, has been compared by me with the original minutes as recorded in my office in the minute book of said Mountain Lakes Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract.

In Witness, I have hereto set my hand and affixed the corporate seal of the said Board of Education this 13th day of April 2005.

Michael T. Kistner
Business Administrator/Board Secretary

EXTRACT OF MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES MORRIS COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Mountain Lakes in the County of Morris, New Jersey, convened in Regular Session on Monday, April 4, 2005 at 7:30 p.m., in the Mountain Lakes High School, Powerville Road, Mountain Lakes, New Jersey.

The following members of the Board of Education were present:

Mrs. Boertzel	Mrs. McCusker
Mrs. Dawson	Mr. Stokes
Mr. Gentul	Mrs. Wall

Mrs. Pascarella – Boonton Township Representative

The following members of the Board of Education were absent:
Mrs. Brennan, Mr. Cohen, Mrs. Lareau

The following resolution was offered by Mrs. Dawson and seconded by Mr. Gentul and adopted by the Board of Education by the following roll call votes:

MOTION 331-04	Yeas	7
Approval – Settlement Agreement – Docket No. EDU 1960-05	Noes	0
	Abstain	0

Motion, to approve the settlement agreement in the matter bearing Docket No. EDU 1960-05 in accordance with the terms therein.

Motion carried 7-0.
ROLL CALL: as above

STATE OF NEW JERSEY)
)ss.
COUNTY OF MORRIS)

I, Michael T. Kistner, Secretary of the Board of Education of the Borough of Mountain Lakes in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on April 4, 2005, has been compared by me with the original minutes as recorded in my office in the minute book of said Mountain Lakes Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract.

In Witness, I have hereto set my hand and affixed the corporate seal of the said Board of Education this 13th day of April 2005.

Michael T. Kistner
Business Administrator/Board Secretary

183-05

OAL DKT. NO. EDU 2156-02
AGENCY DKT. NO. 49-2/02

BOARD OF EDUCATION OF THE CITY OF OF TRENTON, MERCER COUNTY AND JAMES H. LYTLE, SUPERINTENDENT OF SCHOOLS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM LIBRERA, COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board sought and was granted, for good cause shown, a 30-day extension of time within which to file exceptions to the Initial Decision. Upon expiration of this extension period, the Board advised that it had decided not to file exceptions.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioners have failed to satisfy their burden of establishing that they should not be required to reimburse the Department $44,000 in disallowed costs from the Whole School Reform incentive grant for fiscal year 2000, which was utilized for expenditures inconsistent with the approved grant application.

Accordingly, the Initial Decision of the OAL is adopted for the reasons well articulated therein and the instant Petition of Appeal is dismissed. The Board of Education of the City of Trenton is hereby directed to reimburse the Department of Education $44,000 in disallowed grant funds.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/19/05

Date of Mailing: 5/19/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2156-02
AGENCY DKT. NO. 49-2/02

TRENTON BOARD OF EDUCATION
(HEREINAFTER "BOE")
AND JAMES H. LYTLE,
SUPERINTENDENT OF SCHOOLS
Petitioners,

v.

WILLIAM LIBRERA, COMMISSIONER,
NEW JERSEY DEPARTMENT OF
EDUCATION (HEREINAFTER "DOE")
Respondents.

Thomas W. Sumners, Jr., appearing for petitioners, (Sumners, George, attorneys)

Marta N. Kozlowska, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: July 24, 2003 Decided: March 16, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners contest respondents' determination that the BOE is required to return $44,000 in expended grant funds. The matter was transmitted to the Office of Administrative Law, (OAL) on April 3, 2002 for a hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13

and *N.J.S.A.* 52:14B-1 to -15. A hearing was conducted on October 23, 2002 and the record remained open in order to allow for post-hearing submissions. The final submission was received on June 4, 2003 and upon review on July 24, 2003, the record was closed.

FACTUAL DISCUSSION

The petitioners challenge the Department of Education's (DOE) decision to request a refund of $44,000 for disallowed cost from the Cadwalader School's 1999-2000 Second Cohort Whole School Reform (WSR) Grant to the Trenton School District. The Trenton Board of Education (BOE) applied for the grant on or about May 28, 1999. The school district sought a grant of $50,000 for the purchase of laptop computers. Petitioners contend that the DOE approved the expenditure of $50,000 for computers. Respondent contends that it advised the district through communication with the school principal, who is one of the signatories to the grant application, the application had to be revised as a $50,000 expenditure for computers was inconsistent with the WSR model and thus revisions would be required such that only $6,000 could be expended on computers. Petitioners contend they were not aware of this revision and spent $50,000 toward the purchase of 25 laptop computers. The DOE requested a refund in the amount of $44,000 and petitioners filed the within appeal.

The following witnesses testified on behalf of the petitioners: Gloria Tunstall and Melvin Wyns. The following represents a summary of their respective relevant testimony and is not meant to be a transcription of the entire testimony presented at this hearing.

Gloria Tunstall is the principal of the Cadwalader School, the recipient of the grant at issue. She has been the principal for the past 14 years and was previously an assistant principal and teacher. The Cadwalader School is an Abbott School. It selected the WSR Model known as the Modern Red School House. The school applied for a grant in connection with the Modern Red School House. (J-2) She signed the grant application as the principal on May 25, 1999. The funding amount being requested was $50,000 and the school district contact listed on the application was Gail E. Dubin. (J-2) Although the witness was unsure of Ms. Dubin's exact title, she testified that Ms. Dubin was employed by the district as a Director and that part of her responsibilities included overseeing the WSRs. The Activity Plan and Budget Detail portion of the application indicated that the school district sought to purchase 25 laptops at the price of

$2,000 each to facilitate the teachers' use of instruction management system. (J-2) This was the plan submitted to the Trenton BOE for its approval. It was approved by the BOE before the end of the school year. The Activity Plan and Budget Detail changed subsequent to the Board's approval of $50,000 being used for the laptops. The witness testified that Janet Sheppard, the SRI (School Review and Improvement) person from the DOE, stopped by during the summer and indicated that the district had to rewrite the plan because the school would not be able to purchase all of the laptops that they had requested under the grant. She and Janet Sheppard sat down and they "hand wrote and revised the grant at that time;" she hand wrote the first two pages and Miss Sheppard, the last page. (J-4) The bottom of the handwritten revisions reflected on each page "hard copy to follow." (J-4) After the plan was re-written, Tunstall gave it to Sheppard. Sheppard indicated that she would speak with the DOE to let them know that even though they were revising the grant application in conjunction with the WSR, she would attempt to obtain DOE approval for the 25 laptops, anyway. Twenty-five laptops were purchased by the school in January or February of the following year. That purchase was not consistent with the revised plan. When the school district purchased the laptops, the money had been put into their equipment account set up by the Trenton School District. Prior to this application for a grant, Miss Tunstall testified she had no prior experience writing grants.

Tunstall further clarified that after the Trenton BOE approved the initial grant, it was submitted to the DOE. When Sheppard came to visit her at the Cadwalader School after the close of the academic school year, she told her that the grant application had to be revised because the school district could not purchase the 25 laptops with the grant money. When she and Sheppard prepared the handwritten revisions on the Activity Plan and Budget Detail, she signed the bottom of each of the three pages. The revisions reflected the purchase of three laptop computers for a cost of $6,000. (J-4) Sheppard left and took the revised document with her. (J-4) Tunstall testified that the revised typed application was faxed from the Cadwalader School. (J-2) There were three individuals including herself who could have faxed that revised application from the Cadwalader School on August 2, 1999. (J-2) Juda Winget or Pamela Washington, who were both facilitators at the time, were shown the revised application by Tunstall when they returned from the summer break. She explained to them that she and Janet Sheppard revised the plan. The revision reflects the handwritten revisions prepared by her and Janet Sheppard. She does not remember if the revisions went back to the District BOE for approval. She testified in terms of BOE approval,

> I am involved, as far as if something has to be submitted to the Board for approval. But, I cannot remember, after the revision, exactly what happened after the revision.

She did not question the revision or the subsequent purchase of 25 laptops at the cost of $50,000 because Janet Sheppard told her when they drafted the revisions that she was going to speak with the DOE to see if the 25 laptops could still be purchased. When she then saw $50,000 as a line item in the budget, she was under the impression the DOE had approved the purchase.

She never discussed the revision with the Business Administrator. As she had never applied for a grant like that before, she worked with Janet Sheppard, who she testified was "kind of directing" although she knew at all times that Ms. Sheppard worked for the DOE and not for the Trenton BOE. She worked on the original grant application. (J-1) As a member of the Site Management Team (SMT), she knew the application had to be submitted to the Trenton BOE. While she cannot remember who typed up the revisions, it may have been her secretary.

Melvin Wyns, the Trenton BOE School Business Administrator/Board Secretary since July 2, 2001, testified on behalf of petitioner. He had been previously employed with the State DOE for 31 years in the Division of Finance. He was familiar with the Cadwalader WSR Incentive Grant based upon a review of the documents after the DOE demanded a $44,000.00 refund, but he was not the Business Administrator or Board Secretary when the grant was submitted to the DOE for approval. After the DOE requested the return of $44,000, he wrote to Sue Martz at the DOE. On May 24, 1999, the Trenton BOE passed a resolution approving the grant application's submission to the DOE. The normal Board process would encompass grant applications initially being reviewed by the Board's finance committee. The finance committee would then make a recommendation to the full BOE at its regular meeting. The district contact person listed on the first page of the application, Gail E. Dubin is the district's current Director of Grants. He does not know what her position was in 1999 when the application was prepared. (J-2) The Board received notification the grant proposal had been received. (J-5) By correspondence of August 9, 1999, the DOE advised the Trenton BOE the grant application for the program was approved and that the Grant Acceptance Certificate (GAC) must be completed by the Board Secretary. (J-5) The notification made specific reference to the fiscal year 2000

WSR incentive being approved. (J-5) The document indicates it was received "in substantially approvable form on June 3, 1999." (J-5) The August 9, 1999 notification from the DOE required that the attached GAC be completed and signed by the Board Secretary. (J-5) Charles Milewski, Board Secretary, completed the GAC and forwarded it to the DOE. (J-6)

Once Wyns became involved in this matter, he reviewed the file, which he indicated to be incomplete, and he noted that the revisions were all subsequent to the June 3, 1999 grant approval. The DOE indicated the $44,000 it was seeking reimbursement of had not been expended in accordance with the budget that was approved for the grant. The Trenton BOE did not have any records indicating that it had either received or approved revisions to the grant. In addition, he found no correspondence from the DOE indicating a revised application had been approved. The DOE advised the district the original application was rejected but that was by letter from the DOE responding to his inquiry. That letter was not received until the district had already expended the money for the laptops. In this instance, the district BOE individual who had responsibility for authorizing the expenditure of the $50,000 for the 25 laptops was Charles Milewski, the School Business Administrator/Board Secretary. Sue Martz forwarded him a copy of the application for the WSR Incentive Grant, which included instructions and forms. (J-1) She advised him the reason the DOE was seeking reimbursement of $44,000 was because the $50,000 had not been expended in accordance with the grant award and the revised budget; only $6,000 of the $50,000 in the revised budget was allowable for purchase of laptop computers and the remaining $44,000 was for teacher salaries, supplies and materials. Martz advised him the DOE was "holding" the district BOE to the revised budget. He raised the issue of how the business administrator could be responsible for maintaining a record of approved grants when a person not designated as the contact was permitted to make budgetary revisions and the BOE, who was required to approve the application, was never presented with same. His inquiry was centered on how the DOE could have even accepted the revisions from anyone other than the business administrator or without board approval. Martz advised him that it was part of the process to accept verbal revisions. At the time the laptops were purchased, the business office was under the impression that the purchase was consistent with the grant.

He is not aware of anything in the application for the WSR Incentive Grant, that would allow the district contact person the authority to make revisions without board approval. (J-1)

He sent an October 1, 2001 letter to Sue Martz relying upon *N.J.A.C.* 6:20-2A.2(i)2 for the proposition that the verbal request and approval process used by the DOE is not supported by this regulation. (P-1)

He conceded the grant application does not specify that revisions have to be approved by the BOE. (J-1) There is no grant instruction limiting a single contact person on behalf of the district BOE. (J-1) Additionally, there is nothing within those instructions indicating that the Business Administrator has to approve all matters with respect to the grant application. He conceded that there is nothing within the grant application instructions requiring revisions to be in writing. The handwritten revisions made by Gloria Tunstall were dated June 29, 1999.[1] The typed revisions reflected a faxed date of August 2, 1999. Typed revisions thus were faxed a week prior to the notification of the grant approval. He conceded that there is nothing to indicate from a review of the Business Administrator's file that he had seen or not seen the revisions. Additionally, there was nothing within that file to indicate the district BOE central office had not received communication from Ms. Tunstall regarding the revisions.

In attempting to reconstruct the events, Wyns testified that he spoke with Nancy Swirsky, the district's comptroller. Swirsky advised him that the business office did not have any knowledge of the revisions.

Susan B. Martz, the DOE's Director of the Office of Programs Support Services testified on behalf of respondent. Ms. Martz has been employed with the DOE since 1988 when she began working at the Office of Special Education Programs (OSEP) on grants. She became the Manager in the Office of Grants Management and then the Director in that same office from 1996 to July 2002. That was her position with the DOE at the time the grant application was submitted. She is familiar with the fiscal year 2000 WSR grant. The purpose of the grant was to assist school districts in implementing the WSR; it was envisioned as a $50,000 start-up grant. The application listed acceptable expenditures. (J-1)

As long as the schools selected expended the grant funds consistent with the application, the grant would be approved by the DOE. The grant, which the DOE termed a "formula" or

[1] It should also be noted that J-8 reflected handwritten revisions being faxed on July 29, 1999.

"entitlement" grant, was linked directly to the implementation of the WSR model selected by the school and district. Applications were sent to the DOE, they were reviewed by the Office of Program Review and Improvement and the fiscal sections of the application were reviewed by the Office of Fiscal Review and Improvement. Once an application was "signed-off" by the Directors of those separate offices, the application would be forwarded to the Office of Grant Management in order for it to issue the Notification of Award and the Grant Acceptance Certificate. Revisions could occur "in a couple of different points during the review process." For example, she testified that if a person reviewing the Program section of the application had a question, that person could contact the district at that time to resolve that issue. The Fiscal section could do the same.

During this process, "people were encouraged to get their revisions to the Department as quickly as possible, so that there would not be a delay in the approvals of the applications and getting the funding to the districts." She testified that it was not unusual during the process for the DOE personnel involved to make phone calls. With regard to this particular matter, Ms. Sheppard was geographically close enough to travel to Cadwalader to "work out" the revisions. This was an acceptable procedure with regard to the "entitlement" or "formal" grant applications. The normal procedure would be to call the designated contact person listed on the grant application. Frequently the DOE would ask the district designate a contact person who would be available over the summer. In an instance when that person would not be available during the summer, the DOE would contact an administrator listed on the application. In this instance, the DOE reached out to principal Tunstall who was listed on the application. She does not know why Gail Dubin, who was listed as a contact, was not contacted in this matter.

She was involved in this particular application at two separate points. Her first involvement was as the application was being reviewed and questions arose regarding what was allowable and not allowable. While that was the responsibility of the Office of Program Review and Improvement, that office would at times request input from the Grant Office. She recalls a discussion regarding a purchase of laptops with regard to this application. The Program office indicated that purchase of all of those laptops was "absolutely not" allowable and that it wanted that changed. She testified that later, when the district submitted its final report that was inconsistent with the DOE's approved application in the file, both the Office of Program Review and Improvement and the Office of Fiscal Review and Improvement contacted the Grant Office

for advice regarding the procedure to be utilized with regard to an expenditure inconsistent with the approved grant application. The revisions to the grant application came to her attention again after the Trenton school district submitted its letter contesting the DOE's indication of the non-allowable expenditure. A review of the file revealed the original Activity/Budget request that was crossed out with an indication, "revise" and then the typed inserted pages reflecting $6,000 for the purchase of laptop computers. (J-2) She verified that the handwritten revisions were exactly the same as the typed copy that was in the application. (J-2) She also reviewed the checklist for reviewing and approving the WSR applications. (J-3) The last signature on this checklist bore a date of August 9, 1999. (J-3) She testified the typed revisions were received on August 2, 1999.

The DOE does not attend the District BOE meetings and, as such, does not reach out directly to the district regarding its responsibility in the grants approval process. It was not the responsibility of the DOE to make sure the contact person was communicating with the rest of the district. Once the Office of Grants Management and Development (OGMD) completes its final review, the OGMD coordinator would generate the GAC and the Notification of Approval. (J-5, J-6) When the DOE receives the GAC, it is essentially an indication from the District Business Administrator that the BOE has accepted the approved application. (J-6) In this instance, the approved application consisted of the application with its revisions. As part of the DOE process, the district's revisions to the applications are accepted. The "secondary check" or "protection" is to have the district go back to its BOE to approve everything that has occurred. Based upon practice since 1988 when she began working at the DOE, people involved in the process complained about two Board meetings with regard to every application. The idea was that the board would approve the application being submitted and so it was left up to the district to take back to its BOE any revisions to an application. This was what the districts were told, based on her past practice and experience with the DOE.

After the GAC is submitted, the DOE initiates payment to the district. (J-6) The district then submits a final report. (J-7) While she was not part of the review team in this instance, the final report submission was denied by the Fiscal Review and Improvement team as well as the Grant Office based upon its inconsistency with the approved application in the DOE file.

Martz then became involved in the process again. Initially the DOE asked the district to either return the $44,000 or submit a revised final report if it had made errors in the final report submitted. The final approved application relied upon by the DOE was J-2. It contained both the handwritten revision faxed by Gloria Tunstall as well as the typewritten revision. The application was not approved by the DOE until it received the typewritten revision. With regard to the checklist, the Office of Program Review and Improvement "signed off" on the approval followed by the Office of Fiscal Review and Improvement. Then, the Office of Grant Management and Development Review and "signed off" on the application. A second level of review was conducted in each of the offices and then the Directors of each office reviewed the checklist and approved the application. (J-3) This was completed on August 9, 1999 after the revisions were faxed. (J-3)

Martz testified that the DOE received the completed application on June 3, 1999. (J-3). Nothing within J-3 references receipt of revisions. The second page of this internal checklist for reviewing and approving the application submitted by Cadwalader reflects that program reviewer Janet Sheppard and a PIRC (Program Review and Improvement) Manager "signed-off" on the application on June 4, 1999 and June 15, 1999, respectively. (J-3). Item 21 regarding "use of funds" indicates that use was allowable. (J-3) She could not determine, however, if that pertained to an approval based upon the original application or on the revision. She further testified that the language of Notification of Grant award dated August 9, 1999 indicating the application being received in "substantially approvable form" on June 3 does not mean that the process had been completed on that date. What it does mean however, is that revisions can occur without affecting the date that the district can begin to obligate the funds.

With regard to the applications process, the DOE provided training programs for districts.

With regard to whether a school principal had the authority to revise an application, Martz testified that principals did have that authority in the revision process as part of the WSR grant applications. This was because principals were integrally involved with their application from both the program and the fiscal aspect. The DOE would have accepted revisions that occurred prior to the approval of the application from a principal knowing the application was then going back to the district board for its approval. She had no reason to believe Gloria Tunstall did not have any authority to make the revisions. When she was a grant reviewer, she

dealt with principals often. The DOE would have no reason to believe negotiated revisions were not being included by the District BOE in its budget.

That concluded the testimony in this case. [2]

LEGAL ANALYSIS

The burden of proof in this matter is upon petitioners to demonstrate by a preponderance of the competent credible evidence that they are not required to reimburse the DOE in the amount of $44,000 for disallowed costs from the Cadwalader School's 1999-2000 second cohort WSR (WSR) grant to the Trenton School District.

The resolution of this matter necessitates a discussion of the Abbott Districts' special regulations. The regulations for the time period governing the 1999-2000 WSR grant was previously codified at *N.J.A.C.* 6:19A-1.2 *et.seq.*; the Implementation of Court Decision in *Abbott v. Burke*, effective July 20, 1998 (hereinafter the "*Implementation Regulations*") and superseded by *N.J.A.C.* 6:19A-1.2 *et.seq.*; Urban Education Reform in the Abbott districts, effective September 10, 1999 (hereinafter "*Urban Education Reform Regulations*"). References to those regulations in effect during that time period shall be made throughout the remainder of this Initial Decision.[3]

The City of Trenton is an Abbott district as set forth in *Raymond Abbott et.al. v. Fred G. Burke, et.al.*, 11N.J. 287 (1990) and as later codified in the Abbott Districts' special regulations.

The regulations adopted for the purposes of implementating the Supreme Court's decision in Abbott v. Burke required that the Commissioner designate the DOE staff to serve on a School Review and Improvement (SRI) teams. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.3. The primary role of that team was to work with the school management team (SMT). *Implementation Regulations* at *N.J.A.C.* 6:19A-1.4(a). The SRI team was also to serve as liaison between the schools and the DOE, and as sources of technical assistance in programmatic and

[2] Petitioners had intended to call Jean Sheppard who was employed by the DOE during the relevant time frame and was the person from the DOE who worked with Tunstall on the revisions. Sheppard left the employment of the DOE and at the time of the hearing was working for the Trenton Board of Education. Respondent's counsel, during the course of the hearing, moved to bar the testimony of Jean Sheppard pursuant to *N.J.S.A.* 52:13D-17. The parties briefed the matter post-hearing and a letter Order was issued by the undersigned on January 14, 2003, barring the testimony pursuant to that statute, as Miss Sheppard in her prior capacity with DOE was clearly directly involved with the matter that became the subject of this hearing.

[3] The current Abbott District Urban Reform regulations are codified at *N.J.A.C.* 6A:24-1.1 *et.seq.*, effective July 3, 2000.

fiscal areas. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.3. Every Abbott District elementary school implementing the WSR was required to have an SMT. The regulations required that prior to August 30, 1998, the Chief School Administrator was required to submit to the DOE for approval, with a copy to its board, a procedure for the selection and training of a building based SMT in every elementary school implementing the WSR. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.4. The Cadwalader School is an elementary school in the Trenton school district that implemented WSR. The SMT was to consist of members including the building principal. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.4(a)2. With regard to the schools participating in WSR, the SMT had specific duties and had the authority to prepare a school-based budget in consultation with the DOE assigned SRI team. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.4(C) (4). Further, it was the responsibility of the Chief School Administrator to ensure each school was led by an effective principal. *Implementation Regulations* at *N.J.A.C.* 6:19A-1.5. Each elementary school was required to adopt the WSR model by the 2000-2001 school year. *Implementation Regulations* at *N.J.A.C.* 6:19A-3.1(a). The duties of a principal with regard to the school-based budget were further enhanced by the Urban Education Reform and the Abbott District Regulations effective September 10, 1999. For example, pursuant to those regulations, the principal was required to prepare the school-based budget in consultation with staff and SMT. *Urban Education Reform Regulations* at *N.J.A.C.* 19A-4.4(a) (1). Further, once the principal sought input from the SMT, he or she was required to submit the budget to the Chief School Administrator and Board for comments. *Urban Education Reform Regulations* at *N.J.A.C.* 6:19A-4.4(d).

Based upon the forgoing discussion and in consideration of the testimony of the witnesses and credibility determinations made at the time thereof as well as evidence admitted at this hearing, I make the following **FINDINGS OF FACT**:

1. The Cadwalader school, an elementary school located in Trenton, New Jersey, is located in an Abbott School District.

2. Gloria Tunstall had been a principal at the Cadwalader School for 14 years in 2002 when she testified at this hearing. She had been involved in the Abbott WSR implementation approximately since 1998.

3. The school selected the WSR Modern Red School House model.

4. Jean Sheppard was a DOE assigned SRI staff person to the Cadwalader School for purposes of the incentive grant for fiscal year 2000 WSR/Second Cohort application.

5. School districts applying for that grant were forwarded an application, which included instructions and forms. (J-1)

6. In accordance with the instructions, the Cadwalader School submitted its application by date of May 28, 1999. (J-2)

7. The application instructions provided in part

> Finally, please be sure to include on the cover page the name of the contact person responsible for this application and available during the summer months. (J-1, p.7)

8. The Cadwalader School application listed as district contact Gail E. Dubin and provided a telephone number. (J-2) The application also listed Chief School Administrator Dr. James Lytle; Principal Gloria Tunstall; and Business Administrator Charles Milewski. (J-2)

9. On May 24, 1999, the Trenton BOE passed a resolution authorizing submission of the WSR Implementation Plans for Second Cohort Trenton schools grant application for approval by the DOE as required. (J-2, p.2)

10. As required by the instructions in the application, the statement of intent was submitted and was signed by the School Management Team (SMT) chairperson Juda Winget; the school principal and the Chief School Administrator (J-2, p.4). The Activity Plan and Budget Detail submitted at that time provided for the purchase for 25 laptops at $2,000 each to facilitate the teachers' use of Instruction Management System, for a total expenditure of $50,000. (J-2)

11. Once this completed application was submitted to the DOE, several levels of review were conducted. (J-3) Janet Sheppard as program reviewer and Dolores Riegs as PIRC manager "signed off" on the check list for reviewing and approving the application on June 4, 1999 and June 15, 1999 respectively. In addition, fiscal reviewer Tina Debrow "signed off" on the application on June 4, 1999. On July 8, 1999, Office of Grants Management and Development (OGMD) reviewer "signed off" on the application indicating that all required revisions were attached to the checklist.

12. At some point in time either after the June 1999 Fiscal Review and Program Review approvals and prior to, or contemporaneous with the second level review approvals as further discussed below, Jean Sheppard visited Gloria Tunstall at the school.

13. She indicated to her that the application as submitted did not conform with the WSR Incentive Grant: Second Cohort for Fiscal year 2000. As such, she and principal Tunstall revised the application. Those hand-written revisions indicated the following Activity Plan and Budget Detail: $10,333 towards the students standards and assessment to support the Modern Red School House WSR model; $14,555 toward training to support and enrich instructional and management of WSR; $12,000 towards supplies and materials for same: $6,000 toward the purchase of three laptop computers towards the standard driven instructional strategies of the WSR model and $7,112 for a school facilitator to serve as liaison to assist the staff in the Modern Red School House implementation and WSR. The handwritten revisions were in both Tunstall and Sheppard's handwriting. A notation on the bottom of each page indicated "Hard copy to follow" and was signed off by principal Tunstall.

14. A typed version of this document was prepared by Cadwalader staff at the direction of Tunstall and faxed to the DOE on August 2, 1999. (J-2) The handwritten version was faxed on July 29, 1999. (J-8)

15. The checklist for the review and approving of the Cadwalader application for the grant was then submitted for a second level review and was approved by the OPRI Director and the OPSI Director on August 2, 1999. (J-3, p.5)

16. The OGMD coordinator then approved the grant on August 9, 1999. (J-3, p5)

17. On the same date, the DOE forwarded to the Chief School Administrator for Cadwalader a fiscal year 2000 notification of grant award with a copy to principal Tunstall. (J-5) The notification provided, in part:

> Your Grant application for the program indicated below (WSR Incentive Grant) which was received by the New Jersey DOE in substantially approvable form on 06/03/1999 has been reviewed by the offices listed above and recommended for funding for fiscal year 2000 pending the availability of funds. (emphasis in original)

The notification also provided that the local education agency (LEA) could begin to obligate the funds the later of the Program duration start date, which was July 1, 1999, or the date the application was received in substantially approvable form, which was June 3, 1999.

18. Further, the notification provided that amendments to the WSR Incentive Grant application may be submitted during the project period by no later than May 31, 2000. (J-5)

19. On August 30, 1999 Charles Milewski as the Business Administrator submitted a completed GAC. (J-6). The completed GAC indicated that the grant award of $50,000 for the WSR Incentive program had been accepted by the Trenton BOE at its meeting of August 30, 1999. (J-6)

20. On January 24, 2000, the Trenton BOE Department of Purchases and Supplies requisitioned pursuant to purchase order 6107, 25 Dell laptop computers after receiving a quote dated January 7, 2000 and January 10, 2000 from Dell Computer Corporation. (J-7). That purchase order was signed by Charles Milewski as Secretary of the BOE. (J-7)

21. The Cadwalader School and BOE submitted to the DOE a final report of the WSR Start Up Grant indicating $50,000 being expended for the purchase of 50 computers. (J-7). The final report which was signed by Chief School Administrator Dr. Lytle on November 29, and Charles Milewski on the same date and Principal Tunstall on November 20, 2000, included the final report expenditure on an Activity Plan and Budget Detail form as well as the purchase order to Dell computers. (J-7) The final report of the expenditure indicated that the purchase of the 25 laptop computers was to facilitate the use of the instructional management system by teachers to maintain both teaching units and student grades. With regard to the accountability plan to document implementation of the activities, it was noted that "25 teachers have signed for there (sic) computers in their possession. The technology task force has begun their training in the use of the instructional management system, which they will in turn turnkey to the other teachers." (J-7)

22. The DOE then denied the grant on September 18, 2001. (J-7) The DOE then requested reimbursement of $44,000 for the disallowed cost.

Petitioners have not met the burden of proving that they are not required to reimburse the DOE for the disallowed cost. Principal Tunstall testified that she had been the principal at Cadwalader for approximately 14 years and had been involved with the Abbott district's WSR program since 1998. The Implementation Regulations required the Chief School Administrator to ensure that each school was lead by an effective principal. Further, prior to August 30, 1998, the Chief School Administrator was required to submit to the DOE, for approval, with a copy to its Board a procedure for the selection and training of a building based school management team (SMT) at every elementary school that was implementing WSR. The SMT was to consist of the

building principal as well as other staff members. Not only was principal Tunstall a member of the SMT but Juda Winget, another member, signed off on the application as school management team chair person on May 25, 1999. Pursuant to the *Implementation Regulations*, the SMT was to be trained. In addition to the training, the *Implementation Regulations* required the Commissioner to designate department staff to serve on the school review and improvement team (SRI). Ms. Sheppard acted in that capacity on behalf of the DOE with the Cadwalader School. SRI teams were also to assist the SMT in the development of the 1999-2000 school year budget for schools participating in the implementation of WSR. The duties of the principal were further enhanced by the succeeding regulations; the *Urban Education Reform Regulations*. When Ms. Sheppard visited Cadwalader School and prepared revisions to the grant application with principal Tunstall, the responsibility to report the revisions to the Chief School Administrator and the Board rested with principal Tunstall and not the DOE. If principal Tunstall did not have the authority to revise the grant, or had questions whether it was necessary to revise the grant, she never indicated that to the DOE. Instead, she and Ms. Sheppard handled the revisions, she "signed off" on the bottom of each of the three pages and instructed her staff to type those revisions and fax them to the DOE. She discussed it with Ms. Winget, the SMT Chairperson, and neither one of them communicated with the Chief School Administrator or the BOE. The Abbott regulations in effect on September 10, 1999 required the principal to seek input from the SMT on the proposed school based budget and once that input had been provided, the principal was required to submit the budget to the Chief School Administrator and Board for comments. *Urban Education Reform Regulations* at *N.J.A.C.* 6:19A-4.4(c)

At the hearing, petitioner relied on the testimony of Mr. Wyns who was not even involved in the process but rather conducted a review after the DOE's refund request. There was significant testimony and argument that Ms. Sheppard did not rely upon the designated Cadwalader contact listed on the first page of the grant application, Gail Dubin. That is of no consequence for several reasons. The grant application instructions indicated that the contact person should be someone available during the summer. However, there was no evidence introduced at this hearing that Ms. Dubin had superior knowledge with regard to WSR start-up grants or grant writing in general or that she was the only individual authorized to make any revisions. If she was the only individual authorized to make revisions, it was the responsibility of Ms. Turnstall as principal to advise Ms. Sheppard of that. Principal Tunstall's name was listed on the application and she was clearly available to Ms. Sheppard during the summer. Ms.

Tunstall did not testify that she told Ms. Sheppard that she was not authorized to prepare revisions. In addition, the *Implementation Regulations* and the *Urban Education Reform Regulations* clearly establish the role of the school principal in the budgeting process. And although Ms. Tunstall testified that Ms. Sheppard advised her she would seek to ascertain if the original application for the purchase of 25 laptop computers could be approved instead, that is hearsay testimony not supported by the residuum rule *N.J.A.C.* 1:1-15.5. The school principal and SMT chairperson Juda Winget were responsible for communicating with the Chief School Administrator at all times. They did not notify him of the revisions or the possibility the DOE may still approve the purchase of 25 laptops.

Petitioner relies upon a prior regulation, *N.J.A.C.* 6:20-2A.2(i)2 for the premise that the verbal request and approval process utilized by the DOE did not permit the district BOE from maintaining detail budgets for state grants along with authorized revisions on file in its business office as required. However, responsibility ultimately fell upon the principal of the school who was an active participant in the revisions of the grant application as a member of the SMT and as principal to advise her chief school administrator and Board of the revisions that had been requested. The resolution of the within matter does not rest upon credibility determinations. All of the witnesses were credible. Mr. Wyns' testimony of the post-expenditure investigation on his part was not relevant. Ms. Tunstall was a credible witness. It was the first time she was involved in a grant application process and may have been overwhelmed. That, however, does not diminish her responsibility in this matter.

DECISION AND ORDER

Based upon the forgoing I **FIND** and **CONCLUDE** that the petitioners have not met the burden of proof of demonstrating why they should not be required to refund $44,000 in disallowed costs from the WSR incentive grant for fiscal year 2000. I hereby **AFFIRM** the DOE's request for reimbursement of $44,000 of disallowed funds, the expenditure of which was not consistent with the approved grant application. Petitioners are hereby **ORDERED** to reimburse the Department of Education $44,000.00.

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

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

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

March 16, 2005
DATE

ANA C. VISCOMI, ALJ

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

March 16, 2005
DATE

Mailed to Parties:

MAR 22 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ACV/mamf

WITNESS

For petitioner

Gloria Tunstall

Melvin Wyns

For respondent

Susan Martz

EXHIBITS

For petitioner

P-1 October 1, 2001 correspondence Wyns to Martz

P-2 January 2, 2002 Martz to Wyns

P-3 December 7, 2001 correspondence Wyns to Martz

For respondent

NONE

JOINT EXHIBITS

J-1 WSR Incentive Grant Application

J-2 Cadwalader application for grant

J-3 DOE checklist for reviewing and approving application

J-4 Handwritten revision to activity plan and budget detail for grant

J-5 Notification of grant award

J-6 Grant acceptance certificate

J-7 Cadwalader WSR Startup Grant final report

J-8 Handwritten revisions reflecting fax to central office dated July 29, 1999

Palmeri

From: Heredia, Cris [cris.heredia@doe.state.nj.us]
Sent: Thursday, March 17, 2005 10:03 AM
To: Palmeri
Subject: RE: EDU 2156-02 ID

What is wrong with the first decision of Trenton BOE v Librera & NJ DOE?

-----Original Message-----
From: Palmeri [mailto:Palmeri@oal.state.nj.us]
Sent: Thursday, March 17, 2005 9:20 AM
To: EDU
Subject: EDU 2156-02 ID

184-05

OAL DKT. NO. EDU 7964-04
AGENCY DKT. NO. 231-7/04

O.F. ON BEHALF OF MINOR CHILDREN, C.F., S.F. AND K.F.,

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, : DECISION

RESPONDENT. :

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

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating Dr. Edward Kliszus, Superintendent, to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Dr. Kliszus to sign on behalf of the Board. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/19/05

Date of Mailing: 5/20/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07964-04

AGENCY REF.NO.231-7/04

O.F., ON BEHALF OF MINOR CHILDREN, C.F., S.F. AND K.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLVILLE, ESSEX COUNTY,

Respondent.

Felix Lopez Montalvo, Esq., for petitioner

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

Record Closed: March 3, 2005 Decided: April 25, 2005

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on August 17, 2004 for determination as a contested case. A hearing scheduled for December 23, 2004 was adjourned by the respondent due to the unavailability of essential witnesses. The record opened on February 9, 2005 and the matter was continued to March 3, 2005.

However, on March 2, 2005 the parties were able to resolve the matter. The parties submitted the attached signed Settlement Agreement on April 21, 2005. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

April 25, 2005
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

5/4/05
DATE

DEPARTMENT OF EDUCATION

MAY 06 2005
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

LAW OFFICES

ROBERT A. GACCIONE
FRANK POMACO
ANTHONY F. MALANGA, JR. ♦
DENNIS E. GAGLIONE
ALDO DiTROLIO

LESLIE W. FINCH
OF COUNSEL
(1972-2000)

GACCIONE, POMACO & MALANGA
A PROFESSIONAL CORPORATION
524 UNION AVENUE
P.O. BOX 96
BELLEVILLE, NEW JERSEY 07109
(973) 759-2807
TELEFAX: (973) 759-6968
TELEFAX: (973) 759-7717

MARK A.WENCZEL
JOSEPH A. DEFURIA ▲
ROBERT J. PANSULLA ▲
MICHAEL C. SULLIVAN
ANTHONY N. GAETA■

♦ CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
▲ MEMBER OF PENNSYLVANIA BAR
■ MEMBER OF NEW YORK BAR

April 19, 2005

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 APR 21 P 1:26

Honorable Jesse H. Strauss, A.L.J.
33 Washington Street
Newark, New Jersey 07102-3011

Re: O.F. o/b/o C.F., S.F. and K.F. v. Township of Belleville Board of Education
OAL Docket No. EDUOS-07964-2004N

Dear Judge Strauss:

Enclosed please find original and copy of Settlement Agreement executed by the parties in the above-referenced matter.

If the Settlement Agreement meets with Your Honor's approval, please enter an order approving same.

Respectfully,
GACCIONE, POMACO & MALANGA, P.C.

BY: _____
MARK A. WENCZEL

MAW:dk
Enc.
Cc: Felix Lopez Montalvo, Esq.
Dr. Edward Kliszus, Superintendent

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2005 APR 21 P 1:26

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F., Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04 **SETTLEMENT AGREEMENT**

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent
Dated: 4/13/5

_____
OSWALDO FLORES
Dated: 4/4/05

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 APR 21 P 1:26

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F., Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04 **SETTLEMENT AGREEMENT**

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent
Dated: 4/13/5

_____
OSWALDO FLORES
Dated: 4/4/05

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 APR 21 P 1:26

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F., Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04 **SETTLEMENT AGREEMENT**

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent

Dated: 4/13/5

_____
OSWALDO FLORES

Dated: 4/4/05

RECEIVED
STATE OF NEW JERSEY
OFF. OF ADMIN. LAW
2005 APR 21 P 1:26

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F.,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04
Petitioner,	
v.	
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	**SETTLEMENT AGREEMENT**
Respondent.	

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent

Dated: 4/13/5

_____
OSWALDO FLORES

Dated: 4/4/05

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 APR 21 P 1:26

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F.,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04
Petitioner,	
v.	
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	**SETTLEMENT AGREEMENT**
Respondent.	

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent

Dated: 4/13/5

_____
OSWALDO FLORES

Dated: 4/4/05

185-05

ADAM DRAPCZUK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that the Board violated *N.J.S.A.* 18A:17-15, *et seq.*, by giving untimely notice of nonrenewal of the petitioner's employment contract as Chief School Administrator with the Winfield Township Board of Education, and maintained that, by virtue of the Board's improper non-renewal action, he was reemployed for the period from July 1, 2002 through June 30, 2006.

The ALJ identified the pivotal question in this matter to be what constitutes a "final order, ruling or other action by the district board of education" as contemplated by N.J.A.C. 6A:3-1.3(d), and therefore whether either the respondent Board's action by letter dated April 24, 2001, or by formal board resolution on September 18, 2001, commenced the 90-day period for petitioner to appeal the Board's action to not renew his employment contract. The ALJ found that respondent Board provided adequate notice to petitioner, by letter dated April 24, 2001, that the Board intended not to renew his contract, and that the Board's resolution in September was a formality that confirmed their prior action. The ALJ concluded that: there are no disputed facts; the 90-day period for petitioner to appeal the Board's action commenced on April 24, 2001; and the petitioner's appeal exceeded the 90-day period for filing. The ALJ granted summary decision to respondent Board, and dismissed the instant petition.

Upon a thorough and independent review of the record, the Commissioner rejects the ALJ's conclusion that the petition was untimely filed, and finds that: the petitioner had no cause of action to pursue a claim in this matter prior to July 1, 2001; the 90-day appeal period must be calculated from that date; and the instant petition was timely filed. In so determining, the Commissioner emphasizes that the underlying issue is not whether the April letter constituted "sufficient notice," but whether the Board did, in fact, make a lawful determination of nonrenewal. Accordingly, the Commissioner remands the matter to the OAL for an expedited hearing to consider testimony surrounding the issuance of the April 2001 letter and the event or action which prompted the Board's ratification of the contents of that letter in September 2001, and for a legal determination as to whether the Board's actions in this matter constituted formal action in conformity with the Open Public Meetings Act, *N.J.S.A.* 18A:17-20.1, and other applicable education law so as to constitute a lawful determination of nonrenewal of which petitioner was duly noticed.

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 20, 2005

OAL DKT. NO. EDU 8101-01
AGENCY DKT. NO. 133-4/01

ADAM DRAPCZUK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Winfield Township Board of Education's (Board) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

Upon a thorough and independent review of the record in this matter, the Commissioner rejects the Administrative Law Judge's conclusion that the within appeal was untimely filed. In so concluding, the Commissioner finds that petitioner had no cause of action to pursue a claim in this matter prior to July 1, 2001 for the reasons set forth below.

Assuming, *arguendo*, that the April 24, 2001 letter from the president and vice-president of the Board constituted official Board action in conformity with the Open Public Meetings Act, *N.J.S.A.* 18A:17-20.1 and applicable education law, the sole claim which could be triggered by that letter would be one of wrongful termination on statutorily or constitutionally proscribed grounds. That, however, is not the claim which has been asserted herein. Rather,

petitioner asserts that, notwithstanding the letter of April 24, 2001, no formal action was taken to determine to nonrenew his employment. As stated by petitioner in his certification:

> I was notified by letter from the Board President and Vice-President, that I should expect that my contract would not be renewed beyond its June 30, 2002 expiration date; however, I waited for the full Board to take action on this matter. On many occasions the Board President had issued directives to me, that other board members were not aware of, and had assumed authority over matters that were not authorized by the Board. *** (Petitioner's Certification at 1, No. 2)

Because the Board could have acted at any time prior to and including June 30, 2001 to correct any alleged deficiencies in its notification or determination of nonrenewal, the Commissioner finds that the earliest date that petitioner could have asserted a viable claim that his contract was renewed by operation of *N.J.S.A.* 18A:17-20.1 was July 1, 2001.[1] In that petitioner's appeal was filed on September 28, 2001, well within the 90-day time limitation set forth in *N.J.A.C.* 6A:3-1.3(d), therefore, the Commissioner concludes that the petition of appeal in this matter was timely filed. In so determining, the Commissioner emphasizes that the underlying issue in this matter is not whether the April 24, 2001 letter constituted "sufficient notice," but whether -- in the sense discussed in the *Kaprow* decision upon which the Board and the ALJ so heavily rely -- the Board did, in fact, make a *lawful determination* of nonrenewal.

Accordingly, this matter is hereby remanded to the OAL for an expedited hearing for consideration of testimony surrounding both the issuance of the April 24, 2001 letter and the event or action which prompted the Board to ratify the contents of the April 24 letter on September 18, 2001, and for a legal determination as to whether the Board's actions in this

[1] The Commissioner observes there is nothing in the record explaining what event or action prompted the Board to adopt a resolution on September 18, 2001 ratifying the contents of the April 14, 2001 letter.

matter constituted formal action in conformity with the Open Public Meetings Act, *N.J.S.A.* 18A:17-20.1, and other applicable education law so as to constitute a lawful determination of nonrenewal of which petitioner was duly noticed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/05

Date of Mailing: 5/23/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8101-01
AGENCY DKT. NO. 133-4/03

ADAM DRAPCZUK,
Petitioner,
v.
BOARD OF EDUCATION OF WINFIELD TOWNSHIP,
UNION COUNTY,
Respondent.

Melissa Vance, Esq., for petitioner

Mark A. Tabakin, Esq., and **Margaret Miller**, Esq., for respondent
(Weiner Lesniak, attorneys)

Record Closed: February 23, 2005 Decided: April 6, 2005

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Adam Drapczuk, a chief school administrator, contends that respondent Board of Education of the Township of Winfield's action to nonrenew his employment contract occurred on September 18, 2001, more than two months beyond

the deadline of June 30, 2001. Petitioner maintains that he is reemployed in this position from July 1, 2002, to June 30, 2006.

The Board argues that on April 24, 2001, it properly took action to nonrenew petitioner's contract. Therefore, petitioner's appeal on September 27, 2001, is untimely and the petition must be dismissed.

On November 16, 2001, the matter was transmitted to the Office of Administrative Law (OAL) pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for October 3 and 7, 2002. On September 30, 2002, the parties requested an adjournment to discuss settlement. The parties did not settle the matter and informed the undersigned that they intended to file cross-motions for summary decision. The record remained open to allow the parties to submit briefs on the cross-motions. Inadvertently, due to administrative oversight, the record remained open and the ruling on the motions was protracted. Upon receipt of correspondence from the parties regarding the status of the matter, the undersigned reviewed the documents and closed the record on February 23, 2005.

FACTS

The relevant facts are undisputed. I **FIND**:

1. Petitioner Adam E. Drapczuk and the Board of Education of the Township of Winfield, Union County, entered into a contract of employment to employ petitioner in the position of chief school administrator.

2. August 17, 1998, to June 30, 2002, was the duration of Drapczuk's employment contract.

3. Pursuant to the Open Public Meetings Act the Board informed Drapczuk that it would discuss his employment position at special Board of Education meetings on December 12, 2000, January 23, 2001, March 20, 2001, and April 16, 2001. Each

notice included the following statement: "The purpose of the meeting is to discuss your evaluation of performance for the present school year. The meeting will be held in the School Library, starting at 7:30 pm. You may request in writing that you would like this issue to be discussed in public."

4. A letter to Drapczuk dated April 24, 2001, and signed by the president and vice-president of the Board states, "The Winfield Board of Education, with offices located at Gulfstream Avenue, in the Township of Winfield, will not be renewing your employment contract when your present contract expires on June 30, 2002."

5. Drapczuk received the letter dated April 24, 2001.

6. On September 18, 2001, the Board passed the following resolution:

> **BE IT RESOLVED** that the Winfield Board of Education hereby ratifies its earlier decision not to renew the employment contract for its Chief School Administrator, Adam Drapczuk, when said contract expires on June 30, 2002, as discussed with Mr. Drapczuk in Executive Session during April of 2001 and confirmed in writing on April 24, 2001.

ISSUE

The issue is whether the Board's action on April 24, 2001, or September 18, 2001, commenced the 90-day period for petitioner to appeal the Board's action to not renew his employment contract.

ARGUMENTS

Petitioner contends that the letter dated April 24, 2001, signed by the Board's president and vice president, absent a vote of the entire Board, does not constitute action or decision of the Board for the purposes of the 90-day rule. Rather, the Board's vote on September 18, 2001, which adopted the contents of the letter, triggered the 90-

day period. Thus, petitioner maintains that he timely appealed the Board's action. Petitioner relies on several school law decisions: *M.W. v. Bd. of Educ. of Freehold Reg. High Sch.*, 1975 *S.L.D.* 127, *aff'd*, 1975 *S.L.D.* 137 (State Board affirmed the hearing officer's determination that a decision, in caucus session, to expel a student was not made in public session, pursuant to *N.J.S.A.* 18A:10-6); *Migliaccio v. Bd. of Educ. of Paterson*, 1990 *S.L.D.* 543 (no single board member may speak for the board); *Dorrington v. North Bergen Bd. of Educ.*, 1982 *S.L.D.* 247 (an employee may not rely on the promises or actions of individual board members); *Syversten v. Scotch Plains-Fanwood Bd. of Educ.*, 92 *N.J.A.R.*2d (EDU) 251, *aff'd*, 92 *N.J.A.R.*2d 393, *aff'd*, No. A-5928-91 (App. Div. 1993) (letter sent by the board president was not a formal board action because the full board had not ratified the contents of the letter).

Petitioner further avers that the Board never took action in "public" or "private" session "to authorize the board president to issue the written notice of nonrenewal." Petitioner's Brief at 2. Moreover, the certifications by Board members do not reference "a board meeting, private or public, at which the board members authorized, by vote, the board president to notify the petitioner of its decision." *Ibid.* Thus, petitioner maintains that the board took no action in April from which to apply the 90-day rule.

Respondent argues that its letter dated April 24, 2001, was sufficient to start the 90-day limitation to appeal the Board's action. Actual knowledge of the Board's intent to terminate is all that is necessary. Thus, on April 24, 2001, petitioner knew, or should have known, that his contract was not to be renewed when he received the letter. The Board relies on *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993). In *Kaprow* the Court stated that hearing from a board secretary that the board had created and filled two positions in which Kaprow claimed tenure rights was adequate notice.

> That notice, although it was unofficial and informal, was sufficient to trigger the ninety-day limitations period. It is clear that Kaprow learned that the Local Board had in fact taken final and formal action. Kaprow obviously believed that his tenured status entitled him to one or both of those positions under *N.J.S.A.* 18A:28-12 and the notice he had received was adequate to enable him to pursue his claim.
>
> [131 *N.J.* at 588.]

Respondent further relies on the certification of Barbara Baker, Board president, which states in part:

> During the December 12, 2000 meeting, the board reviewed and discussed Drapczuk's performance evaluations and unanimously decided not to offer Drapczuk continued employment with the District. Although the Board determined at its December 12, 2000 meeting that it would not be renewing Drapczuk's contract, the Board did not immediately notify petitioner of its decision because the Board did not want to advise Drapczuk prior to the Christmas Holiday that he would not be rehired after the upcoming school year.
>
> On January 19, 2001, petitioner was forwarded a second written notice advising him that the board intended to discuss his job performance and continued employment at its regular Board of Education meeting being held on January 23, 2001.
>
> Following the January meeting of the Board, the Board began negotiating with petitioner in an attempt to effectuate a buy-out of the remainder of his contract.
>
> Drapczuk refused to accept the Board's offer of a buyout of his contract, advising the board that he wished to continue his employment for the remainder of the term of his contract.
>
> Once Drapczuk rejected the buy-out, the Board began undertaking action to non-renew Drapczuk's employment contract.
>
> On March 15, 2001, petitioner was served with a third written notice advising him that the Board again intended to discuss his performance issues and his continued employment with the Board at its regular meeting scheduled on March 20, 2001.
>
> Thereafter, on April 5, 2001, petitioner was served with another notice advising him that the Board intended to discuss his employment with the Board at its regularly scheduled meeting to be held on April 16, 2001. It was at the meeting that the Board authorized its President to issue the non-renewal letter.
>
> During the Executive Session of each of its meetings held on December 12, 2000, January 23, 2001, March 20, 2001

and April 16, 2001, the entire Board discussed Drapczuk's unsatisfactory job performance, and by way of consensus, unanimously agreed that it would not offer Drapczuk continued employment after his current term expired.

By letter dated April 24, 2001, Drapczuk was advised of the Board's decision to non-renew his Contract of Employment.

Prior to adopting the Resolution ratifying its previous decision to not renew Drapczuk's contract, the Board did not act in public as such discussions involved a personnel matter properly discussed in Executive Session.

Moreover, despite being advised of his right to have his employment discussed during the public sessions of the Board's meetings, Drapczuk failed to take any action to compel such discussions in public.

DISCUSSION

The "90-day rule" provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [*N.J.A.C.* 6A:3-1.3(d).]

"Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow, supra*, 131 *N.J.* at 587. Thus, I have carefully considered the time line of events and the facts to determine if the petition in the instant matter was filed timely in accordance with *N.J.A.C.* 6A:3-1.3(d).

In *Kaprow*, the New Jersey Supreme Court held that the Commissioner and the State Board have the authority to establish a time limitation for the resolution of disputes arising under the school laws. The Court also addressed the public policy reasons behind the 90-day rule:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.
>
> [131 *N.J.* at 582.]

See also Nissman v. Long Beach Island Bd. of Educ., 272 *N.J. Super.* 373, 380 (App. Div.), *certif. denied*, 137 *N.J.* 315 (1994) ("What is important is that the Local Board had the right to know within 90 days whether its action was going to be challenged."). Thus, *N.J.A.C.* 6A:3-1.3(d) represents a fair and necessary requirement for the proper and efficient resolution of disputes arising under school laws. *Kaprow, supra*, 131 *N.J.* at 582.

Petitioner acknowledges receipt of the letter dated April 24, 2001, signed by the president and vice president of the Board, which states, "The Winfield Board of Education, with offices located at Gulfstream Avenue, in the Township of Winfield, will not be renewing your employment contract when your present contract expires on June 30, 2002." However, petitioner sought a formal vote, "in public or private," by the Board to authenticate the notice of renewal dated April 24, 2001. Thus, petitioner maintains that he timely filed his petition under the 90-day rule. Moreover, his continued employment is covered under *N.J.S.A.* 18A:17-20.1, which provides for reappointment of superintendents and for boards declining to reappoint superintendents. Essentially, at the conclusion of the term of the contract, the superintendent shall be deemed reappointed unless either: "a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. at least one year prior to the expiration of the first or any subsequent contract the board shall notify the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term."

I have reviewed the documents and the parties' certifications. Petitioner conceded in his certification, "I was notified by letter from the Board President and Vice President, that I should expect that my contract would not be renewed beyond its June 30, 2002, expiration date; however, I waited for the full Board to take action on this matter."

Board member Kathleen Dooley was present at the meetings held on December 12, 2000, January 23, 2001, March 20, 2001, and April 16, 2001. Dooley states in her certification, "The entire Board discussed Drapczuk's unsatisfactory job performance and his continued employment with the Board. As a result of these discussions, the Board unanimously agreed that it would not renew Drapczuk's employment contract." Similar statements were contained in certifications by other Board members, including Fred Viteka, Joyce Reilly, Robert Stuck, Florence Marsden, Robert Heuser, Tim Heuser, and Ronald Hade. Moreover, Board member Ryan Carter certified that at the April 12, 2001 meeting, the Board directed its president to notify petitioner that his contract would not be renewed.

Based on the undisputed facts presented in the parties' motion papers, I reject as unsupported petitioner's claims that the final act of the respondent occurred on September 18, 2001. Indeed, petitioner did not challenge the statements contained in the Board members' certifications. Consequently, after the Board discussed petitioner's performance "the Board unanimously agreed that it would not renew Drapczuk's employment contract." The pivotal question is what constitutes a "final order, ruling or other action by the district board of education" as contemplated by *N.J.A.C.* 6A:3-1.3(d)? I am persuaded by the Board's argument that by letter of April 24, 2001, the Board provided adequate notice to Drapczuk that the Board intended not to renew the contract.

The public policy, which favors providing school districts with a measure of repose, must be balanced with petitioner's right to notice that the school board has taken a position adverse to his employment. For example, in *Kaprow*, a secretary of

the respondent board of education notified the petitioner, an assistant superintendent for administrative services who had been terminated in a reduction of force, that other appointees had assumed positions for which the tenured Kaprow asserted he was qualified. The Court held that such informal notice satisfied the "notice of a final order, ruling or other action" by the respondent, as required by *N.J.A.C.* 6A:3-1.3(d). 131 *N.J.* at 588. The Court also stated:

> 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. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. . . .
>
> . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to him or her]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48, 120 *A.*2d 721 (1956).
>
> [*Id.* at 587 (citations omitted).]

Here, after discussing petitioner's performance, the Board directed Baker to write the letter to petitioner and inform him that his contract would not be renewed. Although the directive was not by formal motion or resolution, under *Kaprow* notice without formal action of the Board may be adequate because it was information that the petitioner had a right to know and that the Board had a duty to communicate. The Board's resolution on September 18, 2001, was a mere formality that confirmed prior action as described in the letter dated April 24, 2001. The 90-day requirement has been strictly followed and applied almost without exception. Petitioner offered no reasonable support for an exception to the rule.

Summary Decision

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate

> 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.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue of material fact requiring a trial, the party objecting to the motion must present evidence showing that there is such an issue. If the party objecting fails to show such an issue, the motion may be granted.

Based on the whole of the record, I **CONCLUDE** that there are no disputed facts.

Further, I **CONCLUDE** that the Board's action on April 24, 2001, commenced the 90-day period for petitioner to appeal the Board's action to not renew his employment contract.

Further, I **CONCLUDE** that petitioner's appeal exceeded the 90-day period for filing. Therefore, the petition is untimely.

ORDER

It is **ORDERED** that summary decision for respondent Board of Education of Winfield Township, Union County, be **GRANTED**.

It is **ORDERED** that the petition of Adam Drapczuk be **DISMISSED**.

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

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

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

April 6, 2005
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

4-8-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE DENIAL OF THE :

ISSUANCE OF A TEACHING CERTIFICATE : COMMISSIONER OF EDUCATION

TO WILLIAM TIERNEY. : DECISION

SYNOPSIS

Petitioner appealed the decision of the respondent State Board of Examiners (SBE) to deny reinstatement of his Secondary School Teacher of Science Certificate following voluntary surrender of his certificates as part of a settlement agreement to resolve tenure charges against him, and subsequent revocation by the State Board of Examiners. Petitioner requested reinstatement of his former teaching certificate following rehabilitation pursuant to *N.J.A.C.* 6:11-3.6(g), the regulation in effect at the time the petitioner filed his appeal.

The ALJ denied the petitioner's motion for summary decision, for the following reasons: 1) that regulations in effect at the time of the petitioner's application govern this matter, but that such regulations permit the SBE to refuse to reinstate a certificate after affording the applicant an opportunity to be heard; 2) that the petitioner cannot apply for a new Secondary School Teacher of Science certificate because the SBE can only issue endorsements authorized under the current regulations; 3) petitioner cannot receive a new science endorsement because current regulations require that at least four years must have passed since the effective date of the revocation of the previous certificate; and 4) pursuant to *N.J.A.C.* 6A:9-17.10(c)(1), the SBE is not allowed to issue any new certificate to petitioner because he relinquished his certificates pursuant to the settlement of a tenure action against him. The ALJ granted respondent's cross motion for summary decision, and ordered the petitioner's appeal dismissed.

Upon a thorough and independent review of the record in this matter, including the Initial Decision and the parties' exception arguments, the Commissioner rejects the ALJ's analysis and conclusions and grants summary judgment to the petitioner. In so deciding, the Commissioner emphasizes that the governing regulation clearly provides for reinstatement of a revoked certificate. Moreover, there are many individuals teaching under Secondary School Teacher of Science certificates issued in the 1970's and 1980's who have *not* been required to update their licensing by applying for new certificates under new regulations. Therefore, the SBE's conclusion with respect to the petitioner's application for reinstatement of his certificate was inequitable and contrary to *N.J.A.C.* 6:11-3.6(g).

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 24, 2005

OAL DKT. NO. EDU 9368-03
AGENCY DKT. NO. 319-9/03

IN THE MATTER OF THE DENIAL OF THE	:	
ISSUANCE OF A TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
TO WILLIAM TIERNEY.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties submitted exceptions in accordance with *N.J.A.C.* 1:1-18.4, which were duly considered by the Commissioner in reaching his determination.

In his exceptions, petitioner points out that the facts in this matter are not in dispute and argues that the regulation governing reinstatement of revoked teaching certificates at the time he made his initial request for reinstatement, *N.J.A.C.* 6:11-3.6(g), is controlling in this matter. (Petitioner's Exceptions at 1) In support thereof, petitioner submits that *N.J.A.C.* 6:11-3.6(g) was in effect at the time the State Board of Examiners (SBE) issued its decision of November 25, 2002, wherein it was specifically stated that petitioner was "subject to the current certification requirements." (*Id.* at 1-2)

Petitioner avers that *N.J.A.C.* 6:11-3.6(g) states that it is the revoked certificate that is to be reinstated and that the courts have held that clear and unambiguous statutes and regulations must be given their plain meaning. (*Id.* at 2) However, notwithstanding the Administrative Law Judge's (ALJ) conclusion that the regulations in effect at the time of petitioner's application governed in this matter, petitioner asserts, the ALJ "construed the regulation contrary to all common sense" and found that once a petitioner has demonstrated rehabilitation, the SBE then has "the discretion to determine whether the rehabilitation is worthy

of reinstatement." (*Id.* at 2-3) Petitioner points out that this bifurcation does not appear anywhere in the statute and contends the ALJ's interpretation that there are two types of rehabilitations, one authorizing the reinstatement of revoked certificates and another which mandates that the teacher take steps to apply for a new certificate, was not even urged by the SBE. (*Id.* at 3)

Petitioner submits that the only issue before the Commissioner is the construction of *N.J.A.C.* 6:11-3.6(g), the regulation which governed reinstatement of revoked teaching certificates at the time petitioner made his request. Citing *Eastampton Center v. Planning Board of the Township of Eastampton*, 354 *N.J. Super.* 171, 196-97 (App. Div. 2002) and *Kruvant v. Mayor and Council of Cedar Grove*, 82 *N.J.* 435, 440 (1980), petitioner asserts that the time-of-decision rule is to be narrowly construed and only applied when its modification is intended to be retroactive to pending cases and points out that the courts have stated that the equities to the parties must be balanced in applying the time-of-decision rule as the ultimate objective is fairness to both the public and the individual parties. (*Id.* at 4) Petitioner avers that the time-of-decision rule should not apply in this instance because, *inter alia*, there is nothing in the regulatory scheme which indicates that the regulation was intended to be applied retroactively and such application would be a disservice to petitioner, who submitted appropriate evidence of rehabilitation, which was accepted by the SBE as proof of his rehabilitation. (*Ibid.*) Petitioner thus concludes that the new regulation, which was not in effect at the time he submitted his proof of rehabilitation, should not now apply. (*Ibid.*) Petitioner, therefore, submits that the ALJ's determination should be rejected and that his revoked certificate should be reinstated as mandated by the regulation in effect in November 2002, and even as late as April 2003, when the SBE made its second determination in this matter. (*Id.* at 5)

In its exceptions, the SBE notes that the ALJ found that the SBE was not required to reinstate petitioner's revoked certificate in that the regulation in place at the time petitioner

applied for certification after revocation did not require the SBE to automatically reinstate a revoked certificate once rehabilitation had been established. (SBE Exceptions at 1-2) Notwithstanding the ALJ's conclusion that the time of decision rule was inapplicable and the matter was thus subject to the regulations in place at the time of petitioner's application, the SBE points out that the ALJ then decided this matter as if governed by the current regulations. (*Id.* at 2) Upon analysis under the current regulations, the ALJ found that a revoked certificate cannot be reinstated, but an individual may apply for a new certificate. (*Ibid.*) The SBE further observes that the ALJ also determined that petitioner was not eligible for a Biological Science endorsement, the equivalent of a Secondary School Teacher of Science Certificate under the current regulations, because the requisite time since revocation had not passed, and that, moreover, petitioner is ineligible for a new certificate, pursuant to *N.J.A.C.* 6A:9-17.10(c), in that his forfeiture was part of a settlement of tenure proceedings. (*Id.* at 2-3)

Since the conclusions in the Initial Decision were based on two different sets of regulations, the SBE states that its purpose in submitting exceptions is to clarify its position should the matter be decided upon the regulations in effect at the time petitioner applied for certification upon revocation. (*Id.* at 3) In this regard, the SBE argues, *inter alia*, that the language in *N.J.A.C.* 6:11-3.6(g) does not mandate reinstatement of a revoked certificate upon proof of rehabilitation, claiming that the phrase "without providing the petitioner an opportunity to be heard," simply qualifies the language "shall not refuse to reinstate a revoked certificate" and, thus, the only requirement is that the SBE provide an individual an opportunity to be heard. (*Id.* at 4, 6) The SBE avers that it satisfied the requirement specified in the regulation by providing petitioner an opportunity to be heard. (*Id.* at 7)

Additionally, the SBE claims that at the time petitioner applied for a Secondary School Teacher of Science Certificate, its policy, now codified at *N.J.A.C.* 6A:9-17.19(a), was that revocation is a finality and that once a teaching certificate is revoked it no longer exists.

(*Ibid.*) Accordingly, an individual with a revoked certificate was not applying to have the certificate reinstated, but, instead, was considered as applying for a new certificate. (*Ibid.*) Moreover, in this instance the SBE avers, it was not authorized to reinstate petitioner's Secondary School Teacher of Science Certificate because such certification did not exist under the regulations in effect at the time petitioner applied for certification. (*Id.* at 8) *N.J.A.C.* 6:11-6.2 (i-ii), however, authorized an Instructional Certificate with an endorsement for Biological Science, Earth Science and/or Physical Science, and since a holder of an Instructional Certificate with an endorsement for Biological Science can teach biological and general science at any level, petitioner was evaluated for an Instructional Certificate with a Biological Science endorsement. (*Id.* at 8-9) In conclusion, the SBE requests a finding that it properly denied petitioner's request to reinstate his Secondary School Teacher of Science Certificate after it was revoked. (*Id.* at 9)

Upon a thorough and independent review of the record in this matter, including the Initial Decision and the parties' exception arguments, the Commissioner rejects the ALJ's analysis and conclusions and, instead, grants petitioner's motion for summary decision for the reasons set forth below.

Initially, the Commissioner notes that, pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In the instant matter, the parties submitted cross-motions for summary decision, agreeing that there are no material facts in dispute, and the Commissioner has concluded that petitioner is entitled to prevail as a matter of law.

Petitioner herein is appealing a determination by the SBE denying the reinstatement of his Secondary School Teacher of Science Certificate. That certificate, as well as

his Principal/Supervisor and Supervisor certificates, was revoked by the SBE on January 17, 2002 as a result of petitioner's voluntary surrender of his certificates as part of a settlement agreement to resolve tenure charges against him.[1] At its meeting on September 26, 2002, the SBE denied issuance of certification to petitioner, finding that insufficient time had elapsed for rehabilitation since the revocation of his certificates. The SBE subsequently vacated that decision on November 14, 2002, finding that when evaluating petitioner's conduct from the time of the conduct that resulted in tenure charges, instead of the date his certificates had been revoked, petitioner had demonstrated rehabilitation. (SBE decision of November 14, 2002, SBE Brief at 2, dated June 3, 2004 and undated memorandum to the SBE attached as Exhibit A to SBE Brief, dated June 3, 2004) By decision dated April 7, 2003, the SBE notified petitioner of its denial of petitioner's request for a Secondary School Teacher of Science Certificate, explaining that the certificate requested had not been issued since the late 1980's and that the current regulations did not include such certification. However, the SBE also indicated in that decision that petitioner could apply for certification under the current regulations.[2]

In reviewing this matter, it is noted that the threshold issue is which regulation is controlling, *N.J.A.C.* 6:11-3.6(g), the regulation in effect at the time petitioner applied to have his Secondary School Teacher of Science Certificate reinstated and also in effect when the SBE rejected his request to reinstate his certificate, or *N.J.A.C.* 6A:9-17.10, which was promulgated during the pendency of this matter with an effective date of January 20, 2004. Under the circumstances herein where the current regulations do not specify retroactive application, but,

[1] Petitioner was charged with unbecoming conduct, insubordination, incapacity and abandonment of position. (Settlement Agreement at 1) In an affidavit submitted to the SBE, dated February 3, 2003, petitioner acknowledges that he is a recovering alcoholic whose alcoholism interfered with his job performance. (Petitioner's Affidavit at 2, No. 6) Petitioner also asserts that he has a "sobriety date of July 13, 1997," explaining that he has not had a drink since that date and continues to attend AA meetings and to speak publicly about intoxication. (*Id.* at 3, No. 11)

[2] As previously indicated, *N.J.A.C.* 6:11-6.2 (i-ii) authorized the holder of an Instructional Certificate with a Biological Science endorsement to teach biological science and general science at all levels.

instead, indicate in two separate sections that applicants are subject to certification requirements in effect at the time of the application, and in light of the SBE decision of November 25, 2002 which specifically states that petitioner is subject to "current certification requirements," the Commissioner concludes that *N.J.A.C.* 6:11-3.6(g) governs this matter.

N.J.A.C. 6:11-3.6(g) provides:

> Where an applicant for certification indicates that he or she previously held a certificate issued by the State Board of Examiners, which certificate was revoked, the Board of Examiners may require the applicant to set forth the pertinent circumstances relating to the revocation, and require the applicant to demonstrate to the Board rehabilitation which warrants *reinstatement of the revoked certificate.* The Board shall not refuse *to reinstate a revoked certificate* without providing the petitioner an opportunity to be heard. (emphasis supplied)

Notwithstanding the SBE's claim that its policy at the time of petitioner's application was that revocation is a finality and that once a teaching certificate is revoked it no longer exists, the SBE did not provide a copy of the policy to which it refers nor did it provide any explanation as to how such policy comports with *N.J.A.C.* 6:11-3.6(g), which, as emphasized above, clearly refers to reinstatement of the revoked certificate. In the instant matter, the SBE found petitioner to be rehabilitated, but instead of reinstating his certificate, it forwarded to him an evaluation form to apply for an Instructional Certificate with an endorsement for Biological Science. In that there are many individuals teaching under Secondary School Teacher of Science Certificates issued in the 1970's and 1980's who have not been required to update their certifications by applying for new certificates under new regulations and, given the language in the regulation clearly providing for reinstatement of a revoked certificate, the Commissioner finds the SBE's conclusion with respect to petitioner's application for reinstatement of his certificate both inequitable and contrary to *N.J.A.C.* 6:11-3.6(g).

With respect to the SBE's claim that finding an individual rehabilitated does not mandate the reinstatement[3] of a revoked certificate, the Commissioner finds it instructive to consider the history of *N.J.A.C.* 6:11-3.6(g). When *N.J.A.C.* 6:11-3.6(g) was proposed for amendment in 1990, it originally read:

> Where an applicant for certification indicates that he or she previously held a certificate issued by the State Board of Examiners, which certificate was revoked, the Board of Examiners may require the applicant to set forth the pertinent circumstances relating to the revocation, and require the applicant to demonstrate to the Board rehabilitation *or other evidence that he or she no longer poses a threat to children that are entrusted in his or her care.* (emphasis supplied) 22 *N.J.R.* 1879

As a result of public comment, the language highlighted above was changed prior to adoption by the State Board as noted below:

> COMMENT: Proposed *N.J.A.C.* 6:11-3.6(g) requires persons whose certificates have been revoked to present evidence that "he or she no longer poses a threat to children..." It is not clear that all revocations are the result of the certificate holder having posed a "threat to children."
>
> RESPONSE: The Department agrees and has made the following change upon adoption. [or other evidence that he or she no longer poses a threat to children who are entrusted to his or her care] **which warrants reinstatement of the revoked certificate. The Board shall not refuse to reinstate a revoked certificate without providing the petitioner an opportunity to be heard.** (emphasis in text) 22 *N.J.R.* 3242

Given this information with respect to the evolution of the language that appears in the final sentence of *N.J.A.C.* 6:11-3.6(g), whereby the State Board of Education seeks to ensure both a thorough review of an individual's application for reinstatement of a revoked certificate and protection of the applicant's rights to a review, the Commissioner concludes that *N.J.A.C.* 6:11-3.6(g) provides the authority for the SBE to require the applicant to set forth the circumstances related to his/her revocation and to demonstrate rehabilitation, and emphasizes

[3] As noted above, the SBE claims that the revoked certificate does not exist and, therefore, it characterizes a request for reinstatement as an application for issuance of certification.

that the SBE cannot refuse to reinstate a revoked certificate without providing the individual seeking reinstatement an opportunity to be heard. There is no allegation in the record that petitioner is guilty of a disqualifying offense, pursuant to *N.J.S.A.* 18A:6-7.1, and the SBE has not expressed any concerns arising from the circumstances related to the revocation of petitioner's certificate or his rehabilitation which would preclude the reinstatement of his teaching certification. Moreover, contrary to the SBE's assertion that it does not have the authority to reinstate a certificate that it has not issued since the late 1980's, such authority flows from *N.J.A.C.* 6:11-3.6(g), which was duly promulgated and adopted by the State Board of Education and authorizes the reinstatement of a revoked certificate.

Accordingly, the Commissioner finds that the SBE improperly denied petitioner's request for reinstatement of his Secondary School Teacher of Science Certificate. Summary decision is, therefore, granted to petitioner.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/05

Date of Mailing: 5/24/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION FOR
SUMMARY JUDGMENT
OAL DKT. NO. EDU 9368-03
AGENCY DKT. NO. 319-9/03

IN THE MATTER OF THE DENIAL OF THE ISSUANCE OF A TEACHING CERTIFICATE TO WILLIAM TIERNEY

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, P.C., attorneys)

Cindy Campbell, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorneys)

Record Closed: July 8, 2004 Decided: December 21, 2004

BEFORE: **IRENE JONES**, ALJ

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner, William J. Tierney, appeals the decision of the respondent, State Board of Examiners, (respondent or Board) that denied him a Secondary School Teacher of Science Certificate.

Petitioner's appeal was filed with the respondent on April 21, 2003. On September 3, 2003, the respondent remanded the matter to the Commissioner of

Education finding that the Commissioner had original jurisdiction of any appeal in this matter. On September 8, 2003, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. A prehearing conference was held and the parties agreed to file cross motions for summary decision.

FACTS

Based on the record, I **FIND** the following **FACTS**:

On January 17, 2002, the State Board of Examiners ("Board") voted to revoke the petitioner's endorsements as Secondary School Teacher of Science, Principal/Supervisor and Supervisor.[1] Prior to the revocation, the Petitioner had consented to voluntarily surrender his teaching endorsements to settle pending tenure charges filed against him by the Wayne Board of Education.

On September 26, 2002, the Board denied petitioner's request for "certification after revocation" on the grounds he could not prove rehabilitation because an insufficient amount of time had elapsed since his original endorsements were revoked. On November 14, 2002, however, the Board vacated its September 26th decision finding "that when it considered petitioner's conduct from the time of his inappropriate conduct

---

[1] The terms "certificate" and "endorsement" are often used synonymously in tenure law. Howley v. Ewing Township Bd. of Ed., 6 N.J.A.R. 509, 512 (1982). This, however, is a misuse of terminology and is so common it has become the rule rather than the exception. Ibid. Unfortunately, the regulations further perpetuate the confusion by misusing the terms in the text. See N.J.A.C. 6A:9. The following explains the distinctions between certificates and endorsements:

The Board of Examiners issues a "certificate" permitting an individual to serve as a teaching staff member. N.J.A.C. 6A:9-2.1. There are only three types of certificates: 1) instructional, 2) administrative and 3) educational services. N.J.A.C. 6A:9-5.2.

In addition to the three types of certificates available, the Board of Examiners also issues separate endorsements for each specific subject area a certificate holder is authorized to serve. N.J.A.C. 6A:9-2.1. For example, biological science is a teaching endorsement that attaches to an instructional certificate. N.J.A.C. 6A:9-9.2(a)(5). Endorsements are considered part of the certificate. N.J.A.C. 6A:9-2.1. An educator must hold the appropriate certificate and endorsement for a position. N.J.A.C. 6A:9-5.1–9.1.

It appears that the petitioner retains his instructional certificate, and seeks reinstatement of his science endorsement. This decision applies the correct language concerning certificates and endorsements.

that had resulted in the tenure charges, rather than from the date of revocation, petitioner proved rehabilitation."

On November 25, 2002, the Board advised petitioner that it had vacated its earlier decision, and he was now allowed to apply for teaching endorsements, subject to current requirements.

The Office of Licensure and Credentials ("Office") provided petitioner with an evaluation for a Teacher of Biological Science endorsement. However, on February 12, 2003, petitioner requested that the Board issue him a Secondary School Teacher of Science endorsement.

On April 3, 2003, the Board denied petitioner's request for a Secondary School Teacher of Science endorsement because "that particular [endorsement] had not been issued since the late 1980's, and it is not identified in the current regulations as one that the Office was authorized to issue." Thereafter, by letter dated April 7, 2003, the Board advised petitioner that it considers the revocation final and, once revoked, an education endorsement no longer exists. The letter further advised petitioner that once an endorsement is revoked, the individual is allowed to apply for a new endorsement according to the current requirements.

Petitioner appealed the Board's decision to the State Board of Education. On September 3, 2003, the State Board of Education remanded the matter to the Commissioner of Education for his consideration. The State Board of Education determined that the Commissioner of Education had original jurisdiction to hear any appeal from the Board concerning the denial of the issuance of a teaching endorsement.

ARGUMENT

In support of its motion for summary decision, petitioner argues that the matter is controlled by *N.J.A.C.* 6:11-3.6(g) which provides:

> Where an applicant for certification indicates that he or she previously held a certificate issued by the State Board of Examiners, which certificate was revoked, the Board of Examiners may require the applicant to set forth the pertinent circumstances relating to the revocation, and require the applicant to demonstrate to the Board rehabilitation which warrants reinstatement of the revoked certificate. The Board shall not refuse to reinstate a revoked certificate without providing the petitioner an opportunity to be heard.

Petitioner contends that *N.J.A.C.* 6:11-3.6(g) requires the Board to reinstate a revoked endorsement to an applicant, if one demonstrates rehabilitation. Petitioner places great emphasis on the phrase reinstatement of the revoked certificate, arguing that once rehabilitation is demonstrated, reinstatement is warranted. Petitioner contends that the word "warrant" mandates reinstatement of the revoked endorsement. Further, that reinstatement of a revoked certificate is an automatic consequence of rehabilitation. Here, the record demonstrates that the Board has accepted that petitioner's rehabilitated, and accordingly, the issue is not whether he is entitled to reinstatement, but rather which endorsement he is entitled to have reinstated.

Petitioner further construes that "the Board shall not refuse to reinstate a revoked certificate" as unequivocally mandating the Board to reinstate the endorsement previously revoked.

Finally, petitioner argues he is not required to apply for endorsements under current regulations. In support, petitioner relies on *N.J.A.C.* 6:11-3.6(g) which does not mandate or permit the Board to require petitioner to take a test for any endorsement being issued at the time of the reinstatement. Thus, requiring him to apply for endorsements under current regulations is directly contrary to *N.J.A.C.* 6:11-3.6(g), which entitles him to reinstatement of his original endorsements.

Respondent argues that this matter should not be decided pursuant to *N.J.A.C.* 6:11-3.6(g) because it is no longer effective. The regulations governing endorsements after revocation have been amended and, therefore, the matter is governed by the new regulation, set forth in *N.J.A.C.* 6A:9-17.10(a).

N.J.A.C. 6A:9-17.10(a) states a "certificate that has been revoked for any grounds set forth in this chapter shall not be reinstated." Further, *N.J.A.C.* 6A:9-17.11(a)(3), provides that the Board may accept the relinquishment of all certificates held by an individual without issuance of an order to show cause ... [p]ursuant to a settlement of a tenure proceeding that requires the certificate holder to relinquish his or her certificate(s)." Respondent contends therefore, petitioner cannot have his Secondary School Teacher of Science endorsement reinstated because it was revoked after he voluntarily surrendered it pursuant to the settlement of the tenure charges against him.

Further, respondent asserts that at the time petitioner applied for the Secondary School Teacher of Science endorsement, it was policy to treat revocation as final and, therefore, a revoked endorsement no longer exists. In support, respondent relies on *N.J.A.C.* 6A:9-17.10(a), which provides that "[a]n individual who has had a certificate revoked may file an application for a new certificate with the Board of Examiners." Accordingly, the Board provided petitioner the opportunity to apply for a new Teacher of Biological Science endorsement.

Moreover, respondent further argues that there is no authorization to reinstate the Secondary School Teacher of Science endorsement because the endorsement longer exists under the current regulations. Specifically, *N.J.S.A.* 18A:9-38 grants the Board authority to issue "appropriate certificates ... and such other certificates as it shall be authorized to issue by law." There is no current regulation providing for a Secondary School Teacher of Science endorsement on the Instructional Certificate. Under the present regulations an applicant can obtain a Biological Science endorsement authorizing the holder to teach "biological, environmental and general science in all

public schools." Therefore, the respondent concludes that it is only authorized to issue a new Teacher of Biological Science endorsement.

FINDINGS AND CONCLUSIONS

Petitioner sought reinstatement of his revoked teaching endorsement in 2002. At the time of his request, *N.J.A.C.* 6:11-3.6(g) governed reinstatement of revoked teaching endorsements. While the administrative hearing was pending, however, *N.J.A.C.* 6:11-3.6 was revised and recodified as *N.J.A.C.* 6A:9-17.10, effective January 4, 2004. *See* 35 *N.J.R.* 4352(a) (Oct. 6, 2003); 36 *N.J.R.* 469(a) (Jan. 20, 2004). Accordingly, the threshold issue herein is whether the previous regulations apply pursuant to the presumption against retroactivity, or the current regulations apply pursuant to the "time of decision" rule.

Respondent contends that the Courts have found current law generally applicable for administrative decision-making, when the law changes while a case is pending. *Ziffrin, Inc. v. United States*, 318 *U.S.* 73, 78 (1942); *see also Commissioner v. Peter A. Ladas*, 2004 WL 374375 (N.J. Adm.) (holding the case must be evaluated with reference to the currently effective law because, even though the alleged insurance fraud occurred while the superceded New Jersey Insurance Producer Licensing Act was in effect, the Court issued its decision while the updated New Jersey Insurance Producer Licensing Act of 2001 was in effect.). An administrative agency must apply the law at the time of its decision, "[o]therwise the administrative body would issue orders contrary to the existing legislation." *Ziffrin, supra*, 318 *U.S.* at 78 (holding the Interstate Commerce Commission properly applied the law enacted after the administrative hearing, but before the order was issued, on an application for a permit to continue as a designated contract carrier where the permit was for future acts). An exception to the "time of decision" rule is that a current law may not be applied if it will divest a vested right a party obtained under the prior law. *Riggs v. Long Beach Tp.,* 101 *N.J.* 515, 521 (1986).

In *Landgraf v. USI Film Products*, 511 *U.S.* 244 (1994), the United States Supreme Court examined the distinction between the presumption against retroactivity and the "time of decision" rule. The court found the general presumption against retroactive legislation "deeply rooted in our jurisprudence." *Id.* at 265. It reasoned that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Ibid.* The Court further noted "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Ibid.* The Court found, however, the "time of decision" rule applies when the statute either affects the propriety of prospective relief, or where it clearly states it is to be applied retroactively. *Id.* at 273.

Our Supreme Court described the "time of decision" rule as "a well-established principle that an appellate court on direct review will apply the statute in effect at the time of its decision, at least when the legislature intended that its modification be retroactive to pending cases." *Kruvant v. Mayor & Council of Cedar Grove, 82 N.J. 435, 440 (1980); S&L Assocs., Inc. v. Washington Twp.*, 35 *N.J.* 224, 227 (1961); *Borough of Little ferry v. Bergen County Sewer Auth.*, 9 *N.J.* 536 (1952). The rationale underlying the well-established principle is to effectuate the current policy declared by the legislative body. *Kruvant, supra*, 82 *N.J.* at 440.

In this matter, I **FIND** that the "time of decision" rule does not apply because the current regulations contain no indications of legislative intent to have them apply retroactively to pending cases. In fact, the current regulations declare in two different sections that applicants are subject to certification requirements in effect at the time of the application. *See N.J.A.C.* 6A:9-17.12(d) (stating an individual who voluntarily surrenders a certificate may apply for that certificate "subject to the certification requirements in effect at the time the new application is submitted"); *N.J.A.C.* 6A:9-17.10(b)(1) (stating an individual with a revoked certificate may not receive a new certificate unless the candidate satisfies all criteria "in effect at the time of the application"). This language clearly implies agency intent to have the previous regulations apply to reinstatement applications of certificates revoked prior to the

amendments. Therefore, I **CONCLUDE** that the regulations in effect at the time of Petitioner's application govern this matter.

The regulation in effect at the time of petitioner's application for reinstatement of his revoked science endorsement provides:

> Where an applicant for certification indicates that he or she previously held a certificate issued by the State Board of Examiners, which certificate was revoked, the Board of Examiners may require the applicant to set forth the pertinent circumstances relating to the revocation, and require the applicant to demonstrate to the Board rehabilitation which warrants reinstatement of the revoked certificate. The Board shall not refuse to reinstate a revoked certificate without providing the petitioner an opportunity to be heard.

[*N.J.A.C.* 6:11-3.6(g).]

Contrary to the petitioner's assertion, I am not persuaded that the regulation requires reinstatement of the revoked endorsement once rehabilitation is demonstrated. Instead, it modifies the rehabilitation requirement. The Board may require the applicant to demonstrate the type of rehabilitation that would deserve reinstatement. In other words, a petitioner now has the burden of demonstrating rehabilitation. Once rehabilitation is demonstrated, the Board has the discretion to determine whether the rehabilitation is worthy of reinstatement.

N.J.A.C. 6:11-3.6(g) further provides that the Board "shall not refuse to reinstate a revoked certificate without providing the petitioner an opportunity to be heard." Simply put, the Board may refuse to reinstate a revoked endorsement only after the applicant has first had an opportunity to be heard. The Board cannot refuse to reinstate a revoked certification without a hearing, at which time the applicant can demonstrate that he or she has been rehabilitated.

Petitioner's interpretation of *N.J.A.C.* 6:11-3.6(g) would render some of the language of the regulation worthless. Construing the second sentence of the regulation

as mandating reinstatement of a revoked endorsement renders the modifying phrase "without providing the petitioner an opportunity to be heard" inoperative, superfluous, void or insignificant.

Furthermore, interpreting *N.J.A.C.* 6:11-3.6(g) as a whole invalidates petitioner's argument that the first sentence requires the Board to reinstate a revoked endorsement to an applicant if he/she demonstrates rehabilitation. The second sentence plainly states the Board can refuse to reinstate an endorsement. Therefore, the first sentence cannot mandate reinstatement without contradicting the second sentence. Such a reading would not make sense in the context of the entire regulation.

I **FIND** that the first sentence allows the Board to require petitioner to satisfy the burden of demonstrating rehabilitation, and gives the Board the right to determine whether that rehabilitation is worthy of reinstatement. Even if the applicant demonstrates rehabilitation, I **CONCLUDE** that the regulation permits the Board to refuse to reinstate the endorsement after affording the applicant an opportunity to be heard.

I **FIND** that petitioner is not entitled to reinstatement even if the application were governed by the current regulations. Under the current regulations, the Board may accept the relinquishment of an individual's certificates, without issuance of an order to show cause, pursuant to the settlement of tenure charges requiring the holder to relinquish the certificates. *N.J.A.C.* 6A:9-17.11(a)(3). Acceptance by the Board "shall have the force and effect of a revocation." *N.J.A.C.* 6A:9-17.11(b). Here, the petitioner relinquished his endorsements pursuant to the settlement of a tenure action against him. Therefore, pursuant to *N.J.A.C.* 6A:9-17.11(b), the Board's acceptance of the relinquishment has the force and effect of a revocation of petitioner's endorsements.

Additionally, *N.J.A.C.* 6A:9-17.10(a) provide that "[a] certificate that has been revoked for any grounds set forth in this chapter *shall not be reinstated.*" An individual with a revoked certificate, however, may file an application for a *new certificate* with the Board. *Ibid.* (emphasis added).

I **CONCLUDE** that petitioner cannot apply for a new Secondary School Teacher of Science endorsement because the Board can only issue endorsements authorized under the current regulations. "The board shall issue appropriate certificates ... and such other certificates as it shall be authorized to issue by law." *N.J.S.A.* 18A:6-38. The current regulations authorize the Board to issue a Biological Science endorsement that "authorizes the holder to teach biological, environmental and general science in all public schools" for grades preschool through twelve. *N.J.A.C.* 6A:9-9.2(a)(5)(i). Therefore, the Board is not authorized to issue petitioner a Secondary School Teacher of Science endorsement because that endorsement no longer exists under the current regulations.

The next issue is whether petitioner is eligible for a new Teacher of Biological Science endorsement. *N.J.A.C.* 6A:9-17.10(b) provides that the following conditions must be met:

1. The candidate shall satisfy all criteria for the issuance of the certificate that are in effect at the time of the application for the new certificate;
2. At least four years shall have passed since the effective date of the revocation of the previous certificate;
3. The candidate shall have provided evidence demonstrating rehabilitation for the unbecoming conduct, incompetence, or other cause for the revocation;

I **FIND** that the petitioner fails to satisfy these requirements. While he has demonstrated rehabilitation for the cause of the revocation, it has not been four years since the effective date of the revocation of the previous endorsement. Petitioner's certificate was revoked on January 17, 2002. Therefore, petitioner is not eligible to

receive a new endorsement until 2006. Accordingly, I **CONCLUDE** that petitioner cannot receive a new science endorsement because the required four-year period of has not yet been satisfied.

Moreover, I **FIND** and **CONCLUDE** pursuant to the *N.J.A.C.* 6A:9-17.10(b), the Board "shall not issue a new certificate to any candidate who is ... [o]rdered to forfeit certification as part of a settlement in a tenure or criminal proceeding. *N.J.A.C.* 6A:9-17.10(c)(1). Therefore, pursuant to *N.J.A.C.* 6A:9-17.10(c)(1), the Board is not allowed to issue any new certificate to petitioner because he relinquished his endorsements pursuant to the settlement of a tenure action against him.

Thus, for the foregoing reasons, petitioner's motion for summary decision is hereby **DENIED**.

Respondent's cross motion for summary decision is hereby **GRANTED**.

It is therefore **ORDERED** that petitioner's appeal 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

12/21/04
DATE

Irene Jones
IRENE JONES, ALJ

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

12/21/04
DATE

Mailed to Parties:

DEC 23 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/cdr

M.D.G., on behalf of minor child, C.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that respondent Board permitted an unsafe environment for her daughter, who was allegedly "jumped" on the playground at the Uptown School Complex by five children who received no punishment, notwithstanding Board policy.

The ALJ denied respondent Board's motion to dismiss the petition as moot based on the fact that C.J. is no longer enrolled at the Uptown School Complex, emphasizing that the complaint is viable because it deals with the safety and welfare of children attending Atlantic City Public Schools. The ALJ stated that the sole issue in this matter is whether or not the respondent Board provided a safe environment for the petitioner's daughter while she attended the Board's Uptown School, pursuant to *N.J.S.A.* 18A:37-15, which directs each school district to adopt a policy prohibiting harassment, intimidation or bullying. The ALJ found that the respondent Board's agents and representatives were in violation of *N.J.S.A.* 18A:37-15 when they failed to promptly and thoroughly investigate the alleged incident of harassment and/or intimidation involving C.J. The ALJ ordered that the City of Atlantic City Board of Education comply with the provisions of *N.J.S.A.* 18A:37-15 by conducting staff in-service programs with respect to the requirements of the statute in order to assure that all pupils under the Board's supervision and control will be protected from harassment, intimidation or bullying in the future.

The Commissioner concurs with the ALJ that the Board must take appropriate steps to effectuate full compliance with *N.J.S.A.* 18A:37-15 so as to assure that the children entrusted to its care will be protected from harassment, intimidation or bullying. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition is dismissed.

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

May 26, 2005

OAL DKT. NO. EDU 6450-04
AGENCY DKT. NO. 206-6/04

M.D.G., on behalf of minor child, C.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that the Board must take those steps necessary to effectuate full compliance with *N.J.S.A.* 18A:37-15 so as to assure that the children entrusted to its care will be protected from harassment, intimidation or bullying.

Accordingly, the recommended 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/26/05

Date of Mailing: 5/26/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6450-04

AGENCY DKT. NO. 206-6/04

M.D.G ON BEHALF OF
A MINOR CHILD, C.J.,
Petitioner,

v.

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

M.D.G., petitioner, *pro se*

Samuel D. Lashman, Esquire, for respondent

Record Closed: April 18, 2005 Decided: April 27, 2005

BEFORE **LILLARD E. LAW**, ALJ, T/A:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.D.G., filed a Petition of Appeal before the Commissioner of Education (Commissioner) wherein petitioner asserts that the Board of Education of the City of Atlantic City (Board) has permitted an unsafe environment for her custodian daughter, C.J., who was "jumped" by five pupils at the Board's Uptown School. Petitioner alleges that the five pupils

who committed the offense received no punishment for their actions, in violation of the Board's policy.

The matter was transmitted by the Commissioner to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The hearing was held on April 18, 2005, at the Atlantic City of the OAL. The hearing record closed on April 18, 2005.

ISSUE

The sole issue for determination by this administrative tribunal is whether or not the Board provided a safe environment for petitioner's custodial daughter, C.J., while C.J. attended the Board's Uptown School, pursuant to *N.J.S.A.* 18A:37-5?

MOTION

The Board propounded a motion to dismiss the instant matter on the grounds that the matter is moot. The Board argues that C.J. was withdrawn from the Uptown School by petitioner and now attends another school under the Board's control and, therefore, there is no contested case. The Board's motion is **DENIED** on the theory that the complaint is viable because it deals with the safety and welfare of the children attending the Board's public schools.

FACTUAL DISCUSSION

C.J., who was ten years of age in or about April 2004, was enrolled at the Board's Uptown Complex School. On April 26, 2004, while on the school's playground during the lunch recess, C.J. asserts she was "jumped" by five pupils enrolled at the school. One of those pupils who allegedly attacked C.J. and was the leader of the group is a boy, who is C.J.'s older cousin.

C.J. testified she could not get the attention of the playground supervisor at the time of the altercation because the five children were pulling her. C.J. left the playground, crying, and went to the school's office and told Lakecia Hyman, Assistant Principal, about the attack. C.J.

asserted she had scratches on her arms and her face was red. C.J. admitted she did not go the office of the school nurse and went back to her class after her visit with Ms. Hyman.

Ms. Hyman testified, among other things, that on April 24, 2004, she talked with C.J., after the alleged incident involving C.J. and the five pupils. Ms. Hyman testified she did not observe any injuries on C.J. Ms. Hyman admitted she did not contact the adult responsible for the supervision of the playground on that day to determine whether or not the supervisor had observed the alleged incident. She did, moreover, have the five pupils in her office after C.J. reported the incident. One of the pupils admitted he wanted to intimidate C.J., however, he did not hit C.J. It was reported to Ms. Hyman that C.J. had talked about her cousin and her cousin's mother with other pupils. Ms. Hyman concluded that the incident occurred because C.J. had mentioned things about her cousin to other pupils. Ms. Hyman asserted that the other pupils involved in the incident all agreed that was the cause.

After the incident was reported to Ms. Hyman, she asserted that all of the children involved in the incident were written up, however, none of the five children were suspended from school. She filed a written report the incident with the school principal. It was also agreed that the pupils would avoid contact with C.J. and C.J. would avoid contact with the five pupils.

C.J. testified that after she talked with Ms. Hyman about the incident on April 24, 2004, Ms. Hyman telephoned petitioner and reported the incident. Subsequently, petitioner arrived at the school, very upset, and took C.J. home.

Ms. Hyman stated she would arrange to have a meeting with all of the parents of the pupils involved in the incident. She testified that petitioner did not want to meet with the parents but, rather, petitioner proceeded to file a compliant about the incident with the Atlantic City Police Department. Thereafter, a mediation conference was conducted by the Community Mediation Services, Inc., the Community Justice Institute of the Atlantic City Police Department. All of the parents of the pupils involved in the incident were in attendance.

Subsequent to the mediation conference, petitioner had C.J. removed from the Uptown Complex School and enrolled in another school under the Board's control, where C.J. remains today. Petitioner thereafter filed the herein Petition of Appeal with the Commissioner.

There is conflicting testimony with respect to the incident or incidents. There is a question as to whether the incident occurred on May 24. 2004, or April 24, 2004, to which C.J. testified. However, in her Petition of Appeal, petitioner refers to her action of May 25, 2004, where she arrived at the Atlantic City Police Station to file a complaint about the incident where petitioner alleges that five pupils "jumped" C.J. (See paragraphs # 5 and 6, Petition of Appeal).

There is also conflicting testimony concerning C.J.'s alleged injuries. Ms. Hyman testified she did not observe any injuries to C.J. on April 24, 2004. However, Vernal Vance testified on petitioner's behalf and asserted she observed C.J. with a red face on May 24, 2004, and that C.J. was very emotional and upset about a fight with other pupils. Ms. Vance testified that C.J. told her she had been jumped by the five pupils.

LEGAL ANALYSIS

There is no question that the Board is required to adopt a policy prohibiting harassment, intimidation or bullying on school property. *N.J.S.A.* 18A:37-15a. The law also requires, among other things, that the Board have a procedure for reporting acts of harassment, intimidation or bullying, *N.J.S.A.* 18A:37-15b.(5), and a procedure for a prompt investigation of violations and complaints, *N.J.S.A.* 18A:37-15b.(6). In the instant matter, the facts demonstrate that Ms. Hyman, the Assistant Principal, failed to conduct a prompt and thorough investigation of the alleged incident. She did not inquire of the adult supervisor of the playground where the incident is alleged to have occurred as to what, if anything, was observed. In fact, Ms. Hyman did not even inquire as to the identity of the adult supervisor on duty and admitted on the hearing record she did not know who was assigned as the playground supervisor on the day of the incident.

CONCLUSION

I **CONCLUDE**, therefore, that the Board's agents and representatives were in violation of the statute, *N.J.S.A.* 18A:37-15, when it failed to promptly and thoroughly investigate the alleged incident of harassment and/or intimidation involving pupil C.J. by five identified pupils. The preponderance of the evidence clearly demonstrates that Ms. Hyman failed to follow the statute and investigate the violence reported to her by C.J. Rather, Ms. Hyman agreed with the pupils who are alleged to have committed the acts against C.J., that it was C.J.'s fault when she talked about her cousin with other pupils. A thorough investigation would have revealed the truth.

ORDER

Although there is no immediate remedy readily available to petitioner, it is hereby **ORDERED** that the City of Atlantic City Board of Education comply with the provisions of *N.J.S.A.* 18A:37-15. This may be accomplished by conducting staff in-service programs with respect to the requirements of the statute in order to assure that all pupils under the Board's supervision and control will be protected from harassment, intimidation or bullying in the future. It is imperative that the Board provide a safe environment to all of its pupils; free of harassment, intimidation and/or bullying.

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

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

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

27 April 2005
DATE

Lillard E. Law
LILLARD E. LAW, ALJ, T/A

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

April 27, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 2 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES

For Petitioner:

Vernell Vance

C.J.

For Respondent:

Lakecia Hyman

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

None

192-05

EDUARDO NUNEZ,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning custodian, employed by the Union City Board of Education in March 1998, appealed his disqualification from school employment and termination from his Board position as a result of a 2001 criminal history background check conducted because no record could be found of a prior check upon his initial employment with the district. Petitioner contended that since he did everything required of him and should have been checked at the time of his first employment, the check conducted in 2001 should have been evaluated under the law as it existed prior to June 30, 1998, so as to allow him to demonstrate rehabilitation from his sole disqualifying offense, committed in 1984.

The ALJ found that petitioner should be allowed under the circumstances to demonstrate rehabilitation and ordered the Union City Board of Education to conduct a hearing for this purpose. No order was recommended with respect to petitioner's entitlement to reemployment or back pay.

The Commissioner set aside the Initial Decision, noting numerous errors in the ALJ's fact-finding and conclusions of law, the latter resulting from confusion between the role of the Department and that of the local board of education. Although the Commissioner concurred that petitioner had demonstrated through administrative hearing that he should be afforded an equitable opportunity to demonstrate rehabilitation, he also determined that the ALJ had not made appropriate findings with respect to the Department, which had acted properly in all respects with regard to petitioner's application, and found that the ALJ had ordered relief contrary to law since only the Department and Commissioner, not a local board of education, may deem an applicant qualified for school employment under the criminal history record check statute. The Commissioner remanded the matter for a hearing on petitioner's rehabilitation consistent with the statutory standards in effect prior to June 30, 1998, and directed that, because petitioner had sought reemployment by the Board and back pay notwithstanding that the Board was not named as a party to this matter, if petitioner were found rehabilitated and continued to seek reemployment, the Board must be named as a respondent and further proceedings must be held on the question of petitioner's entitlement, if any, to reemployment and/or back pay under the circumstances.

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 26, 2005

OAL DKT. NO. EDU 3689-02
AGENCY DKT. NO. 57-2/02

EDUARDO NUNEZ,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the recommendations of the Administrative Law Judge (ALJ) were filed by the respondent Department of Education (Department) and by the Union City Board of Education (Board);[1] the Department replied to the latter, while petitioner, in a single submission, replied to both.

In its exceptions, the Department contends that the ALJ erred in finding that it should have considered whether petitioner could demonstrate rehabilitation prior to disqualifying him from school employment. According to the Department, the ALJ mischaracterized the nature of the case, which was an appeal of the Department's determination of disqualification, not a challenge to the legality of petitioner's termination from his employment with the Board; in concluding that petitioner should not have been terminated from employment and directing the Board to conduct a plenary hearing on his rehabilitation, the ALJ both decided an issue not before her and ordered relief improper

[1] Although not a party in this matter, the Board was granted permission to submit exceptions in view of the Initial Decision's recommended Order directing it to hold a hearing, for purposes of assessing rehabilitation, on petitioner's disqualification from school employment.

under the law, first because the operative statute does not and never did grant such authority to local district Boards of education and second because the recommended order directs relief from an entity (the Board) not a party to this matter.[2] (Department's Exceptions at 4-6)

The Department further argues that the Initial Decision must be rejected because the controlling statute mandates automatic disqualification from school employment for persons convicted of specified crimes and makes no provision for relaxation of its effective date, which is when the record check is actually conducted, not the date of an applicant's employment. The Department stresses that, in 1998, due to the overriding need to protect New Jersey's school children from potential harm, the Legislature took the affirmative step of making the disqualification statute stricter and removing its prior provision for demonstration of rehabilitation; this purposeful, substantive change in legislative policy cannot simply be ignored, the Department urges, as it was by the ALJ. (Department's Exceptions at 6-9)

The Department also takes issue with the ALJ's finding that petitioner's criminal history record check application was properly forwarded to and received by the Department in 1998, so that the law in effect at that time—rather than the stricter statute in effect when the Department received petitioner's 2001 application—should control petitioner's disqualification determination. The Department contends that the record contains no substantive evidence whatsoever to support this stated factual finding, and

[2] The Department notes: "Several times throughout the hearing, counsel for petitioner attempted to obscure the difference between the Department of Education, a state agency, and the Union City Board of Education, a local board of education. [The manager of the Department's Criminal History Review Unit] clarified this important distinction as did the Department's post-hearing brief and supplemental letter dated November 6, 2004 (*sic*; actually October 22, 2004). Petitioner chose not to join Union City in this action." (Department's Exceptions at 5, citations to hearing transcript omitted)

notes in particular that petitioner's own witness—the Board administrator responsible for the hiring of non-instructional staff—could not say that he had personal knowledge of petitioner's application being forwarded to the Department, and that no witness or documentation was produced to show that such forwarding was, in fact, accomplished as claimed; whereas the Department, in contrast, produced compelling testimony that it never received a 1998 application from petitioner and that the 2001 submission was the first and only application of which it had any knowledge. Therefore, according to the Department, petitioner's criminal history record check was properly conducted in 2001 under the law applicable at that time. (Department's Exceptions at 9-12)

Finally, the Department contends that, even if, *arguendo*, petitioner is eligible for assessment of rehabilitation under the law in effect at the time his 1998 application was purportedly submitted, petitioner did not present clear and convincing evidence sufficient to meet the standard of the statute as it existed prior to legislative amendment, either in the documentary record or at the OAL hearing where he had the obligation to do so; indeed, petitioner did not even acknowledge the factors specified in that statute, notwithstanding the ALJ's recitation of case law where those factors were fully and carefully considered. Under these circumstances, the Department urges, petitioner is not entitled to another opportunity to demonstrate rehabilitation. (Department's Exceptions at 12-15)[3]

[3] The Department also notes certain factual errors in the Initial Decision, such as the ALJ's statement that the hearing in this matter was conducted on June 17-18, 2004, when in actuality the hearing concluded on the first day and no hearing was held on the second; her statement that petitioner was convicted of a "second degree sale of a controlled dangerous substance" when the record is clear and undisputed that the conviction was for "first degree criminal sale of a controlled dangerous substance in the State of New York;" and her various direct and indirect statements that petitioner was employed and/or terminated by the New Jersey Department of Education. (Department's Exceptions at 1, 2, and 5)

In large measure, the Board joins in the Department's exceptions,[4] additionally taking issue with three further aspects of the Initial Decision. First, the Board contends that the evidence does not support the ALJ's conclusion that petitioner was entirely forthcoming about his prior conviction, since there is no indication other than petitioner's own testimony that the papers he completed referred only to convictions within the past seven years, and the 1998 fingerprint authorization form itself, which petitioner undisputedly signed, contains no such limitation. (Board's Exceptions at 3-4, referencing Exhibit P-1) Next, the Board objects to any suggestion that it may have an obligation to rehire petitioner, rejecting the ALJ's apparent assumption that the Board's termination of petitioner was contingent upon, or temporary pending, the result of his appeal to the Commissioner; according to the Board, it made no such representation, nor did it represent that it would hold a position open for petitioner pending the results of an appeal. Indeed, the Board observes, it has no such legal obligation, and being compelled to rehire petitioner now, three years after his termination and with no position presently available, would not only create undue hardship for the district, but also force it to take on an employee who did not disclose his criminal history during the employment application process. (*Id.* at 4-6) Finally, the Board stresses, it is a corporate body separate and distinct from the Department, with the power to sue and be sued pursuant to *N.J.S.A.* 18A:10-1 and 18A:11-1, and it was neither made a party to the present matter nor notified of the potential for an outcome affecting its rights as clearly required by *N.J.A.C.* 1:1-16.4. (*Id.* at 7)[5]

---

[4] The Board indicates, in a letter dated February 1, 2005, that it joins in the Department's first three exceptions; the letter is silent with respect to the Department's *arguendo* objection to further hearing at OAL.

[5] The Department's Reply to the Board's Exceptions "does not challenge" the Board insofar as it objects to the relief ordered against it by the ALJ. However, the Department does seek to clarify that the Board repeats the ALJ's error of describing petitioner's conviction as second degree (See note 3 above), that the record does not include evidence to support the Board's statement that petitioner submitted a *complete* criminal

In reply to the exceptions of the Department and the Board, petitioner objects to the suggestion that his appeal was for any reason other than to obtain reinstatement to his employment; in essence, he states, his argument from the beginning has been that he should not have been dismissed without an opportunity to demonstrate rehabilitation, since the law in effect at the time he submitted his application clearly granted him that right and he did all that was required of him when submitting the application. (Petitioner's Reply Exceptions at 1-4) He elaborates:

> Petitioner's claim in his petition is quite simple. He claims that he sent the application. He claims that he worked for almost three years before he was terminated. He believed and the Union City Board of Education believed that he was employed and as such he was paid for three years. The date on which the Department received or should have received his criminal background check application was somewhere in 1998. But there is no doubt about the fact that the petitioner was hired in February 1998. Petitioner claimed that he should have been able to demonstrate rehabilitation under the law as written at the time he began his employment. The Department refused to acknowledge such right. This is precisely what this case was about. The ALJ found correctly.***There was a blunder in this case, but it certainly cannot be pinpointed to the petitioner.
>
> The Decision of [the ALJ] correctly found that the prior statute should apply under the ex-post facto (*sic*) provisions of the New Jersey Constitution and that the petitioner should be able to demonstrate***that he has been rehabilitated and thus, reinstated as he sought in his appeal. This appeal was not for declaratory purposes. The petitioner has the right to seek back pay since, according to the ALJ's decision, he was wrongfully terminated." (*Id.* at 4-6)

Petitioner reiterates his arguments on brief and at hearing with respect to application of the prior law, but adds in response to the Department's and Board's exceptions:

> ***The Department wishes to blame the petitioner for the blunder of either the Department or the Board of Education in failing to process the criminal

---

history review application in 1998 (i.e., prints and a money order in addition to the authorization form), and that any reference to the 2001 application being a *re*submission must be viewed in light of the Department's consistent contention that this submission was the *only* one received on behalf of petitioner. (Department's Reply Exceptions at 1-3)

background check. Such position is unfair given the facts of this case. The ALJ had a difficult time assessing blame on the petitioner for the failure of the State in running his criminal background check. Either way, despite the fact that in hindsight it is rather clear that the [Board] was negligent in failing to follow up its submission for the criminal background check, the State is ultimately responsible for the blunder. That is the way the law is written. The Department of Education instructed the [Board] to terminate the employment of the petitioner and it also has the right and the power to reinstate him. [The Board's administrator] testified that he received the application and gave it to one of his subordinates to send. [The manager of the Department's Criminal History Review Unit] testified he never received it. If the application was lost in the mails or was never sent, or was lost by the Department Unit of Criminal Background checks (*sic*), it was lost or never sent while already in the hands of the State.***That's why the ALJ decided the matter in the fashion that she did. The ALJ's opinion is pretty clear on the issue of who was responsible for having done the right thing here. If the [Board's] witness stated that the petition was sent, the trial court found that the responsibility lied (*sic*) with either of the educational departments and not with the petitioner. Findings of fact cannot be tried de novo. Despite the embarrassing situation for the [Department and Board] in this case for clearly not having performed their responsibilities and obligations with reasonable care, and despite the ramifications that this case can cause to the public opinion as to the state of the governmental agencies that provide educational services to the children of this State, this case is not about the facts, which have been decided. This case is about the law and whether or not the ALJ applied the law in a fashion that was appropriate. This case presents a legal issue exclusively as to the issue of ex-post facto (*sic*). What is the basis and right of the Department or the [Board] to make arguments regarding the fact finding conclusions of the ALJ? The answer is simple. None other than these exceptions are taken as a matter of right. This case is about a violation of the constitutional protections against ex-post facto (*sic*), not about whether or not the petitioner was not forthcoming with the [Board] or whether the [Board] can be ordered to reinstate the petitioner. It can be ordered to reinstate the petitioner once petitioner demonstrates rehabilitation in the same manner that it ordered the termination of the petitioner and the [Board] had no choice but to terminate.

(Petitioner's Reply Exceptions at 8-10)

Following a brief discussion of the constitutionality of retroactive laws, petitioner continues:

***In this case, there should be a presumption against retroactivity because the existing law is deemed unjust. The mess up of the Department of Education for not having processed the application pursuant to law and having given rights to the petitioner to demonstrate rehabilitation is quite

> clear in this case. The Department of Education chose to apply the harsh whip to the petitioner in the hope that he would just go away. It did not happen. By the same token, the [Board] is now claiming that petitioner was not forthcoming with information regarding his criminal background and that there are no places available to him. This is also false and in contravention of the statute. A good reading of the application for employment as made by the ALJ will lead to the inevitable conclusion that all the arguments are simply made in the hopes that they will stick, but really have no substance.*** (Petitioner's Reply Exceptions at 11-12)

Petitioner reiterates that he did everything required of him in applying for employment, including being as forthcoming as requested given the wording of the application questionnaire; that he worked for the Board for three years without incident; that he has been an outstanding citizen since his conviction twenty years ago and has had no subsequent convictions; and that it is no fault of his that the Department did not process his application and the Board did not follow up to ascertain the outcome of his background check. While recognizing the State's interest in achieving the legislative goal of the new statute, petitioner urges that its strict application here is clearly inequitable and unconstitutional, an argument which, he contends, the Department has consistently failed to address. (Petitioner's Reply Exceptions at 12-17) Petitioner further objects to the Department's claim that he failed to demonstrate rehabilitation, since "the issue at trial was [not] whether or not he was able to demonstrate rehabilitation, but whether the dismissal, without demonstrating rehabilitation under ex post facto constitutional protections was appropriate." (*Id.* at 17-18)

Finally, petitioner objects to the Board's contention that it is not obliged to rehire him if he is able to demonstrate rehabilitation. He argues:

> ***It is rather clear by law that if an administrative termination occurs as was the case here and an appeal is made to the authority that instructed the [Board] to terminate the petitioner, such appeal is directly made to have the

petitioner restored.***If the petitioner ultimately prevailed as he did in his trial, the Department of Education needs to first effect an interview or any process available to determine the petitioner's rehabilitation, and once it finds that such rehabilitation existed, it must rehire the petitioner by order of the judicial tribunal that makes the ultimate decision in this case.

***

The [Board] argues that it was not part of the action and thus, no relief may be afforded against it. It flows from reason that if the Department of Education instructed the [Board] to terminate petitioner's employment when the [Board] employed the petitioner and the petitioner had been an excellent employee, and as a result the petitioner filed an appeal seeking his reinstatement, now that the petitioner has prevailed in his appeal, the [Board] must reinstate the petitioner once the rehabilitation determination is made by the Department of Education. Petitioner complied with all regulatory and procedural steps to effect his appeal. Furthermore, the [Board] was on notice of this case and its representation here that it had no knowledge is a lame excuse to avoid liability. The fact that the [Board] was never notified of the potential outcome affecting its right in this case does not hold water as far as the directive of the trial court's is concerned because 1) the [Board] was on notice and 2) it should have known that a potential decision such as the one rendered by the trial court here could have been made.***The [Board] knew of this case and also had the right to intervene if it had chosen to. The rules do not state that intervention or participation is mandatory of a party whose rights may be affected.

(Petitioner's Reply Exceptions at 20-21)

Upon thorough review and consideration, the Commissioner determines to reject the Initial Decision, since, in substantial part as set forth below, it is incomplete or erroneous with respect to both its factual findings and its analysis and conclusions of law.

With respect to factual findings, based on the documentary record and testimony at hearing, and concurring with the ALJ that all witnesses were fully credible, the Commissioner finds the following as the facts of this matter pursuant to *N.J.S.A.* 52:14F-10(c), *N.J.A.C.* 1:1-18.1(c), and *N.J.A.C.* 1:1-18.6(b) and (d):[6] [7]

[6] Exhibits are referenced by their respective "Petitioner" (P-) or "Respondent" (R-) designations, while the transcript of hearing on June 17, 2004 is indicated by "T" followed by the applicable page number(s).

1. Petitioner was convicted in New York State of First Degree Criminal Sale of a Controlled Dangerous Substance on March 28, 1984. (R-2) (*Cf. Initial Decision at 4, indicating Second Degree offense*) He pled guilty (T27), was sentenced to "supervision or custody" (R-2), spent 4-1/2 years in jail and was released July 1988. (T27). Since that time, he has had no further trouble with the law. (T28)

2. In mid-February 1998, petitioner applied for a maintenance position with the Union City Board of Education. (T26) His employment was recommended by district administrative staff who had no knowledge of his conviction (T12-13), and on February 24, 1998, the Board approved the administration's recommendation. (P-3)

3. On February 26, 1998, upon learning of the Board's approval, petitioner completed the State background check authorization form, indicating that he had not been convicted of the various enumerated crimes and offenses, including "violations of the New Jersey Controlled Dangerous Substance Act." (P-1; T55-57) On the same date, he also completed a local district form indicating that he had not been convicted of "any crime or disorderly persons offense involving sexual offenses, child molestation or endangering the welfare of children or incompetents." (P-5; T55-57) He went to Union City Police Department to be fingerprinted, got a money order, put his package together and gave everything to the board of education. (T26, T29, T60)

4. Petitioner was officially advised of the Board's decision to hire him by letter from the Board Secretary dated February 27, 1998, indicating that on February 24, 1998, the Board took action to employ him effective March 1, 1998, pending completion of a criminal history record check. (P-3; T18, T26) (*Cf. Initial Decision at 5, where this letter is characterized as advising petitioner that his six-month provisional period had ended and his employment was now permanent; there is no such document on record, nor was there any testimony to the effect that petitioner was so advised.*)

5. Petitioner testified that at some point during the initial application/hiring process he filled out a "board form" asking if he had been convicted of any crimes in the past seven years, answering "no" because his conviction predated that period. (T44, T47, T57-58) Asked about his negative response to P-5, petitioner stated that he found the listed sex and child endangerment crimes not applicable in his case (T28-29); he answered all application questions truthfully because there was no need to lie. (T36)

---

[7] Petitioner's arguments on exception (at 9-10), to the effect that the fact-finding of the ALJ may not be challenged before or disturbed by the Commissioner, are clearly contrary to the Administrative Procedure Act and its implementing rules.

6. At the time of his initial hiring, petitioner was not aware that the criminal history record check law provided for demonstration of rehabilitation, learning of this from his lawyer only when asked for new prints in 2001. Although he knew his crime would be revealed by the background check, he was unconcerned because he relied on the "7-year" provision purportedly in the Board application. (T36-37) The "board application" referenced by petitioner is not a part of the record in this matter, nor does any document on record contain such a provision. (*Cf. Initial Decision at 4, where the ALJ references P-5 in support of petitioner's "7-year" statement.*)

7. During the period in question, the process for effectuating criminal history background checks was as follows: An applicant would complete the authorization form, fingerprint card and money order and return it to the employing school district, which would then forward it to the Department's Office of Criminal History Review. (T65) There, mail was opened, applicant information was entered into a database, money was deposited, and prints were forwarded to the NJ State Police and the FBI (T65). All steps were accomplished through an elaborate system of manual cross-checks, continuing through receipt of results and billing for the State and federal records, and designed to ensure that everything matched: the number of deposit slips, counts to State Police vs. number of searches, amounts of billings from the State Police and FBI, etc. (T 96-97, T101-03). With this system, complete loss of an application was a virtual impossibility, and there is no known instance of the Department ever having lost an application once received. (T102-03) If an application was lost without a trace, it must have been at the district level or in the mail (T126, T128), since any application received by the Department would at the very least have remained in the office database. (T108-10)

8. Once received and processed, if an applicant's check came back with a disqualifying conviction, both the applicant and school district were notified. (T68, T73) If it came back without disqualifying conviction, a letter was sent to the applicant's home address and the applicant's name was added to a computer printout, generated weekly, listing all the approvals by school district since the prior week. The weekly printouts were sent to local school districts through the offices of the county superintendents, so that there would be "a complete circle" and boards of education could meet their responsibility under the statute to ensure that anyone hired by them had undergone a completed background check. (T66, T104, T111-15, T122, T124-25) On a regular basis, district administrators did not even wait for the printout, instead calling, writing or faxing the Department to confirm receipt or check the status of submitted applications. (T147)

9. At the time of petitioner's initial employment, Mr. Carl Johnson was the administrative supervisor who oversaw Union City's hiring process for

maintenance workers and whose office staff was responsible for processing applicant paperwork. (T12-13) With respect to petitioner's background check materials, Johnson testified that he did not mail them personally, but his staff was responsible for mailing. (T18) Because he had never had a problem with an employee background check package not being sent to Trenton, he assumed all records were mailed. (T18, T21) No documentation of mailing can be produced because the district's practice was to send background check packages by regular mail. (T21) (*Cf. Initial Decision at 4, where Johnson is said specifically to have testified that petitioner's application was complete and that he, Johnson, gave it to his office personnel for mailing; this statement is unsupported by the transcript.*)

10. Johnson testified that the Board got no formal notification from the Department when an employee was approved, only when disapproved; therefore, if he heard nothing, he assumed a person was qualified for indefinite employment. (T14-15) His office did not follow up with the Department in checking on applications, since he believed there were no State procedures or guidelines for doing so and he was never told by the Department that it was necessary to follow up when submitting an applicant for a background check. (T22-23)

11. Petitioner understood that he was hired pending the results of a criminal history record check, but because he heard nothing to the contrary while he continued working for 3-1/2 – 4 years, he assumed everything was fine. (T31, T41-42, T49-50, T58-59) During this time, he never received anything from the Department, either qualifying or disqualifying him with respect to school employment. (T51)

12. The Department never received the application purportedly sent by the Board on petitioner's behalf in February 1998, nor was it aware of petitioner, or contacted with respect to him, at any time prior to 2001.

13. Sometime in 2001, the Department received information from an "outside source" indicating that petitioner was working in a school district without having undergone a background check. This is one of the two ways (the other being a State compliance investigation) that the Department is typically made aware of an unchecked employee. (T74)

14. As it routinely does in such cases, the Department contacted the district Superintendent's office once it ascertained that it had no record of petitioner's fingerprints ever having been submitted for check or any other record of contact with respect to petitioner. (T73, T75, T107-08, T148) The absence of any record could not be simply a question of lost paperwork, because, even if every single paper had been lost, petitioner would still have appeared in the Department's database. (T108-10, T148)

15. Since the district could not produce any evidence that petitioner had, in fact, undergone a completed background check, in accordance with the Department's consistent practice in situations of this type, the district was told to submit a new application on petitioner's behalf. (T128, T147-48).

16. Petitioner was asked for new prints, and he went "again" to the police department to get them. (T40) Petitioner had no idea why the prints were requested; he "figured" they were lost and "didn't question" giving them "again." (T42) On September 9, 2001, petitioner signed a new State background check authorization form, wherein he attested that he had not been convicted of "drug offenses" among other listed crimes and offenses. (R-1) The Board sent the new authorization, prints and payment to the Department (T75), and petitioner was removed from contact with children pending the results of his background check. (T16)

17. Upon its receipt of petitioner's application, the Department conducted the required check, which revealed petitioner's 1984 conviction. (R-5) Because petitioner had not been previously approved for school employment and did not meet the statutory requirement for application of the prior law, the Department applied the current statute rather than the one in effect at the time of petitioner's hiring by the district, reasoning that the plain language of the statute left it no other choice. (T132, T137, T139)

18. By separate letters dated December 7, 2001, the Department notified both petitioner (R-2) and the Board (R-4) that petitioner was disqualified from school employment as a result of a conviction revealed by his criminal history record check.

19. By letter dated December 12, 2001, petitioner was notified by the Board that his employment with the district was terminated effective July 13, 2001 (*sic*); the intended, and actual, effective date of termination was December 13, 2001. (R-3; T53) Petitioner characterized his termination as "fired pending appeal on the case" (T40); however, the Board's letter makes no reference to any such contingency.

20. By letter dated December 21, 2001, counsel for petitioner wrote to the Department seeking to vacate petitioner's disqualification. (Letter not part of record; description based on R-6, *infra*) The Department responded by letter dated January 16, 2002 (R-6), summarizing the provisions of the current statute and noting in particular that showings of rehabilitation were no longer permitted and that employment in the public schools for any person found convicted of an enumerated crime was precluded by law. The Department further advised that petitioner could seek the Commissioner's review of its determination by filing an appeal pursuant to *N.J.A.C.* 6A:3.

21. On February 28, 2002, counsel for petitioner filed the instant appeal, seeking reinstatement to employment and back pay for the period of termination. (Petition of Appeal at 6-7) No request for stay of the Department's determination of disqualification was made, either upon filing of the appeal or subsequently.

Although pled as a single claim against the Department, this matter, in fact, presents two separate and distinct issues: 1) whether, when petitioner's prints were submitted to the Department in 2001, they should have been evaluated under the criminal history record check law as it existed prior to June 1998, so as to accord petitioner the opportunity to demonstrate rehabilitation under the standards then in effect, and 2) whether petitioner is entitled to reinstatement to his employment with the Union City Board of Education and to back pay for the period between his termination and reinstatement.

With respect to the question of the appropriate statute to be applied to petitioner's record check, the Commissioner initially finds that the Department's actions in this matter were in all respects proper and in accordance with law. *N.J.S.A.* 18A:6-7.1 states on its face that the provisions of *P.L.* 1998, *c.* 31 shall apply to criminal history record checks *conducted* on or after the effective date of that act (June 30, 1998), except in the case of an individual employed by a board of education who is required to undergo a check upon employment with another board of education.[8] In petitioner's case, no record check application was received by the Department, and consequently no check was conducted, prior to 2001;[9] petitioner's application at that time did not fall within the

[8] The Initial Decision's summation (at 7-8) of the 1998 criminal history record check statute and its June 1998 legislative amendment is essentially accurate and need not be repeated herein.

[9] The Initial Decision (at 9) states that, "In this instance, there is no indication as to whether or not the 1998 background check [was] completed; however, what is for certain is that all of the facts and the testimony reveal that Petitioner fully completed his responsibilities and turned all documents for the background check over to the Respondent. Respondent acknowledges receipt of all documents and confirms that the documents were turned over for a criminal background check." As the Commissioner's factual findings demonstrate,

statutory exception provision since he was not being checked in conjunction with changing his employment from one school district to another.[10] The Department, therefore, acted correctly—indeed, in the only manner permitted to it by law—in applying current standards to the results of petitioner's 2001 record check, and then advising petitioner, in response to his protest of such application, of his right to present proofs and argument to the Commissioner through the administrative hearing process. The Commissioner rejects as entirely without merit petitioner's contention that the Department did not perform its responsibilities and duties with reasonable care, either in 1998 or in 2001: In the first instance, it could not possibly have acted on an applicant of whom it had no knowledge, and it had general procedures in place to provide local districts with a means of checking on submitted applications; in the latter, it applied the law correctly under the circumstances and diligently followed all established practices and procedures, including directing petitioner's legal counsel to the appropriate process for administrative hearing so that he could fully present his claim for exception to the plain language of the law.[11]

Concluding that the Department's actions were proper, however, does not end the inquiry with respect to petitioner. Through this proceeding—the very purpose of which is to permit development of a factual record and legal argument that may justify

---

however, no check was conducted in 1998, and, notwithstanding that petitioner apparently gave the requisite materials to the Board for submission to the Department, the Department did not receive an application or other information on behalf of petitioner until 2001, let alone acknowledge receipt of such documents.

[10] The Commissioner is unpersuaded by petitioner's "grandfathering" argument as raised at hearing (T140-46), which is based on a reading of statute that truncates the critical sentence at midpoint ("except in the case of a person employed by a board of education"), completely ignoring the qualifying clause that follows. (T146) The Commissioner likewise discounts petitioner's inferences at hearing that the Criminal History Review Unit did not have the expertise to make decisions about application of the statute under which it operates. (T80-87, T119-22, T124, T132-37, T142, 144-45)

[11] The Commissioner rejects petitioner's suggestion that the Department is culpable no matter what because the statute places on it the ultimate responsibility for the conduct of background checks and there is no requirement in statute or rule for district boards to check on the results of applications submitted. (T115-24)

under the circumstances a result different from an otherwise appropriate agency determination[12]—petitioner has established that the delay occurring between his initial application to the Board in February 1998 and the actual conduct of his criminal history record check was in no way due to fault, omission or bad faith on his part. Indeed, the record shows that petitioner did all that was asked of him in order to enable the check to be conducted, that he answered the questions asked of him truthfully based on the language of the forms he was given, and that he reasonably relied on the Board's acceptance of his application pending completion of the check and its subsequent continuation of his employment without further comment, as evidence that the check had occurred and that his prior conviction did not disqualify him under the law. In this regard, the Commissioner notes in particular that petitioner accurately completed his State application form (P-1), since he had not, in fact, been convicted of any violation of the New Jersey Controlled Dangerous Substance Act (NJCDSA) and no provision was made on the form at that time for disclosure of other drug offenses, and that he likewise responded truthfully to the additional district form regarding criminal history (P-5), which reflects the law as it was originally enacted in 1986, never having been updated to reflect the Legislature's 1989 amendment adding drug offenses to sexual and child endangerment crimes as disqualifying convictions. Under these circumstances, and where the Board's witness admits that it received petitioner's application materials in February 1998 and believed them to be sufficient for conditional employment in the district and submission to the Department for record check, petitioner did all he was required or could reasonably have been expected to do, so that the interests of justice favor according him the opportunity to demonstrate—as

[12] In this regard, petitioner errs in his contention that his case is "not about the facts;" to the contrary, precisely the type of fact-finding contemplated by the contested case process is a necessary prerequisite for the Commissioner to be able to consider granting of equitable relief.

he would have been able to do in 1998 had his application not in some manner failed to reach the Department for processing—that he is rehabilitated under the standard of the statute so as not to pose a threat to the school children with whom he comes into contact as a custodian.[13] [14]

On the question of petitioner's entitlement to reinstatement to his employment with the Union City Board of Education and to back pay for the period between his termination and reinstatement, however, no determination can be made on the present record or at this juncture in proceedings. First, petitioner cannot even claim such entitlement unless he successfully demonstrates rehabilitation so as to be qualified for school employment pursuant to *N.J.S.A.* 18A:6-7.1, which he has not yet done. Moreover, even if petitioner prevails in his demonstration of rehabilitation so as to be found qualified for school employment, it is not a foregone conclusion, as Petitioner claims, that the Board must then re-employ him and award him back pay; no statutory or decisional authority for such contention is cited by petitioner, nor is any readily apparent. Finally, the entity

---

[13] The Commissioner rejects the Board's argument that petitioner should not be given an opportunity to demonstrate rehabilitation because he was less than forthright about his criminal history. As indicated, petitioner answered all questions accurately in 1998, and, although the "no convictions" attestation on the State form he completed when asked for reprints in 2001 (R-1) does refer to "drug offenses" and no longer to only violations of the NJCDSA, given the preceding events and petitioner's lack of knowledge as to why he was being asked to fill out a second criminal history form after several years of uneventful employment, the Commissioner cannot find, based on the present record, that this one fact alone should foreclose petitioner from the *opportunity* to demonstrate rehabilitation.

[14] The Commissioner also rejects the Department's argument that, even if the Commissioner finds it appropriate to apply the pre-June 1998 law to petitioner, petitioner failed to demonstrate rehabilitation at hearing and is not entitled to a further opportunity to do so. The Commissioner finds that, while petitioner testified at some length on his work history and current family background and the Initial Decision includes some discussion of decisional law regarding rehabilitation, the issue of rehabilitation is not mentioned in the prehearing order, the ALJ prefaces her discussion of applicable statutory criteria with the qualifying phrase "should petitioner be able to present a rehabilitation argument, he must discuss..." (Initial Decision at 5), and the ALJ's stated belief that all necessary testimony had been taken (T151-52) clearly arises from the (mis)understanding, reflected in the Initial Decision, that a rehabilitation hearing, if ordered, would be conducted by the Board. Under these circumstances, the Commissioner cannot find that petitioner has already had an opportunity to demonstrate rehabilitation on appeal.

against which the relief of reemployment and back pay must be sought, the Union City Board of Education, has not been named as a respondent in this matter and, as such, has had no opportunity to counter petitioner's factual and legal claims or present its own position with respect to pertinent facts and law; indeed, petitioner's claim in this regard should not even have been allowed to proceed without the Board being named as an "indispensable party" pursuant to *N.J.A.C.* 6A:3-1.3;[15] that it did so is primarily the result of petitioner's and the ALJ's continual confusion and conflation of 1) the State Department of Education with the Union City Board of Education, and 2) petitioner's disqualification from school employment with the termination of his employment with the district.

This difficulty pervades the Initial Decision from the outset, as well as petitioner's papers and arguments: The petitioner regularly refers to the Department and Board as one amorphous entity entitled "the State," and both the petitioner and the ALJ confuse the respective roles and authority of the Department versus those of the local board of education. Notwithstanding the Department's repeated efforts to clarify the requisite distinctions,[16] throughout the ALJ's discussion, reference is made to petitioner's employment and/or termination by the Department, when, in fact, the extent of the Department's role and authority in matters of this type is to: conduct the criminal history record checks required by law; determine employee qualification or disqualification based upon the results; and notify the employing school district of the outcome so that it can

[15] While the Board had a right to intervene or participate pursuant to *N.J.A.C.* 1:1-16.1 *et seq.*, it did not have the obligation to do so; the obligation to name the Board, as the entity against which the relief of reinstatement/back pay would be ordered if petitioner prevailed in his claim for reemployment, rested with petitioner pursuant to *N.J.A.C.* 6A:3-1.3. Because the Petition of Appeal (at 7-8) clearly identifies reinstatement and back pay as the relief sought by petitioner, and that claim is plainly inferred by Issue 5 in the Prehearing Order, petitioner should have been required to name the Board as a party. Moreover, although the Board was far more than merely "affected" by petitioner's claim, as is the standard for intervention or participation, there is no evidence on record that the Board was notified of even this potential as provided by *N.J.A.C.* 1:1-16.4.

[16] The Department's claims in note 2 above are fully supported by the record.

comply with the law. The Department neither employs nor terminates local district staff members; these functions are expressly reserved to district boards of education subject to compliance with statutes prohibiting employment of disqualified persons. Conversely, the criminal history record check law does not give, and has never given, any authority to district boards to make determinations of qualification for school employment, a function reserved solely to the Commissioner and State Department of Education. Thus, while only the Commissioner or Department can find petitioner qualified for school employment under statute, only the Board can re-employ him, either on its own initiative or by order of the Commissioner. The Commissioner's authority to issue such an order, however, is appropriately exercised only upon the conduct of a contested case hearing with the Board being given a full and fair opportunity to defend against petitioner's claim, and not until petitioner has successfully demonstrated rehabilitation under the criminal history record check law in effect at the time of his application.

The Commissioner, therefore, directs that this matter be remanded to the OAL, initially for a hearing on whether petitioner meets the standard for rehabilitation set forth in *N.J.S.A.* 18A:6-7.1 as it existed prior to amendment effective June 30, 1998, and then, if petitioner is found qualified[17] *and* takes appropriate steps to pursue his claim, for determination as to whether the circumstances of this matter may entitle him to reemployment and/or back pay. Because the disqualification hearing is to be conducted on a *nunc pro tunc* basis, petitioner shall be limited in the evidence he may present to demonstrate rehabilitation to that which would have been available to him at the time of his 1998 application and a few months thereafter, since any disqualification hearing

[17] The parties are reminded that any Order by the ALJ in this regard may be appealed on an interlocutory basis pursuant to *N.J.A.C.* 1:1-14.10.

resulting from a February 1998 application would ordinarily have been concluded before the end of that year. If petitioner wishes to pursue his claim for reemployment and back pay, he must forthwith submit to the ALJ, and serve on the Board, an amended petition naming the Board as a respondent. Moreover, any proceeding on reemployment or back pay must recognize from the outset that the Department properly applied the 2001 law at the time of petitioner's "second" application, and that only through the present proceeding has petitioner established an equitable right to have his qualification re-determined under prior standards; further, it must recognize that the Board had no choice under State statute but to terminate petitioner's employment once he was disqualified from school employment and he neither requested nor obtained a stay of such disqualification pending appeal pursuant to *N.J.A.C.* 6A:3. (*N.J.A.C.* 6A:3-1.6) Finally, if petitioner is found to have any entitlement to back pay, the question of mitigation must also be taken into account.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected, and this matter is remanded for further proceedings consistent with the Commissioner's directives above.

IT IS SO ORDERED.[18]

COMMISSIONER OF EDUCATION

Date of Decision: 5/26/05

Date of Mailing: 5/26/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03689-02
AGENCY DKT. NO. 57-2/02

EDUARDO NUNEZ,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
Respondent.

Gilberto M. Garcia, Esq. representing Petitioner

Kathleen Asher, Deputy Attorney General (**Peter C. Harvey**, Attorney General State of New Jersey, representing Respondent)

Record Closed: November 10, 2004 **Decided:** January 5, 2005

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Eduardo Nunez, (Petitioner/Nunez) contends that his removal as a maintenance worker by the State of New Jersey Department of Education (Respondent) on December 7, 2001, was a result of a second criminal history review which was unlawful, since he had undergone an initial criminal history review in 1998 and was hired and worked for the Union City School District from March 1, 1998 until his dismissal on

December 13, 2001. On or about November 29, 2001, a second criminal history review of Petitioner was conducted because no criminal review records were found in his personnel file. The second check revealed the existence of a criminal history, for first degree criminal sale of a controlled dangerous substance in New York State, pursuant to *N.J.S.A.*18A: 6-7.1, for which Petitioner served a four and one-half year jail term during 1984 through 1988. Petitioner argues that he met all the requirements of the application process and was hired prior to the June 30, 1998 effectuation of a deletion in the New Jersey Statutes, allowing rehabilitation to be demonstrated.

PROCEDURAL HISTORY

On April 29, 2002, the Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) where it was filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). A July 2002 settlement conference was scheduled by the ALJ initially assigned to the case, but an adjournment was granted pending the substitution of the Deputy Attorney General handling the case. On July 25, 2002 another Deputy Attorney General was assigned and the matter was scheduled for an in-person settlement conference on November 2, 2002. The November 2nd conference was rescheduled due to a case scheduling conflict by Petitioner's counsel. On February 4, 2003 this matter was reassigned to another ALJ and then reassigned on February 10, 2003 to the undersigned. Another settlement conference date was set for April 25, 2003 and Petitioner's counsel did not appear due to his inability to obtain an air-flight back to New Jersey; the case disposition was treated as a Failure To Appear. On May 1, 2003, Petitioner's counsel requested a reinstatement of the matter because of the circumstances for his non-appearance. The case was reinstated and an in-person pre-hearing was completed on August 29, 2003; a Pre-hearing Order was signed on September 5, 2003. *De novo* hearing dates were scheduled for December 4 - 5, 2003 and June 17-18, 2004. At the close of testimony on June 18, 2004, the exhibits appearing in the Appendix were entered into evidence; and a Briefing Schedule Order was signed which included time for the acquisition of tapes and transcripts. Post-hearing briefs were due to the undersigned by September

24, 2004. An extension of time for submission was granted to the parties. On October 28, 2004, the undersigned received a reply to Petitioner's initial post hearing submission from the Attorney General's office. A telephonic conference was scheduled for November 9, 2004 for the purpose of determining a deadline date for reply responses, should Petitioner choose to respond to the Attorney General's second submission. Petitioner advised the undersigned by letter that no reply would be forthcoming and the case was closed on November 10, 2004. Due to the volume of the caseload, the undersigned was granted an extension for the submission of the decision in this matter, until January 7, 2005.

ISSUE

Is Petitioner's termination from employment with the Union County Board of Education for a criminal conviction on March 28, 1984, lawful pursuant to *N.J.S.A.* 18A: 6-7, where:

(1) the version of the statute in force at the time of hire on March 1, 1998 allowed for a showing of rehabilitation to effectuate an exception to employment with the public school system;

(2) a legislative amendment *N.J.S.A.* 18A:6-7.1 effective June 30, 1998, after the date of hire in 1998, eliminated the provision to demonstrate rehabilitation as a consideration in disqualification cases and prohibited employment of any person in the public school system with a conviction for certain offenses who did not previously have the criminal record expunged.

SUMMARY OF FACTS AND TESTIMONY

On March 28, 1984, Petitioner Nunez was convicted of a second-degree sale of a controlled dangerous substance in New York State. On March 1, 1998, the Petitioner was hired as a maintenance worker by the Union City Board of Education. At that time of hire, Petitioner was fingerprinted, submitted completed application forms, which included the necessary information for a criminal background investigation. (**Exhibits P-1, P-2).** Respondent's witness, Carl Johnson, Secretary to the Union City Board of Education and Supervisor of non-instructional staff acknowledged during testimony that Petitioner had submitted all documents requested of him at the time of hire. Mr. Johnson testified that he gave Petitioner's application to his office personnel for forwarding to the Criminal History Review Unit in Trenton (via regular mail), but he did not receive the results of a criminal background check. Carl Johnson had no idea that Petitioner had a criminal record when he recommended him to the Board for hiring. The Board of Education approved the hiring and awaited a sign-off by the Department of Education, which reviews of the package submitted. **(Exhibits P-3, P-4, P-5).** Carl Johnson explained that if the criminal background check is clear the applicant becomes a permanent hire, and the Board of Education would not receive a formal letter of approval (only the new hire would get a formal letter). Petitioner said on February 27, 1998 he received a letter of approval for provisional hire to commence work in March 1998. Mr. Carl Johnson said that in 1998 the Board of Education only received disqualification letters. When questioned about why there was no disclosure by Petitioner of his criminal background, he responded that he answered the question asked of him on the application:

> Have you been convicted of a crime within the last seven (7) years?
> He answered: NO. (because he was convicted on March 28, 1984; the amendment to the New Jersey Administrative Code became effective June 30, 1998; and he was completing the application in February 1998).
> **See Exhibit P-5.**

Petitioner advanced his request of the OAL Court to arrive at a finding which would recommend an opportunity to allow his presentation of arguments and evidence regarding Rehabilitation, by way of: summarizing his work experiences after release from jail explaining that he worked for two plumbing companies (2 years); for Kraft Foods (3 years); Goya Foods (1 year); that he moved to Florida from 1994 to 1998 and purchased a home while working for Parmalatt, Liberia Foods and A.C. Refrigerator Company. When he vacationed in New Jersey in 1998, he stayed and searched for employment because his family had always found life to be better in New Jersey. He has purchased a home in Wayne, New Jersey for his wife of twenty-three years and their two sons, ages 13 and 23. From 1998 through the date of this hearing Petitioner professed to be an outstanding citizen with no convictions or arrests. He earned $36,000.00 per year without overtime, from the Union City Board of Education; medical and dental benefits were included in his employment package. He was assigned to all schools in the district to assist with carpentry, painting and plumbing. His wife works for Hilton Corporation. His parents, father 86 years old and mother 80 years old live in Union City. He has two brothers and one sister. Petitioner said he was unaware of the rehabilitation waivers until his disqualification was explained to him in 2001. His belief was that his provisional hire was completed after six months on the job, and his permanent position commenced when he received a letter from the Board of Education at the end of the six-month period. **(Exhibit P-3).** He said he had no reason to believe there was any concern about his employment since he had provided truthful response to all the questions asked of him on the application and had completed the fingerprinting requirement for the criminal background check. Petitioner has been terminated without pay, pending the appeal of this matter.

Petitioner discloses information which would be used as evidence of rehabilitation in a plenary hearing before the Board of Education. It is noted that should Petitioner be able to present a rehabilitation argument that he must discuss the circumstances under which the offense occurred; explain whether the offense was an isolated or repeated incident; explain the asocial conditions which may have contributed

to the offense; provide evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocation schooling, successful participation in correctional work-release, or the recommendation of persons who have had the individual under their supervision (while incarcerated and after).

On November 29, 2001, approximately 45-months after Petitioner began working, the Criminal History Review Unit within the Department of Education conducted a criminal history background check on him because documentation regarding his 1998 submission was not found in his personnel file. **(Exhibits R-1, R-2).** It was during this investigation that the Petitioner's 1984 criminal conviction was revealed. **(Exhibits R-4, R-5).**

Carl Carabelli, Manager New Jersey Department of Education Criminal History Review Unit (Unit) has been with the Unit for sixteen years and prior to becoming Manager he worked for and retired from the New Jersey State Police Criminal Investigations Section. Mr. Carabelli said that prior to the change of law in 1998 an applicant for employment with the Department of Education could be hired for a six-month provisional period, because the response from the FBI on the criminal background checks usually took six months. The procedures for applicant processing and the system for criminal investigation checks have been revised. Currently, the Office of Compliance monitors school employee records (as of July 1, 2002 there was a fully automated system); there was no monitoring in 1998, all procedures were done manually, so there were times when files were not reconciled because of the volume of work to complete. Also, Mr. Carabelli noted that criminal background application documents received by the State prior to 1998 were kept for one year and after 1998 they were kept three years. In 1998, according to Mr. Carabelli, it was the school district's responsibility pursuant to State Statute to "make sure a criminal background check occurred, and the school district had to assume responsibility for compliance". Mr. Carabelli's search of computer data records indicated that Petitioner was not in the database prior to 2001. Carabelli said that had he received Petitioner's application

package prior to June 30, 1998 that a disqualification letter would have been mailed to Petitioner allowing a thirty-day response to appeal the decision and include proof of rehabilitation.

On December 12, 2001, Petitioner's employment with the New Jersey Department of Education was terminated due to his felony conviction in New York State and the fact that the New Jersey Statues changed in 1998 and disqualification (employment in public education sector) was automatic, for any felon. **(Exhibit R-3).** No argument was offered to refute the criminal conviction or application pursuant to the current version of *N.J.S.A.* 18A:6-7.1 (d):

> "for purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this state or under any similar statues of the United *States* or any other state for a substantially equivalent crime."

Petitioner argues that because of the unique circumstance of the case, he should be allowed to demonstrate rehabilitation pursuant to the prior, no longer effective, version of the statute. **(Exhibit R-6).**

ANALYSIS

School employees and applicants are subject to a check of their criminal record. *N.J.S.A.* 18A:6-7.1. This statute enumerates a list of crimes that permanently disqualify an applicant or employee from employment in a facility, center, school, or school system under the supervision of the Department of Education and the Board of Education. *N.J.S.A.* 18A:6-7.1(a)-(c). Among the enumerated offenses is the sale of a "controlled dangerous substance," the substantive offense which the Petitioner was convicted of on March 28, 1984. *N.J.S.A.* 18A:6-7.1(b).

Prior to its June 1998 amendment, *N.J.S.A.* 18A: 6-7.1 permitted an employee to potentially mitigate a disqualifying criminal offense conviction by affirmatively demonstrating his or her rehabilitation by clear and convincing evidence. See: L. 1986, c. 116, § 1. As amended, the current version of *N.J.S.A.* 18A:6-7.1, does not allow evidence of rehabilitation to be presented to mitigate past offenses, but instead provides that any individual convicted of a disqualifying offense "shall be permanently disqualified from employment or service." In repealing the provision that had allowed the individual the opportunity to show rehabilitation, the Legislature limited the individual to the opportunity to challenge only the accuracy of the disqualifying criminal history record. *N.J.S.A.* 18A:6-7.1(e).

The June 30, 1998 amendments to the statute expressly provided that it "shall take effect immediately." Moreover, it provided that the new law "shall first apply to criminal record checks *conducted* on or after the effective date of [the act.]" *N.J.S.A.* 18A:6-7.1(g) (emphasis added). The statute does not speak to when the investigation should or must be conducted, only the law to be followed when it is done.

The key issue in this matter is which version of the statute should be applied to Petitioner's disqualification. Petitioner contends his employment was conditioned upon the successful completion of a background check and therefore the investigation should have occurred under the authority of the prior version of the statute. However, the statute's plain-language does not provide that the applicable law must be that of the date of hire, but instead provides that the date of the background check should control.

In addition, *N.J.S.A.* 18A:6-7.2, which governs the authority of the Commissioner of Education in regard to the criminal history investigations of workers in educational institutions, makes no reference to when the background check must be done. It only authorizes the Commissioner of Education to conduct such checks. Whereas, the plain-language of the statute makes no clear reference to when the criminal investigation must be conducted, the statute does state however, that an individual who has been convicted of any of the enumerated offenses, "shall be permanently disqualified from

employment or service . . ." making no reference to prospective application only. *N.J.S.A.* 18A:6-7.1. Generally, courts favor interpretations of statutes that afford prospective application only. *Nobrega v. Edison Glen Associates,* 167 *N.J.* 520, 536 (2001).

In *Garvin v. N.J. State Bd. of Examiners*, EDU 7455-00, Initial Decision, (March 27, 2002), adopted, Commissioner of Education (May 20, 2002), the Petitioner was found ineligible for a teaching certificate under the current version of the statute due to prior convictions which are enumerated as disqualifications from employment under *N.J.S.A.* 18A:6-7.1. In *Garvin*, the Petitioner had submitted to a background investigation after he had been granted a position and was teaching pursuant to a conditional teaching certificate. His background check found felony convictions similar to those of Petitioner Nunez, and he was accordingly found to be disqualified from the position of substitute teacher. Garvin contended that he should be allowed to present evidence of rehabilitation under the old statute due to his holding of conditional licenses during the transition from the old to the current version of the statute. In denying Garvin the opportunity to proffer mitigating evidence of rehabilitation, the Administrative Law Judge held that the conditional permit and the full permit were not equivalent, and his prior position as an emergency-substitute did not provide reasoning to grandfather the prior law to the current standard. Similar facts are currently at bar, except that Petitioner Nunez had been working for the school district for two and one-half years and had fulfilled all requirements of the application process: and had received a letter indicating permanent employment. Petitioner Nunez's situation does warrant the application of the prior version of the statute, since the plain language of the statute provides the applicable date to be the date of the criminal history record check. *N.J.S.A.* 18A:6-7.1(g). In this instance there is no indication as to whether or not the 1998 background check completed; however what is for certain is that all of the facts and the testimony reveal that Petitioner fully completed his responsibilities and turned all documents for the background check over to Respondent. Respondent acknowledges receipt of all documents and confirms that the documents were turned over for a criminal background check.

Under these circumstances, Petitioner should be allowed his due process rights and the Board of Education should entertain a plenary hearing. Unlike *Garvin* who submitted an application for a standard teaching certificate two months after the June 30, 1998 effective date of the act, Petitioner Nunez had been submitted documents prior to the effective date, and if fact in February 1998 prior to the application of the new law. Absent any indication that Petitioner was the cause for no criminal history record in his personnel file, the opportunity to demonstrate affirmatively his rehabilitation by clear and convincing evidence should be granted.

In *Wolffbrandt v. New Jersey State Department of Education* 92 *NJAR* .2d (EDU) 457 (1991), there was a finding that a paroled school custodian worker, who had been arrested for distribution of a controlled dangerous substance, possession of marijuana and armed robbery, demonstrated rehabilitation where he had completed drug treatment, counseling and had actively pursued academic and vocational training and was supported by good recommendations from persons who knew him in various environments. In *State Department of Education v. Skwarek,* 92 *NJAR* .2d (EDU) 1 (1991), there was a finding of rehabilitation for a teacher convicted of possession of marijuana, use of cocaine, possession of hypodermic needle and drug paraphernalia, were there was proof of success in a twelve step program, completion of counseling, subsequent training, community service and received strong recommendation from persons who supervised her.

In this matter, Petitioner Nunez was convicted of "possession" of a controlled dangerous substance, which is a disqualifying offense under both versions of the statute; but the first version allowed for a demonstration of rehabilitation. Petitioner's application for employment and submission of documents and fingerprints for the criminal background check occurred during the first version of the statute and his right to due process should be permitted at advance, as per the terms of pre 1998 statute. The denial of a demonstration of rehabilitation would be improper, according to the circumstances of this case.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the Petitioner may not be permanently disqualified from his position due to his past conviction and in light of the current law. The old version of the statute allows a demonstration of rehabilitation to mitigate his prior conviction, and because of the circumstances of this case, an exemption not to use the plain-language of the current version should apply. The Board of Education should have the power to terminate Petitioner if there is no affirmative demonstration of his rehabilitation by clear and convincing evidence. I therefore **CONCLUDE** that the circumstances of the case provide a basis for allowing Petitioner to proffer evidence of his rehabilitation, as per the language of the Statute in effect in February 1998.

ORDER

Based on the above, and for good cause shown, I **ORDER** that the Petition in this matter be and is hereby **GRANTED**, and that Petitioner be allowed a Plenary Hearing before the Union City Board of Education.

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

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

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

January 5, 2005

DATE

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

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

1/5/05

DATE

Mailed to Parties:

Laura Sanders

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JAN 6 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses For Petitioner:

Eduardo Nunez, Petitioner

Carl Johnson, Secretary Union City Board of Education

Witnesses For Respondent:

Carl Carabelli, Manager Criminal History Review Unit State of New Jersey Department of Education

EXHIBITS

Petitioners:

P-1 Applicant Authorization and Certification February 26, 1998

P-2 Petitioner's Affidavit February 26, 1998

P-3 Letter of Hire Union City Board of Education February 27, 1998

P-4 Union City Board of Education Personnel Master File Year 1997/98

P-5 New Jersey Department of Education Affidavit February 26, 1998

Respondents:

R-1 Applicant Authorization and Certification for 2001

R-2 Finger Print Search Letter from the New Jersey Department of Education December 7, 2001

R-3 Termination Letter from Union City Board of Education December 12, 2001

R-4 New Jersey Department of Education Disqualifying Letter to Union City Superintendent December 7, 2001

R-5 FBI Criminal History Information sheet

R-6 New Jersey Department of Education Letter of Explanation Change in State Statute

194-05

GAIL SARCONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner disputed the respondent Board's authority to recoup any or all of a salary overpayment resulting from a purported error in calculating her salary increment for the 1994-95 school year; such mistake was carried forward, effecting salary calculations through the 2001-02 school year. Respondent Board discovered the error in March 2003, and sought to recover the alleged overpayments by freezing petitioner's salary at the then current level until the full amount of the overpayment is recovered.

The ALJ found, *inter alia*, that the parties incorporated the salary mistake in a subsequent negotiated agreement, and that tenure law prevents a board from reducing a tenured teacher's salary where both parties have "undertaken performance of the contract" and the teacher has already started to work. The ALJ concluded that: there was an overpayment totaling $2,500 for school years 1994-95 and 1995-96; all salary calculations flowing from the base year 1996-97 forward were properly grounded in a duly negotiated agreement; and that by the time respondent Board sought to recover the overpayments in March 2003, the petitioner's negotiated salary for that year exceeded the salary level at which the salary was frozen. The ALJ ordered the Board to restore the petitioner to the salary of $60,204 for the 2004-05 school year, and to reimburse the petitioner amounts improperly withheld for the 2002-03 and 2003-04 school years.

Upon a full and independent review of the record in this matter, the Commissioner initially rejects the ALJ's conclusion with respect to whether the Board may recoup $2,500 in overpayments to petitioner for the 1994-96 school years, and emphasizes that there is no allegation that the Board delayed in acting to correct a salary overpayment once it was discovered, and no evidence that petitioner was prejudiced in pursuing her claim. The Commissioner finds that the equities lie with the Board's fiduciary responsibility to recoup the 1994-95 and 1995-96 salary overpayments in the amount of $2,500. With respect to the issue of the effect of the contracted agreement incorporating the salary levels erroneously fixed in 1994-95 and 1995-96, the Commissioner finds that this issue does not fall within the scope of his jurisdiction. Accordingly, the Commissioner sustains the Board's action to recoup $2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years and dismisses petitioner's contractual claims for lack of jurisdiction. This matter is hereby forwarded to the PERC for action as that agency deems appropriate.

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

May 26, 2005

OAL DKT. NO. EDU 5952-03
AGENCY DKT. NO. 165-5/03

GAIL SARCONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Hackettstown Board of Education's (Board) exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination. To the extent these submissions essentially reiterate arguments raised before the ALJ, they are not recounted herein.

In its exceptions, the Board avers, *inter alia*, that the Administrative Law Judge (ALJ) failed to consider the applicable case law on recoupment and asserts that the older cases relied on by the Administrative Law Judge (ALJ) are no longer "good law." (Board's Exceptions at 7) The Board claims that the decision which should control in this case is the State Board determination in *Carol DeLyon v. Board of Education of the Borough of Old Tappan, Bergen County*, decided by the State Board, February 2, 2000, in that the facts in *DeLyon* are analogous to those herein, noting that the Board in that matter had erroneously placed Ms. DeLyon on the wrong step of the salary guide and did not discover the error until some

15 months after the error had been made. (*Id.* at 8) The Board contends that the State Board decision in *DeLyon* "permits a board of education that made a mistake with respect to the salary payment for a tenured teacher to rectify that mistake by freezing the teacher's salary, so as to recoup the prior salary overpayment *** until the teacher's salary is at the level it would have been absent a mistake." The Board further complains that the *DeLyon* decision was ignored by the ALJ, notwithstanding its prevailing precedent and the extensive analysis provided in the parties' briefs. (*Id.* at 10)

Moreover, the Board reasons, it appears that there were two factors relied on by the ALJ in denying it relief. (*Id.* at 11) One factor was the span of time between the mistake and the Board's freezing of petitioner's salary to rectify the mistake. (*Ibid.*) The Board observes that nothing was submitted to the ALJ for the proposition that the mistake was anything other than a good faith error and the Board can only guess at the ALJ's reasoning, adding that there is no support in case law that rectification of a salary mistake cannot occur if there is too long a gap between the mistake and the attempted rectification. (*Id.* at 11-12) Additionally, the Board notes its agreement that a teacher's salary may not be reduced to rectify a mistake and states that it can only assume that the ALJ mistakenly equates the freezing of an employee's salary with a reduction in salary. (*Id.* at 12) The Board further asserts that "[r]eduction of salary in this context, of course, means actually paying the teacher less than the teacher had been making the year before," which is prohibited by *Harris, supra*; *DeLyon, supra*; and *Stockton, supra.* (*Id.* at 12-13) However, the Board contends, these same cases also state that "freezing a salary is *not* reducing one's salary in violation of *N.J.S.A.* 18A:28-5 when it is done in order to rectify an agreed-upon mistake." (emphasis in text) (*Ibid.*)

The second factor relied on by the ALJ in denying it relief, the Board submits, was the finding that the mistake in the salary figure was ratified in the 1996-99 collective bargaining agreement and, thus, no correction of this mistake was permitted. (*Id.* at 13) The Board argues that the Commissioner does not have jurisdiction to decide this matter in that jurisdiction on this issue rests with the Public Employment Relations Commission (PERC), a fact the Board claims was acknowledged by petitioner when she filed the Unfair Practice Charge with PERC, which has been held in abeyance pending the resolution of petitioner's appeal under the education laws. (*Ibid.*) The Board notes that petitioner addresses the rescission argument concerning the collective bargaining agreement in her initial brief and refers to it as being resolved "in the appropriate forum." (*Ibid.*) The Board also takes issue with the ALJ's ruling on what it contends is a labor relations issue arising under PERC law, contending that -- notwithstanding the ALJ's ruling on the labor relations question of the Board's 2003 freezing of petitioner's salary, which found that it represented a reduction or rescission of her salary as fixed in the 1996-1999 collective bargaining agreement -- this question is not before the Commissioner. (*Id.* at 15)

Additionally, the Board questions, "even if the Court were jurisdictionally correct in holding that Respondent could not fix the salary mistake because the mistake had been memorialized in a 1996-1999 collective bargaining agreement, why does that conclusion preclude the Board from remedying a mistake before and after that agreement?" (*Ibid.*) The Board argues that "the ALJ provided no legal support for his conclusion that, even if petitioner's salary were fixed at the contractual amount for the 1998-1999 school year, that amount was immutable and the mistake represented therein could never be remedied" and asserts that this

conclusion is not only beyond the jurisdictional authority of the ALJ, but also completely unsupported in the Initial Decision. (*Id.* at 15-16)

In her exceptions, petitioner contends, *inter alia*, that the ALJ's determination is entirely consistent with the State Board's decision in *DeLyon*, arguing that under no theory of the case can she be deemed to have been overpaid in terms of her placement on the salary guide because she was paid precisely what the .5 school psychologist was to be paid between 1996 and 1999. (Petitioner's Exceptions at 4) Petitioner further points out that she was paid according to the amounts established in the 1996-99 collective bargaining agreement and, if the 1996-97 salary is used as the base, all the salaries subsequent to 1999 are also correct. (*Id.* at 4-5)

With respect to the Board's rescission argument, petitioner notes that the Board has not moved for reformation or rescission of the 1996-1999 collective bargaining agreement and claims that there are only two bases for reformation of the contact: mistake or fraud. (*Id.* at 6) Petitioner points out that there has been no claim of fraud and there was no "mutuality of mistake" because the mistake was the product of an allegedly erroneous calculation that was never specifically agreed upon in any prior negotiations or written agreement. (*Ibid.*)

Upon a thorough and independent review of the record in this matter, the Commissioner rejects the Administrative Law Judge's conclusion with respect to whether the Board may recoup the $2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years. As found by the State Board in *DeLyon, supra*,

> When a district board makes an error in the placement of a tenured staff member on the negotiated salary guide or incorrectly establishes such employer's salary under the terms of that guide, action by the board to freeze the staff member's salary until such time as the overpayment is recouped does not constitute an impermissible reduction in compensation under the tenure laws. (citations omitted) (slip op. at 4)

As noted by the ALJ, "[i]t is clear from the testimony and documentary evidence adduced, that there was a miscalculation of the base salary, caused by the addition of the full off-guide amount of $2,500 rather than the .5 amount of $1,250." (Initial Decision at 6) As a result, the additional amount of $1,250 was included for each subsequent year. (*Ibid.*) Accordingly, for each of the school years of 1994-95 and 1995-96, petitioner received an overpayment of $1,250, for a total of $2,500. Although petitioner argues that it is fundamentally unfair to permit the Board to recoup these overpayments in that "there is no case which allows recovery for nine years" (Petitioner's Initial Brief at 37-38), petitioner has presented no evidence that the Board unreasonably delayed or was negligent in pursuing its claim nor has petitioner established that her defense was disadvantaged by her reliance on the Board's conduct. At the hearing, the board secretary testified that the salary error was discovered in the 2002-03 school year during contract negotiations (*Tr.* at 110), and by letter of February 27, 2003, petitioner was advised of the overpayment. (Petition of Appeal at 2-3, No. 5) On March 31, 2003, the Board passed a resolution freezing petitioner's salary until the salary overpayments were recouped. (*Id.* at 3, No. 6)

Black's Law Dictionary, seventh edition, at 879, defines *laches* as an "unreasonable delay or negligence in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought." *See, also, Enfield v. FWL, Inc.*, 256 *N.J. Super.* 502, 520-522 (Ch. Div. 1991). Given the specific facts in this matter where there is no allegation that the Board delayed in acting to correct a salary overpayment once it was discovered, albeit nine years later, and no evidence that petitioner was prejudiced by the Board's negligence in pursuing it claim, the Commissioner declines to apply *laches* and finds, instead,

that the equities lie with the Board's fiduciary responsibility in its management of public funds to recoup the 1994-95 and 1995-96 salary overpayments in the amount of $2,500.

With respect to the issue of the effect of the contracted agreement incorporating the salary levels erroneously fixed in 1994-95 and 1995-96, the Commissioner finds that this issue does not fall within the scope of his jurisdiction. Therefore, this decision, and the full record herein, shall be transmitted to the PERC, where the issue is currently pending.

Accordingly, as set forth above, the Commissioner sustains the Board's action to recoup $2,500 in overpayments to petitioner for the 1994-95 and 1995-96 school years and dismisses petitioner's contractual claims for lack of jurisdiction. This matter is hereby forwarded to the PERC for action as that agency deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/26/05

Date of Mailing: 5/26/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5952-03

AGENCY NO. 165-5/03

GAIL SARCONE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, PC, attorneys)

James L. Plosia, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record closed: January 5, 2005 Decided: February 23, 2005

Before **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Gail Sarcone is employed by the respondent Hackettstown Board of Education as a tenured School Psychologist. In the years since 1989-1990, she has been paid off-guide to determine her salary for the next school year. Her salary was calculated by using the prior year base salary, and adding the off-guide amounts. After

taking maternity leave for the 1992-1993 school year, she returned as a part-time School Psychologist, designated at the time as a .5 employee. Starting in the 1998-1999 school year, the petitioner was considered a .8 salaried teacher. From that point on, her salary was pro-rated on a .8 basis. During the years from 1996-1997 to 1998-1999, the petitioner was paid a salary based on the Agreement ratified by the respondent and the Education Association.

In or about March 26, 2003, the respondent passed a resolution asserting that a salary error had been made in the 1994-1995 school year; that the petitioner had been overpaid that year and each succeeding year since. The respondent undertook to recover the alleged overpayments by freezing the petitioner's salary at the then current level of $55,140 "until the full amount of the overpayment... is recovered."

The respondent asserted the overpayment occurred as a result of her receiving a full off-guide increment in the amount of $2,500 for the 1994-1995 school year, rather than .5 of that amount, or $1,250. This overpayment was thereafter included in all subsequent salary calculations for the petitioner. The respondent further asserts that this error was included in the negotiated Agreement for the years 1996-1997 to 1998-1999. Through the 2001-2002 school year, the alleged overpayments amounted to a total of $13,001. That was the year the petitioner's salary reached the amount of $55,140. Thereafter, the respondent "froze" the salary at that amount through the 2004-2005 school year in an effort to recover those overpayments.

The petitioner filed a Petition of Appeal with the Department of Education on May 23, 2003. The petitioner averred that the respondent violated her tenure rights by withholding her increments and freezing her salary. She requested the Commissioner to direct the respondent to return monies lost as a result of the action by the respondent in freezing her salary at the level of $55,140 until the alleged overpayment of $15,003[1] is recovered.

[1] The parties stipulated during the hearing that the actual amount in dispute as of the 2001-2002 school year was $13,002. Thereafter, the petitioner's salary has been frozen at the amount of $55,140 through the 2004-2005 school year.

Thereafter, the respondent filed an answer to the Petition of Appeal on June 12, 2003. The respondent asserted that the action to recover the alleged overpayments was in accordance with its legal authority under the Education laws of the state. The respondent requested that the Commissioner of Education dismiss the petitioner's appeal with prejudice.

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on July 11, 2003. The hearing on the matter was conducted on January 27, 2004. Thereafter, the parties submitted post-hearings submissions. Prior to the entry of an initial decision in the matter, a question arose as to the method of calculating the off-guide salaries of teachers in the District. A further hearing was scheduled to supplement the record. The hearing was continued on January 5, 2005. Thereafter, the record was closed.

STATEMENT OF THE ISSUES

Whether the respondent may recover alleged overpayments made to petitioner by freezing her salary at the time the alleged overpayment was discovered until the amount is fully recovered.

What is the impact of a contract agreement incorporating the salary levels allegedly erroneously fixed in prior years?

FACTUAL DISCUSSION

Testimony

Michael Simonetta

The witness is employed by the Hackettstown Board of Education as the school business administrator and board secretary. He has been employed in that position

since March of 1995. The duties of the board secretary are to handle payroll, personnel, review salaries, and check on contracts for staff members.

He identified the various negotiated agreements including the contracts from 1989-1991 to the present. (P-1 to P-6). He also identified the Board resolution dated March 26, 2003, freezing the petitioner's salary at $55,140 until the overpayments were recovered. (P-7). Simonetta testified that the overpayments first occurred in the 1994-1995 school year. These overpayments were first discovered during the 2002-2003 school year.

Simonetta went through the history of salary increases fore the petitioner, through the 2002-2003 school year. He acknowledged that although the resolution reflected an overpayment of $15,002, the actual amount of overpayment through the 2002-2003 school year was $13,002. He further acknowledged that there was no formal agreement as to the manner by which stipends would be pro-rated for part-time employees. The method used here was always used by the District. Stipends would be pro-rated according to the percentage part-time. Longevity was always at 100% however. To calculate the salary for off-guide teachers, the previous base is used, adding the off-guide amount plus stipend and longevity. Starting the 1994-1995 school year, the petitioner should have received .5 of the off-guide amount. For that year, she actually received the full off-guide amount of $2,500. Starting the next year, she received the correct off-guide pro-rata amount, but the additional $1,250 continued to be included. Starting the 1998-1999 school year, that amount was increased to an overpayment of $2,000 per year, because the petitioner was from that time considered a .8 salaried teacher. The total of overpayments from 1994-1995 to 2001-2002 was $13,002.

Michael James Carroll

The witness is a field representative for the NJEA, Region 28. This includes the areas of Warren and Sussex Counties. He assists the local bargaining units in contract negotiations. He is the NJEA field representative for the Hackettstown Association. He

was involved in negotiating the current contract on behalf of the Hackettstown Association, in effect for the contract period 2002 to 2005. (P-6).

He explained that the collective agreement includes a 16 step salary guide. The following years are off-guide. The salaries are calculated by using the final salary on the guide, and adding the off-guide amount to the prior year base salary. This applies to all off-guide salary calculations. He acknowledged that the petitioner was paid a salary for her first year as a .5 teacher, 1994-1995, using the full off-guide amount of $2,500. Generally, the off-guide amounts are pro-rated for part-time employees.

Gail Sarcone

The witness testified that she received a salary notification each year from the respondent. She signed and returned the notification, keeping a copy in her files. These notifications were identified by her. (P-8 to P-22).

She testified that she did not independently calculate her annual; salary. She generally just signed the notification, assuming the calculation was correct. She further testified that she did not calculate the salary amount for the year she became a part-time employee. She first became aware of a mistake or miscalculation in the salary amount, was in February 2003. The Board brought it to her attention. She acknowledged that she now understands that there was a mistake in the calculation of her salary for the 1994-1995 school year.

Michael James Carroll

The witness was recalled at a subsequent hearing date to explain the method for calculating salaries under the Hackettstown agreements. Specifically, as it relates to the salary calculations for the petitioner, there was a chart prepared that outlined that calculation method. There was a chart prepared on behalf of the petitioner moved into evidence as C-2. There was also a chart prepared on behalf of the respondent moved into evidence as C-3. The first chart started with the salary calculation from the year 1990-1991. (C-2). The witness explained that the petitioner was at step 16 on the

salary guide in the school year 1989-1990. For every year thereafter, the salary is calculated by using the previous year salary plus the off-guide amount.

Analysis

There is no dispute as to the amounts actually paid to the petitioner during the years in question. The parties agreed that the salary calculations and the figures reflected in both C-2 and C-3 were accurate calculations. The parties disagree as to whether the amounts actually paid were overpayments, and whether in any event, those amounts can be recovered by the respondent. Specifically in dispute are whether the amount paid starting the school year 1994-1995 was an overpaid amount, and whether that overpayment can be recouped. It is clear from the testimony and the documentary evidence adduced, that there was a miscalculation of the base salary caused by the addition of the full off-guide amount of $2,500, rather than the .5 amount of $1,250. The petitioner herself acknowledged that the off-guide amount was miscalculated in the 1994-1995 school year. And since the agreement for that year did not include reference to part-time employees, the explanation that the stipend should have been pro-rated is a reasonable one. From that point forward, the parties once again used the correct amounts of stipend, off-guide amounts, and longevity. However, the additional amount of $1,250 was included for each subsequent year as a result. When the petitioner began being compensated at the .8 rate in the 1998-1999 school year, that amount of alleged overpayment increased to an amount of $2,000 per year. It is noted that the parties agree that the longevity payment should not be pro-rated, but paid in full amount regardless of the part-time status of the employee.

In an effort to abolish the stipend for the Learning Disabilities Teacher Consultant, Psychologist and Social Worker, the parties agreed to fixed salaries for the school years 1996-1997, 1997-1998, and 1998-1999, in an agreement entered between the Hackettstown Board of Education and the Hackettstown Education Association, (P-4). The salary for the .5 part-time psychologists was established in the agreement for each of the three years of the agreement. The salary was fixed at $28,996 for 1996-1997, $29,750 for 1997-1998, and $31,050 for 1998-1999. The agreement did not

provide for a separate amount for off-guide payment for the psychologist. From the evidence adduced, it is clear that the parties started from the previous year base as had been used for the 1995-1996 school year. Off-guide amounts were included in the salary established for those three contract years.

The miscalculation from 1994-1995 carried over into the written agreement between the Hackettstown Board of Education and the Hackettstown Education Association for 1996-1999. In addition to whether the respondent may recover the overpayments made due to the miscalculation in 1994-1995, there is the additional issue regarding the effect of ratification of the salary amount for the part-time employee in the agreement, albeit based on a previous miscalculation.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. Petitioner is employed by the respondent as a tenured school psychologist.

2. For the 1989-1990 school year, the petitioner was paid a salary at the 16th and final step of the salary guide in effect for the Hackettstown Board of Education. Her base salary was $37,650, calculated based on a Master's degree plus 30 credits. She also received a stipend amount of $2,071. The total salary paid to the petitioner for the 1989-1990 school year was $39,721.

3. For the 1990-1991 school year, the petitioner received a salary calculated at the previous year base salary of $37,650, plus the off-guide amount of $3,600. The 1990-1991 base salary was therefore $41,250. To that amount was added a stipend of $2,257. The total salary paid to the petitioner for the 1990-1991 school year was $43,507.

4. For the 1991-1992 school year, the petitioner received a salary calculated at the previous year base salary of $41,250, plus the off-guide amount of $3,100. The 1991-1992 base salary was therefore $44,350. To that amount was added a stipend in the amount of $2,449, plus a longevity payment in the amount of $100. The total salary paid to the petitioner for the 1991-1992 school year was $46,899.

5. For the 1992-1993 school year, the petitioner was on maternity leave.

6. Upon the return of the petitioner for the 1993-1994 school year, she was a part-time school psychologist, designated as a .5 employee. The agreement in effect at the time did not reference any part-time position. The petitioner received a salary calculated at .5 of the previous year base salary of $44,350, or $22,175; .5 of the off-guide amount of $2,350, or $1,175; a longevity payment in the amount of $100; and a stipend of .5 of the stipend amount of $2,790 or $1,395. The total salary paid to the petitioner for the 1993-1994 school year was $24,845.

7. For the 1994-1995 school year, the petitioner received a salary calculated at .5 of the previous year base salary of $46,700, or $23, 350; the full off-guide amount of $2,500; a longevity payment of $100; and a stipend of .5 of the stipend amount of $2,930 or $1,465. The base salary paid to the petitioner for 1994-1995 using the full off-guide amount was $25,850. The total salary paid to the petitioner for the 1994-1995 school year was $27,415.

8. The base salary using the .5 off-guide amount would have been $24,600. The total salary would have been $26,165. The overpayment was $1,250.

9. For the 1995-1996 school year, the petitioner received a salary based on the previous year base of $25,850; .5 of the off-guide amount of $2,800, or $1,400; and a longevity payment of $200. The total salary paid was $28,996.

10. Using the off-guide amount of .5, or $1,400, the previous base salary would have been $24,600. Adding .5 of the full off-guide amount of $2,800, or $1,400

in the 1994-1995 school year, plus the longevity payment of $200, the salary would have been calculated to be $27,746.

11. The amount of overpayment for the two years, 1994-1995 and 1995-1996 amounted to $2,500,

12. For the 1996-1997 school year, the petitioner received a salary set forth in the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1996 to June 30, 1999. The agreement reflected a base salary of $28,350 for a .5 psychologist; a stipend of $446; and a longevity payment of $200. The total salary paid to the petitioner for the 1996-1997 school year was $28,996. There was no separate adjustment for off-guide amounts, as the salary increments for the .5 psychologist were set over the three year period. The respondent asserts the correct salary should have been $27,746.

13. For the 1997-1998 school year, the petitioner received a salary set forth in the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1996 to June 30, 1999. The agreement reflected a base salary of $29,550 for a .5 psychologist; no stipend; and a longevity payment of $200. The total salary paid to the petitioner for the 1997-1998 school year was $29,750. There was no separate adjustment for off-guide amount, as the salary increments for the .5 psychologist were set over the three year period. The respondent asserts the correct salary should have been $28,500.

14. For the 1998-1999 school year, the petitioner received a salary set forth in the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1996 to June 30, 1999. The agreement reflected a base salary of $30,850 for a .5 psychologist; no stipend; and a longevity payment of $200. There was no separate adjustment for off-guide amounts, as the salary increments for the .5 psychologist were fixed over the three year period. However, the petitioner was designated a .8 psychologist for the year. Pro-rating her salary at .8 increases the salary to a

base salary of $49,360. With the longevity payment in the amount of $200, the total salary paid to the petitioner for the 1998-1999 school year was $49,560. The respondent asserts the correct salary should have been $47,560.

15. For the 1999-2000 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1999 to June 30, 2002 included the psychologist within the salary guide for all teachers. The petitioner received a salary established using the previous year base salary of $49,360; the off-guide amount calculated at .8 of the full off-guide amount of $2,152, or $1,722; and a longevity payment of $200. The base salary for the 1999-2000 school year was $51,082. The total salary paid to the petitioner for the 1999-2000 school year was $51,282. The respondent asserts the correct salary should have been $49,282.

16. For the 2000-2001 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1999 to June 30, 2002 included the psychologist within the salary guide for all teachers. The petitioner received a salary established using the previous year base salary of $51,082; the off-guide amount calculated at .8 of the full off-guide amount of $2,286, or $1,892; and a longevity payment of $300. The base salary for the 2000-2001 school year was $52,911. The total salary paid to the petitioner for the 2000-2001 school year was $53,211. The respondent asserts the correct salary should have been $51,210.

17. For the 2001-2002 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 1999 to June 30, 2002 included the psychologist within the salary guide for all teachers. The petitioner received a salary established using the previous year base salary of $52,911; the off-guide amount calculated at .8 of the full off-guide amount of $2,411, or $1,929; and a longevity payment of $300. The base salary for the 2001-2002 school year was $54,840. The total salary paid to the petitioner for the 2001-2002 school year was $55,140. The respondent asserts the correct salary should have been $53,139.

18. For the 2002-2003 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 2002 to June 30, 2005 included the psychologist within the salary guide for all teachers. The base salary calculated using the previous year base salary of $54,840 and the off-guide amount calculated at .8 of the full off-guide amount of $2,100, or $1,680 would have been $56,520 for the 2002-2003 school year. Including the longevity payment of $300, the total salary would have been $56,820. The respondent undertook to freeze the petitioner's salary at $55,140 until recovering the alleged overpayments. The total salary paid to the petitioner for the 2002-2003 school year was $55,140. The respondent asserts the correct salary should have been $54,819.

19. For the 2003-2004 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 2002 to June 30, 2005 included the psychologist within the salary guide for all teachers. The base salary calculated using the previous year base salary of $56,520 and the off-guide amount calculated at .8 of the full off-guide amount of $2,100, or $1,680 would have been $58,200 for the 2003-2004 school year. Including the longevity payment of $300, the total salary would have been $58,500. The respondent froze the petitioner's salary at $55,140 until recovering the alleged overpayments. The total salary paid to the petitioner for the 2003-2004 school year was $55,140. The respondent asserts the correct salary should have been $56,499.

20. For the 2004-2005 school year, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association for July 1, 2002 to June 30, 2005 included the psychologist within the salary guide for all teachers. The base salary calculated using the previous year base salary of $58,200 and the off-guide amount calculated at .8 of the full off-guide amount of $2,130, or $1,704 would have been $59,904 for the 2003-2004 school year. Including the longevity payment of $300, the total salary would have been $60,204. The respondent froze the petitioner's salary at $55,140 until recovering the alleged overpayments. The total salary paid to the petitioner for

the 2004-2005 school year was $55,140. The respondent asserts the correct salary should have been $58,203.

21. For the school years 1994-1995, 1995-1996, and 1999-2000, 2000-2001, 2002-2003, 2003-2004, 2004-2005, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association contained no written agreement for calculating salaries for the part-time psychologist in the Hackettstown School District.

22. For the school years 1996-1997, 1997-1998, and 1998-1999, the agreement between the Hackettstown Board of Education and the Hackettstown Education Association contained provisions for the salary of the part-time psychologist based on .5 employment.

LEGAL DISCUSSION

New Jersey state law provides at *N.J.S.A.* 18A:28-5 that any teacher who has acquired tenure "shall not be ...reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause..." A long line of school law decisions has interpreted this reduction-in-compensation language as prohibiting a local board from reducing a tenured employee's salary, unless the board successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. See, *e.g., Stockton v. Board of Educ. of City of Trenton*, 210 *N.J. Super.* 150,(App. Div. 1986) (unilateral decision to reduce teacher to lower step of salary guide violated Teachers' Tenure Act); *Kalapos v. Trenton Bd. of Educ.*, 93 *N.J.A.R.2d* (EDU) 430 (Comm'r June 2, 1993) (overpayment due to clerical error); *Galop v. Hanover Twp. Bd. of Educ.,* 1975 *S.L.D.* 358 (Comm'r May 16) (inadvertent placement on wrong step of salary guide); *Anson v. Bridgeton Bd. of Educ.*, 1972 *S.L.D.* 638 (Comm'r Dec. 5) (administrative error in placement on salary guide); Docherty v. West Paterson Bd. of Educ., 1967 S.L.D. 297 (Comm'r Oct. 23) (miscalculation of graduate credits).

The Appellate Court in *Stockton* held that:

> The unilateral decision of someone (apparently not the official act of the Board) to correct an error allegedly made in September 1981, by reducing petitioner to step 14, appears to us to violate the Teachers' Tenure Act by reducing his compensation in violation of N.J.S.A. 18A:6-10, notwithstanding that the adoption of the new contract in October 1983 resulted in a small increase in petitioner's salary because he was reduced from step 15 to step 14.
> *[supra at* 157]

The matter of *Kalapos v. Trenton Bd. Of Educ, supra*, involves the recoupment of an alleged salary overpayment by the Trenton Board of Education. The Honorable Bea Tylutki, ALJ, concluded in *Kalapos* that:

> ...the case law has clearly established that a board of education cannot require the reimbursement of monies paid in error through no fault of the employee, *Trenton Educ. Ass'n v. Trenton Bd. of Educ.*, 1986 S.L.D. 2415, *Galop v. Hanover Bd. of Educ.*, 1975 S.L.D. 358, *Honaker v. Hillsdale Bd. of Educ.*, 1980 S.L.D. 898, and *Conti v. Montgomery Bd. of Educ.*, OAL DOCKET NO. EDU 7118-84 (April 25, 1985), *rev'd, Comm'r of Educ.* (June 10, 1985), *rev'd, State Bd.* (July 2, 1986).

In *Anson v. Bridgeton Bd. of Educ., supra*, three teachers' salaries were set at a higher level than that to which each was entitled, and the commissioner ruled that the teachers had acquired vested rights to the salaries established for them by the board's adoption of their salary placement, saying:

> If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the board in fixing their salaries for the 1970-71 school year.

On the other hand, there are a line of cases that appear to support the proposition that a School board may freeze a teacher's salary erroneously fixed, until the negotiated salary reaches the point where the salary level had been frozen. *Markot v. East Brunswick Bd. of Educ.*, 1988 *S.L.D.* 10 (Comm'r May 9), rev'd on other grounds, Dkt. No. 26-88 (St. Bd. Aug. 2, 1989); *Trenton Educ. Ass'n v. Trenton Bd. of Educ.*, 1986 S.L.D. 2415, 2434 (Comm'r Oct. 6). According to the holding of the Commissioner in *Markot*, the proper procedure "is to hold the salary level in place, not to reduce it through deductions." *Markot,* 1988 *S.L.D.* at 11. Thus, the goal "is not to

allow the board to recoup every penny erroneously paid out," but to preserve existing salary until the employee's training and experience catches up with his place on the guide. *Id.* Some decisions have held that the excessive salary may continue for only the balance of the current school year or possibly until expiration of a multi-year contract. An example is in *Galop*, where the Commissioner did not allow the district to recover the prior overpayment of a staff member placed on the wrong step of the guide for the 1973-74 school year, but added that "petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract." *Galop, at* 364.

CONCLUSIONS

The instant case presents a unique set of facts that is somewhat distinct from the line of cases regarding the issue of recoupment of alleged overpayments made to teaching staff members. The clear evidence leads to the conclusion that the accepted practice in the District for calculating salaries for part-time employees was to pro rate the stipend and off-guide amounts where applicable. In the 1994-1995 school year, the petitioner was paid a salary for part-time employment using the full off-guide amount in the contract. This led to an overpayment of salary in the amount of $1,250. The initial "overpayment" can certainly be properly characterized as a mistake. Thus, the respondent maintains that the erroneous overpayment is properly subject to recoupment. However, the matter turns not on the expeditious discovery of such mistake, but discovery delayed for approximately nine years, during which time the petitioner had enjoyed the benefit of incremental increases in salary otherwise consistent with the negotiated agreements and past practice. Additionally, the parties incorporated the "mistake" in a subsequent negotiated agreement. While the respondent may assert that a mistake may be rectified by freezing a salary in excess of the negotiated amount, the tenure law prevents a board from reducing a tenured teacher's salary where both parties have "undertaken performance of the contract" and the teacher has already started to work. *Stockton v. Trenton Bd. of Educ., supra at* 157. To allow a rescission of the agreement incorporating the salary guide for the .5 psychologist for the school years 1996-1997 to 1998-1999, would require a showing of original invalidity, fraud, failure of consideration or a material breach or default. *Hilton Hotels, Corp. v. Piper Co.*, 214 *N.J. Super.* 328, 336 (Ch. Div. 1986). Based on the

evidence adduced, I **CONCLUDE** there was no such showing extant. There was no evidence to show that the agreement was anything other than an arms-length negotiated agreement. Clearly, the Board sought to eliminate the stipend previously paid to certain teaching staff members. Not only was the elimination of the stipend incorporated in the agreement, but so too was the removal of the off-guide amount for those employees during the three-year contract period. Salary calculations for the specific staff members were based on the base salary, plus stipend (in year one only) and longevity, if applicable.

Clearly, there was evidence sufficient to establish that there was an overpayment in the 1994-1995 and 1995-1996 school years, totaling $2,500. Had the Board taken steps to recover those overpayments at the time, the result might differ. However, thereafter, by way of ratification of a negotiated agreement, the parties established a new salary guide for the petitioner for the 1996-1997 to 1998-1999 school years. I **CONCLUDE** that all salary calculations flowing from the base year 1996-1997 forward were properly grounded in a duly negotiated agreement. By the time the respondent sought to recover the "overpayments" in 2002-2003, the petitioner's negotiated salary exceeded the salary level at which the salary was being "frozen".

There was sufficient evidence to find that the proper salary for the petitioner for the school year 2002-2003 (the initial year salary was frozen at $55,140) was $56,820. Since the respondent paid the petitioner the salary of $55,140, I **CONCLUDE** that the petitioner was underpaid in the amount of $1,680 for the school year 2002-2003.

The evidence establishes that the proper salary for the petitioner for the school year 2003-2004 was $58,500. Since the respondent paid the petitioner the salary of $55,140, I **CONCLUDE** that the petitioner was underpaid in the amount of $3,360 for the school year 2003-2004. It is noted that even by the calculations of the respondent, the petitioner was due a salary of $56,499 ($1,359 more than actually paid) for the 2003-2004 school year.

The evidence further establishes that the proper salary for the petitioner for the school year 2004-2005 should be $60,204. Since the respondent is paying the petitioner the current salary based on $55,140 per year, I **CONCLUDE** that the petitioner is entitled to an increase of $5,064 for the school year. It is noted that even by the calculations of the respondent, the petitioner is due a salary of $58,203 ($3,063 more than actually paid) for the 2004-2005 school year.

ORDER

Based on the foregoing, I hereby **ORDER** that the respondent restore the petitioner to the proper salary level for the 2004-2005 school year, in the amount of $60,204. Amounts withheld from the commencement of the school year are to be paid in a lump sum. The remaining amounts shall be included in the weekly salary going forward.

It is further **ORDERED** that the respondent reimburse the petitioner amounts improperly withheld from the petitioner for the 2002-2003 school year in the amount of $1,680, and for the 2003-2004 school year in the amount of $3,360. These amounts are to be paid in a lump sum.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/23/05
DATE

Robert J. Giordano
ROBERT J. GIORDANO, ALJ

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

2/23/05
DATE

Mailed to Parties:
[illegible] AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 24 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses

For petitioner:

Michael Simonetta
Michael James Carroll
Gail M. Sarcone

Exhibits

For petitioner:

P-1 Agreement between Hackettstown BOE and Hackettstown Education Association dated 7/1/89 to 6/30/91

P-2 Agreement between Hackettstown BOE and Hackettstown Education Association dated 7/1/91 to 6/30/93

P-3 Agreement between Hackettstown BOE and Hackettstown Education Association

P-4 Agreement between Hackettstown BOE and Hackettstown Education Association

P-5 Agreement between Hackettstown BOE and Hackettstown Education Association

P-6 Agreement between Hackettstown BOE and Hackettstown Education Association

P-7 Resolution of Board of Education, dated March 26, 2003

P-8 Contract of employment from Hackettstown Public Schools to Gail Sarcone dated 4/17/89

P-9 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for 1990-91 school year

P-10 Contract for Gail Sarcone from Hackettstown BOE dated 5/24/91

P-11 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for 1992-93 school year

P-12 Memo to James Sheerin from Sowmya Kumar re: Part-time Psychologist

P-13 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule fro 1994-95 school year

P-14 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule fro 1995-96 school year

P-15 Contract offer to Gail Sarcone from Hackettstown BOE dated 4/26/96

P-16 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule fro 1997-98 school year

P-17 Letter to Gail Sarcone from Hackettstown Public Schools re: Salary adjustment for 1998-99 school year.

P-18 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for 1999-2000 school year

P-19 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for-2000-01 school year.

P-20 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for 2001-2002 school year

P-21 Contract offer to Gail Sarcone from Hackettstown BOE dated 5/10/02

P-22 Letter to Gail Sarcone from Hackettstown BOE re: Salary schedule for 2003-2004 school year

P-23 Computation of Off Guide Salaries fro Contract Year 1990-1992

Court:

C-1 Salary Calculations for Gail Sarcone 1991-2003

C-2 Salary Calculations for Gail Sarcone 1990-1994

C-3 Salary Calculations for Gail Sarcone 1989-1994

C-4 Salary information from Hackettstown Public Schools Office of Business Administrator dated 12/20/04

202-05

BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

The petitioning Board requested that the Department recalculate the district's core curriculum standards aid (CCSA) for the years 2002-2003, 2003-2004, and 2004-2005, pursuant to *N.J.S.A.* 18A:7F-15, claiming that the Department had erroneously combined the population of Milford with sections of Holland and/or Alexandria Township, to the effect that the local share formula used in the calculation did not accurately reflect the district's income wealth and resulted in an underestimate of the Board's State Aid entitlement for the above years.

The ALJ found that there were no material facts in dispute, stating that the material issues the petitioning Board argues are disputed facts actually concern interpretations of relevant statutes—including CEIFA and the FY05 Appropriations Act—and do not bar a conclusion that summary decision is appropriate in this matter. Further, the ALJ found that the petitioner failed to appeal the 2002-2003 and 2003-2004 aid calculations within 90 days as required by *N.J.A.C.* 6A:3-1.3(d), and found that the petitioner's reliance on a statutory provision which permits a district to appeal the amount of it's CCSA on the basis of the calculation of income within the local formula is misplaced. The ALJ concluded that: the Department is not authorized to recalculate State aid pursuant to CEIFA provisions which have been suspended by the Legislature for the duration of FY 2005; and the FY 2003 and FY 2004 calculations cannot be appealed because they are beyond the 90-day time limitation and there is no overriding public interest that justifies a relaxation of the rule. The ALJ granted respondent Department's motion for dismissal, and ordered the petition dismissed.

Upon a full and independent review of this matter, the Deputy Commissioner, to whom this matter has been delegated for decision pursuant to *N.J.S.A.* 18A:4-33, identified two threshold issues: whether the challenge to the Department's calculations of the CCSA entitlement for school years 2002-2004 was timely filed, and whether the FY05 Appropriations Act precludes the Department from applying the provisions established in *N.J.S.A.* 18A:7F-15. The Deputy Commissioner held that: the greater public interest lies with the enforcement of the 90-day rule and the dismissal of the Board's claims with respect to its appeal of its CCSA award for the 2002-2004 school years; and the effect of the FY05 Appropriations Act was the suspension of the aid calculation under CEIFA and the challenges thereto based on *N.J.S.A.* 18A:7F-15. The Department's motion for summary decision was granted and the petition 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 2, 2005

OAL DKT. NO. EDU 738-05
(EDU 6012-04 ON REMAND)
AGENCY DKT. NO. 178-5/04

BOARD OF EDUCATION OF THE BOROUGH OF MILFORD, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. The Milford Board's (Board) exceptions and the Department of Education's (Department) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18 and were considered by the Deputy Commissioner to whom this matter has been delegated for decision, pursuant to *N.J.S.A.* 18A:4-33, in making his determination.[1]

In its exceptions, the Board argues that the Initial Decision on Remand fails to fulfill the remand directive to cure the deficiencies identified by the Deputy Commissioner. (Board Exceptions at 3) The Board further asserts that the revised decision remains inadequately grounded in fact or law to justify the granting of summary decision. (*Ibid.*) Specifically, the Board alleges that the revised decision does not acknowledge that there are material facts in dispute which would preclude the granting of summary decision in this matter and claims that the revised decision still improperly disregards the nature of the relief sought. (*Id.* at 3, 5)

[1] Both parties attached a copy of the exceptions each filed in response to the previous Initial Decision in this matter, OAL DKT. NO. EDU 6012-04, dated December 15, 2004. Although not summarized in this determination, the Deputy Commissioner emphasizes that these previously submitted exception arguments were thoroughly reviewed and considered in the course of the Deputy Commissioner's review of the complete record in this matter.

With respect to its claim that material facts in this matter are in dispute, the Board points out that there is clearly a dispute as to whether its Core Curriculum Standards Aid (CCSA) was calculated correctly and that this factual issue is relevant because this petition was filed under *N.J.S.A.* 18A:7F-15, which permits a district to challenge the calculation of its CCSA if the calculation of income within the local share formula does not accurately reflect a district's income wealth. (*Id.* at 4) The Board notes that it included voluminous statistical and documentary records, calculations and arguments (attached to its previous exceptions as Exhibit A) in support of its contention that the Department utilized inaccurate factual data in calculating its local share for the 2001-02 school year, but that it did not -- and could not -- submit a record of the data and methods actually used by the Department. (*Id.* at 4-5) The Board points out that, whether the Department's calculation was erroneous or not, the calculation for 2001-02 has been relied upon every year since. (*Id.* at 5) In that the submission of records to support the Department's assertion that the local share was not miscalculated is in the purview of the Department and it has not submitted these records, the Board contends, further discovery is necessary to resolve this dispute and other factual disputes. (*Ibid.*)

The Board also avers that the revised decision does not accurately address the relief sought in this matter, claiming that "(a) correcting the Department's calculation, if found to be factually inaccurate, and (b) restoring funds improperly withheld as a result, are two distinct forms of relief, both of which operate independently of the Appropriations Act." (*Id.* at 5-6) The Board contends that the funds appropriated by the Legislature for the current and most recent prior fiscal years are irrelevant to ensuring that any mistake previously made in calculating the District's CCSA entitlement is not compounded going forward. (*Id.* at 6) Moreover, the Board argues that its CCSA calculation can be reviewed and corrected independently of the Appropriations Act in that the Appropriations Act may only be deemed to

have superseded other funding statutes for the duration of that Act, and only upon a clear showing that the two legislative measures are repugnant or inconsistent. (*Ibid.*) Thus, the Board asserts, the Administrative Law Judge's (ALJ) finding that the ability to correct a CCSA calculation cannot coexist with the language in the FY05 Appropriations Act is unsupportable. (*Ibid.*) Moreover, the Board maintains, the FY05 Appropriations Act does not contain language affirmatively prohibiting the Department from investigating and correcting a mistake. (*Ibid.*) Additionally, the Board claims that the ALJ's conclusion that the Department does not have any authority to transfer revenue between or among State revenue funds is directly contrary to the express legislative provision of the FY05 Appropriations Act, which authorizes the Director of the Department's Division of Budget and Accounting to transfer revenues from the General Fund into the Property Tax Relief Fund -- the fund from which the aid in question is drawn -- if appropriations in that fund should exceed available revenues. (*Id.* at 7)

The Board further contends that the ALJ erred in rendering his revised decision because he based his findings on the parties' exceptions, rather than the underlying pleadings and exhibits. (*Id.* at 7-8) In support thereof, the Board points out that the ALJ found in his revised decision that the Board had alleged three disputed facts, whereas the Board actually raised a panoply of pertinent facts in its petition; the disputed facts raised in its exceptions were only examples of disputed facts that would prevent the granting of summary judgment. (*Id.* at 8) As examples of facts that have not yet been addressed, the Board claims that it "has alleged a series of facts to show that the Divisions of Taxation and School Finance have improperly combined portions of the populations of the Townships of Holland and Alexandria, both of which share Milford's zip code, and both of which are wealthier than Milford, and that, as a result, the relative CCSA entitlements allotted to each of these three municipalities are vastly

disproportionate to what they should be, given their relative population and socioeconomic status." (*Ibid.*)

Turning to whether the 90-day time limit for the filing of an appeal to the Commissioner should be strictly construed in light of the Board's claims of a continuing violation of public rights, the Board avers that the cases relied upon by the ALJ, *i.e.: Portee, supra,* and *Kaprow, supra*, involve claims brought by individuals, not claims brought -- as in this case -- on behalf of the public. (*Id.* at 9) Citing *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975), the Board submits that "the State Supreme Court specifically found that exceptions to a procedural limitations period are warranted where the matter involves 'important *public rather than private* interests which require adjudication *or clarification.*'" (emphasis supplied in text) (*Ibid.*) In further support of its argument, the Board quotes the Supreme Court in *Reilly v. Brice*, 109 *N.J.* 555, 558 (1988) wherein the Court found that "one of the well-recognized exceptions warranting relief from [a] statute of limitations is based on consideration of public rather than private interests." (emphasis supplied in text) (*Id.* at 10)

Additionally, the Board points to *Ironbound Committee Against Toxic Waste v. Board of Chosen Freeholders*, 230 *N.J. Super.* 133 (App. Div. 1989) and *Bernstein v. Krom*, 111 *N.J. Super.* 559 (App. Div. 1970) in support of its contention that a waiver of procedural limitations is appropriate in disputes that involve or implicate the expenditure of pubic funds, and specifically points out that neither of these require or suggest that the doctrine is contingent upon an explanation for the delay in filing from the one seeking vindication of a public right. (*Ibid.*) Moreover, the Board argues, the ALJ's finding that it has not set forth the harm, if any, the taxpayers, students or administration faced due to the State aid awards in FY03 and FY04 is irrelevant and inaccurate as this claim involves an allegation, brought under *N.J.S.A.* 18A: 7F-15, that the calculation of income used to determine the Board's local share under the statutory

formula does not accurately reflect the District's income and that a portion of the CCSA State Aid to which the District was rightfully entitled was erroneously attributed to the Holland Township and Alexandra Township school districts. (*Id.* at 11)

Finally, the Board submits that the ALJ failed to grant all legitimate inferences in favor of the Board in determining to grant the Department's motion to dismiss, which would include that: 1) the CCSA was miscalculated; 2) the District was harmed as a result; 3) the Department was authorized to revisit and redo the calculation notwithstanding the particular amount of aid the State Legislature appropriated to a particular fund in the annual budgets for the years in question; 4) the Department was authorized under the Appropriations Act to transfer funds, if necessary to rectify the insufficient award; and 5) it would be possible in this or future budget years to provide prospective and/or retroactive relief. (*Ibid.*) The Board, therefore, concludes that the ALJ failed to justify an award of summary decision to the Department, pursuant to *Brill, supra*, and contends that the ALJ's determination is still insupportable in fact or at law, was reached in error, and must be rejected. (*Id.* at 12)

In response, the Department contends, *inter alia*, that the ALJ properly determined that there are no material facts in dispute, noting that the crux of the parties' dispute concerns the interpretation of relevant statutes, including the Comprehensive Education Improvement and Financing Act (CEIFA), *N.J.S.A.* 18A:7F-1 *et seq.* and the FY05 Appropriations Act. (Department's Exceptions at 1-2) The Department asserts that "the Legislature intended to suspend State aid calculations pursuant to CEIFA for the 2002-2003, 2003-2004, and 2004-2005 school years," and that, because of these Legislative mandates, the Department was obligated to limit school districts to the same CCSA they received in the prior year. (*Id.* at 4) The Department concludes that, because the Board does not contest that it was

provided the same CCSA aid in 2002-2003, 2003-2004 and 2004-2005, the ALJ correctly determined that there are no material facts in dispute. (*Ibid.*)

With respect to the Board's assertion that the ALJ erred by failing to accept as true its contentions that the income and/or property values used by the Department in the calculation of CCSA are wrong and, therefore, are material facts in dispute, the Department points out that the ALJ was only required to view the evidence in the light most favorable to the non-moving party, which does not mean that he was required to dispense with his ability to review the facts and law relevant to the dispute. (*Id.* at 4-5) Even giving the Board every inference, the Department argues, it is unreasonable to believe that the Board would wait three years to file a claim against the State if it believed that its CCSA calculation was incorrect and its taxpayers were being unfairly burdened. (*Id.* at 5) Moreover, the Department asserts, even if the ALJ had accepted the Board's claim that the income and property values utilized in calculating the State aid in 2001-2002 were erroneous, that claim is time-barred. (*Ibid.*) Thus, the Department reasons, the income and property values utilized for the 2001-2002 CEIFA calculation which forms the basis of the CCSA award for the 2002-2003, 2003-2004 and 2004-2005 school years are not material facts in dispute. (*Ibid.*)

Additionally, the Department avers that there is no need for discovery in that the Board does not dispute that it received the amounts of CCSA indicated in the Initial Decision and it is time-barred from challenging the CEIFA calculation for the 2001-2002 school year which formed the basis for CCSA funding in subsequent years. (*Id.* at 5-6) The Department claims that it is clear that the Board's dissatisfaction is not with some purported miscalculation of CCSA, but is a dispute involving legal issues concerning the suspension of CEIFA and the inability of the Department to provide any additional aid to Milford. (*Id.* at 6) Thus, the

Department contends, there are no material facts in dispute, the Board is not entitled to the relief it seeks and its petition must be dismissed. (*Ibid.*)

In support of the ALJ's determination that the Board's appeal of the 2002-2003 and 2003-2004 CCSA awards were time barred pursuant to *N.J.A.C.* 6A:3-1.3(d), the Department cites numerous cases in support of its contention that the 90-day time limitation for filing an appeal has been strictly applied by the Commissioner, the State Board and the courts, and is only relaxed, pursuant to *N.J.A.C.* 6A:3-1.16, in instances where there is a compelling reason, where judicial review of an informal administrative determination is sought, where there is a substantial constitutional issue or where there is an issue of fundamental public interest beyond the parties themselves. (*Id.* at 6-8) Citing *Sloan v. Klagholz*, 342 *N.J. Super.* 385, 394 (App. Div. 2001), "holding that the imposition of a greater tax burden upon local property owners does not implicate the Thorough and Efficient Education Clause of the New Jersey Constitution," the Department avers that the Board's challenge of its State aid award does not implicate any constitutional issues nor dispute an informal administrative determination. (*Id.* at 8) Moreover, the Department argues, the Board's claims do not raise any issues of substantial public interest beyond the parties themselves that would warrant the relaxation of the 90-day time limitation. (*Ibid.*)

The Department points out that the Board does not dispute that it was provided adequate notice of the CCSA awards for the 2002-2003 and 2003-2004 school years and it has failed to provide any explanation as to why it was unable to file its appeal within 90 days of its receipt of notice of the awards for each of those years. (*Id.* at 8-9) The Department also points out that there has been no allegation by the Board that its students failed to receive a thorough and efficient education. (*Id.* at 9) Moreover, the Department submits that, although the District taxpayers understandably have a concern to ensure that they are not paying more than necessary

for education, their interest is not paramount to the State's other taxpayers who have a right to have issues of school funding and State aid resolved in a timely fashion so that they can finalize their own communities' budgets from year to year. (*Ibid.*)

The Department also asserts that the cases cited by the Board in support of its argument that this dispute concerns public issues, are not germane to the issues on appeal because all of the cases cited concern limitations applicable to actions in lieu of prerogative writs. (*Id.* at 9-10) In explanation, the Department contends that the rules for the filing of prerogative writs have no bearing upon the regulatory process governing disputes arising under the school laws and "actions in lieu of prerogative writs only apply to municipal actions, as all challenges to State agency actions or regulations must be made to the Appellate Division." (*Id.* at 10) Citing *Sloan, supra*; *Board of Education of the Township of East Brunswick, Middlesex County v. New Jersey State Department of Education,* decided by the Commissioner August 10, 2001; and *Board of Education of the City of New Brunswick, Middlesex County v. New Jersey State Department of Education the Department*, decided by the Commissioner August 31, 2004, the Department additionally submits that the ALJ's determination that the Board's appeal of its 2002-2003 and 2003-2004 CCSA awards was time barred should be upheld because that determination is consistent with other determinations by the Commissioner involving school funding. (*Id.* at 10-11)

With respect to the Board's challenge to the 2004-2005 calculation of the CCSA, the Department sets forth its position that the FY2005 Appropriations Act clearly suspended CEIFA for the 2004-2005 school years and that funding statutes are subject to the allocations allowed for by the annual Appropriations Act in that, as found in *Hammonton Board of Educ. v. New Jersey Dep't of Educ. et al,* (App. Div. 2003) (A-3836-01T5), slip op. at 16, where "statutes which require State funding for mandated programs are irreconcilable with the annual

Appropriations Act, an 'implied suspension' of the funding statutes occurs for the life of the fiscal year covered by the Appropriations Act." (*Id.* at 11-12) Additionally, the Department notes that the "implied suspension" reasoning in *Hammonton, supra*, was applied by the Commissioner in his determination dismissing the challenge to the amount of aid awarded under CEIFA for the 2003-2004 school year in *Board of Education of the City of Woodbury, Gloucester County v. New Jersey Department of Education, et al,* decided by the Commissioner April 28, 2004. (*Id.* at 13)

The Department also argues that the FY05 Appropriations Act has the full effect of law and expresses the Legislature's intent and points out that the language in the FY05 Appropriations Act stating that each district shall receive no less of a total State aid amount payable than it received in the 2002-2003 school is identical to the language at issue in *Hammonton*, with the exception of the school year. (*Id.* at 12) The Department thus concludes that the Legislature intended to limit CCSA and other aid to each district to the amount of aid received the previous year. (*Ibid.*) Since the Legislature appropriated the same amount of CCSA in FY05 that it had appropriated in FY04 and FY03, respectively, the Department claims that it cannot increase the award of aid in one district without lowering the amount of aid to another district, which is strictly prohibited by the Legislature. (*Id.* at 12-13)

Moreover, the Department claims the Board's reliance on *N.J.S.A.* 18A:7F-15 to support its assertion that the Department can review and recalculate the income figure used in the State aid award for FY05 is misplaced in that: 1) since the Department's position is that it cannot change the amount of CCSA awarded for the FY05 school year, and the Department did not calculate the income within the local share formula for the FY05 school year, the provision under *N.J.S.A.* 18A:7F-15 which permits a district to challenge its district income figures must also be deemed suspended; and 2) since the Department's position is that the Board's challenge

of the State-aid awards for the FY01 and FY02 school years is time barred, it follows that the income and property values utilized in the 2001-2002 school year, which was the last time State aid was based upon a CEIFA calculation, can not be reviewed. (*Id.* at 14)

Finally, with respect to the Department's ability to transfer funds between the General Fund and the Property Tax Fund, the Department contends that it is the Department of Treasury that is responsible for the oversight of the State budget, and the Office of Management and Budget within that Department, that may make transfers between appropriation and revenue accounts in the General Fund for the entire State budget. (*Ibid.*) The Department avers that "the Appropriations Act has not granted any authority to, nor is there any statutory authorization for, the Department to transfer funds between or among State revenue funds." (*Id.* at 15)

Upon a thorough and independent review of the record in this matter, the Deputy Commissioner concludes that there are two threshold issues which must initially be determined, *i.e.*: 1) whether the challenge to the Department's calculations of the Board's CCSA entitlement for the 2002-2003 and 2003-2004 school years was timely filed; and 2) whether the FY05 Appropriations Act precludes the Department from applying the provisions established in *N.J.S.A.* 18A:7F-15.

On May 14, 2004, the Board filed a Verified Petition of Appeal, claiming that, possibly as a result of identical zip codes, the Department had erroneously combined the population of Milford with more prosperous sections of Holland and/or Alexandria Township resulting in an underestimate of the Board's State Aid entitlement for the 2002-2003, 2003-2004 and 2004-2005 school years. (Board's Brief in Opposition to Motion to Dismiss at 10) The parties concur that the last time the Department conducted CCSA calculations was the 2001-2002 school year and that in the Appropriations Acts for the subsequent years, FY03, FY04

and FY05, the Legislature limited the CCSA funding for each school district to that which had been received in the prior year.

The Board does not dispute that its appeal of its CCSA award for the 2002-2003 and 2003-2004 school years was not filed within the 90-day limitation set forth at *N.J.A.C.* 6A:3-1.3(d). Instead, the Board argues that the alleged CCSA calculation error for the 2001-2002 school year has been perpetuated each year since and is thus a "continuing violation of public rights." (*Id.* at 20) The Deputy Commissioner rejects this argument in that there has been no claim that the District's students were deprived of a thorough and efficient education, nor has it identified the violation of any protected right.

Rather, the within matter is analogous to *North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587 (1984), wherein teachers challenged their placement on a salary guide and argued that their failure to file within the 90-day limitation period from notification of such placement should not preclude them from actions for relief in the subsequent years because the withholding of the increment constituted a continuing violation. The Supreme Court in that case found:

> The teachers' asserted right to advance an additional step on the 1980-81 salary guide depends on the propriety of the Board's action in not advancing them on the 1979-80 guide. The time bar of the original action also precludes the dependent action for relief in future years.
>
> Nor does the withholding of the increment constitute a continuing violation. Such a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case. Furthermore, the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations. *North Plainfield Educ. Ass'n at 595.*

Numerous decisions concerning the 90-day time limitation have been litigated and the courts have consistently held that the rule is mandatory and that the 90-day time period begins to run on the date that notice is received of the action taken. *See Nissman v. Bd. of Educ. of the Twp. of Long Beach Island,* 272 *N.J. Super.* 373, 380 (App. Div. 1994), *cert. denied* 137 *N.J.* 315 (1994); *Wynne v. Tillery, Camden County Superintendent of Schools et al.,* 96 *N.J.A.R.*2d (EDU) 995; and *Portee v. Newark Board of Education,* 94 *N.J.A.R.*2d (EDU) 381. Moreover, the 90-day limitation period has been strictly applied in other determinations by the Commissioner involving school funding. See *Sloan, supra; Board of Education of the Township of East Brunswick, supra*; and *Board of Education of the City of New Brunswick, supra.* Moreover, the Deputy Commissioner does not find that the factual circumstances set forth in the Board's pleadings constitute grounds for relaxation of the 90-day rule. No constitutional issues are involved in the matter, nor does it present issues of significant public interest beyond the parties. On the contrary, the Deputy Commissioner herein determines, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood,* 1990 *S.L.D.* 663, 673, that the greater public interest lies with the enforcement of the 90-day rule and the dismissal of the Board's claims with respect to its appeal of its CCSA award for the 2002-2003 and 2003-2004 school years.

Turning to the Board's appeal of its CCSA State aid for the 2004-2005 school year, the Deputy Commissioner notes that the amount appropriated by the Legislature for State aid to school districts for the 2004-2005 school year was the same as the amounts appropriated for the three previous years, and the FY05 Appropriations Act specifically states:

> Notwithstanding any other law or regulation to the contrary, each district shall receive no less of a total State aid amount payable for the 2004-2005 school year than the sum of the district's total State aid amount payable for the 2003-2004 school year for the

following aid categories: Core Curriculum Standards Aid *** (*P.L.* 2004, *c.* 71 at 105)

Given that the State aid appropriated to school districts for the 2004-2005 school year was the same as the amounts appropriated for the previous three years and the language in the FY05 Appropriations Act requires that no district receive less CCSA than the previous year, the Deputy Commissioner finds that the effect of the FY05 Appropriations Act was the suspension of the aid calculation under CEIFA and the challenges thereto based on *N.J.S.A.* 18A:7F-15.

As the Court found with respect to a challenge of the funding provided to the Hammonton School District by the FY03 Appropriations Act in *Hammonton, supra*:

> The principle is also well established that statutes which rely on State funding are not "self-executing." *City of Camden*, 82 *N.J.* at 147. Thus, even where "the Legislature has mandated a particular program, it is subject, insofar as it requires appropriations, to the Annual Appropriations Act." *Franklin*, 225 *N.J. Super.* at 516. Accordingly, "the judiciary is unable to compel a requested appropriation even where a statutorily defined substantive right to the monies is established." *City of Camden*, 82 *N.J.* at 148.
>
> *****
>
> The current appropriations act at issue in this case, the FY03 Appropriations Act, L. 2002, c. 38 (FY03), has the full effect of law and expresses a "definite legislative intent." *City of Camden*, 82 *N.J.* at 142. To the extent that the two enactments – CEIFA and FY03 – are irreconcilable, they cannot coexist. Our courts, consistent with federal statutory interpretation, have declined to apply the doctrine of "implied repeal." *** Because appropriations acts have "a life limited to its fiscal year," our courts have been sensitive to the impact of appropriations laws upon existing laws, choosing to characterize the effect of appropriations on standing legislation as an implied "suspension rather than an implied repeal"; however, for practical purposes, the effect is the same. (*Hammonton, supra* at 15-17)

Notwithstanding the Board's argument that the matter herein is distinguishable from *Hammonton, supra,* because the Legislature's definitive budgetary action affected all

school districts alike, and Hammonton did not dispute that the Commissioner had fulfilled his own respective duties by certifying Hammonton's aid in accordance with CEIFA's provisions, the Deputy Commissioner finds *Hammonton, supra* to be precisely on point with respect to the effect that the Appropriations Act has on the suspension of CEIFA State aid calculations and the ability to challenge those calculations under *N.J.S.A.* 18A:7F-15. Moreover, the Deputy Commissioner points out that, even assuming *arguendo*, that the Department did make an error in its CCSA calculation of aid for the 2001-2002 school year that has implicated funding in the 2004-2005 school year, there is no provision in the FY05 Appropriations Act whereby a correction can be made at this late date. If it were found that the Department had erroneously combined the population of Milford with more prosperous sections of Holland and/or Alexandria Township resulting in an underestimate of the Board's CCSA entitlement as claimed by the Board and State aid was increased on this basis, then there would need to be a proportionate decrease in aid to the school districts of Holland and/or Alexandria Township, which is specifically prohibited by the FY05 Appropriations Act. As noted above, the amount appropriated for CCSA aid for school districts for FY05 was the same amount appropriated for the previous year, and the FY05 Appropriations Act specifically states that no school district shall receive less CCSA aid than it received in the previous year.

Additionally, contrary to the Board's contention that the FY05 Appropriations Act authorizes the Director of the Department's "Division of Budget and Accounting" to transfer revenues from the General Fund into the Property Tax Relief Fund, such authorization is -- in point of fact -- given to the "Director of the Division of Budget and Accounting," which is, as the opening section of the Appropriations Act makes abundantly clear,

a Division within the Treasury Department.[2] *P.L.* 2004, *c.*71 at 106. Neither the Department of Education nor the Commissioner is authorized by the FY05 Appropriations Act to make such transfers of funds.

Accordingly, after an exhaustive review of the arguments submitted in this matter, the Deputy Commissioner has determined that grant of summary decision to the Department is appropriate in this instance. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding the Board's assertion to the contrary, there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." All the issues characterized by the Board as "genuine issues of material fact" are facts related to whether its CCSA was calculated correctly. However, the instant dispute centers on whether the challenge to the Department's calculations of the Board's CCSA entitlement for the 2002-2003 and 2003-2004 school years was timely filed and what the effect is of the FY05 Appropriations Act on the implementing provisions of CEIFA and *N.J.S.A.* 18A:7F-1 *et seq.,* which are questions of law, not disputed "material facts."

"It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25

[2] The Appropriations Act is additionally replete with references to the Division of Budget and Accounting in sections pertaining to appropriations in various departments. See, for example, pages 18, 19, 20, 21, 25, 29, 30, 58, 60, *etc.* It is also noted that the Department of Education's Office of Budget and Accounting is in the Division of Finance.

(1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Additionally, the Deputy Commissioner agrees that the Department is entitled to prevail as a matter of law for the reasons set forth above.

Accordingly, the Department's motion for summary judgment is granted and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 6/2/05

Date of Mailing: 6/3/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 738-05

(ON REMAND EDU 6012-04)

AGENCY DKT. NO. 178-5/04

BOARD OF EDUCATION OF MILLFORD,

HUNTERDON COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF

EDUCATION, DIVISION OF FINANCE,

OFFICE OF SCHOOL FUNDING,

Respondent.

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Allison Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 3, 2005 Decided: March 3, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 13, 2004, Petitioner, the Milford Borough Board of Education, filed a Verified Petition of Appeal to recalculate State aid pursuant to *N.J.S.A.* 18A:7F-15. On June 4, 2004,

Respondent, the State Department of Education, filed a motion to dismiss. The Bureau of Controversies and Disputes in the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on July 14, 2004.

On October 7, 2004, the Petitioner filed a brief in opposition to Respondent's Motion to Dismiss. Respondent's reply brief was filed on November 15, 2004. An Initial Decision, dated December 15, 2004, was issued granting Respondent's motion to dismiss. A Final Decision, dated January 31, 2005, was issued remanding the matter to the Office of Administrative Law for revision of the Initial Decision and/or further proceedings as necessary, consistent with the concerns set forth therein.

ANALYSIS

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). The standard for granting summary judgment (decision) is found in *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
> *Id.* at 541.

The *Brill* standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose." *Id.* at

541. In addressing whether the *Brill* standard has been met in this case, further guidance is found in *Rule* 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefore favoring the non-moving party, would require submission of the issues to the trier of fact.

Petitioner challenges the calculation of the Core Curriculum Standards Aid component of its Comprehensive Education Improvement and Financing Act aid for the years 2002-2003, 2003-2004 and 2004-2005. Petitioner in its exceptions contends that the Initial Decision violated the *Brill* mandate because there are genuine issues in dispute with respect to material facts. Petitioner in its exceptions alleges three material issues are in dispute.

First, Petitioner claims that the dispute regarding whether the CEIFA aid was calculated properly is material fact in dispute. Second, Petitioner claims a material fact is in dispute regarding whether the provisions of the Appropriations Act provide a remedy to the alleged miscalculation or whether the Act allows monies to be transferred from Fund to Fund. Third, Petitioner contends a material fact is in dispute regarding whether CEIFA has been suspended.

I **FIND** and **CONCLUDE** that the three disputed facts alleged above do not bar a finding and conclusion that summary decision is appropriate. The three issues raised by Petitioner are disputes about the law and interpretations of statutes, not disputes about facts. Each issue can be resolved simply by reviewing the appropriate statutes, and exhibits accompanying the parties' briefs.

There are simply no material facts in dispute which warrant discovery or a hearing in this matter. The disputes in this matter concern interpretations of relevant statutes, including CEIFA and the FY05 Appropriations Act. The basic facts of this matter are as follows:

The amount of Core Curriculum Standards Aid appropriated by the Legislature for the 2002-2003 school year was $3,080,318.00. The amount of CCSA appropriated by the Legislature for the 2003-2004 and 2004-2005 school years was likewise $3,080,318.00 for each

year. The last time the Department of Education calculated State aid pursuant to CEIFA was during the 2001-2002 school year.

1. 2002-2003 and 2003-2004 Calculations:

The only material facts on this issue concern the Petitioner's failure to appeal the 2002-2003 and 2003-2004 aid calculations within 90 days as required by *N.J.A.C.* 6A:3-1.3(d). From the briefs and attached exhibits, I find that there is no question that Petitioner filed its appeal of the FY03 and FY04 calculations long after the 90-day time period expired.

With respect to the challenge to the 2002-2003 and 2003-2004 calculation, the Department contends that the Petitioner's claim is time barred because the petition was not filed within ninety days of the date it received notice of its State aid awards. *N.J.A.C.* 6A:3-1.3(d). In my Initial Decision, I agreed with the Respondent that the 90-day time limitation should not be relaxed. After reviewing the exceptions to the Initial Decision and relevant law, I continue to **FIND** and **CONCLUDE** that the 90-limitation applies and should not be relaxed.

The 90-day limitations rule has been strictly construed by the Commissioner. *John Portee v. Bd. Of Educ. of the City of Newark,* 94 *N.J.A.R.* 2d (EDU) 381 (Apr. 14 1994). Time limitations will be relaxed "only where there is some compelling reason for the same, such as the presence of substantial constitutional or other issue of fundamental interest beyond that of concern only to the parties themselves." *Kaprow v. Bd. Of Educ. of Berkley Twp.,* 131 *N.J.* 572, 587 (1993). In the instant matter, Milford's petition raises no constitutional issue, nor does it provide any rationale or justification for the delay.

Petitioner contends that the 90-day limitation should be relaxed since the issue concerns taxpayer money, which is an issue of public interest. I continue to disagree with Petitioner's contention that the time limitation should be relaxed in the public interest. Although the public has an interest in assuring that taxpayer funds are appropriately spent, the public also has an interest in the prompt resolution of disputes arising under school laws. *See Morris-Union Juncture Commission*, 92 *N.J.A.R.* 3d (EDU) 453 (Jul. 22, 1992). Further, Milford has not set forth what, if any, harm taxpayers, students or the administration faced due to the State aid

awards in the FY03 and FY04 school years. Moreover, retroactive relief is not going to alter the quality of education provided during those school years.

In summary, Petitioner has failed to justify a relaxation of the 90-day time limitations provided for in *N.J.A.C.* 6A:3-1.3(d).

2. 2004-2005 Calculation:

For FY05, the Legislature appropriated $3,080,318.00 for CCSA. This is the same amount that the Legislature appropriated for the FY 04 and FY03 school years respectively. The legislative language in the FY05 Appropriations Act provides that each district shall receive no less of a total State aid amount payable for the FY 05 school year than the district's total State aid amount payable for the FY04 school year. The legislative language does not state that a district could not receive more in FY05 than in the prior year. However, what is important is that the actual amount of funds appropriated by the Legislature was the same amount as in prior years. Since the CCSA funds actually appropriated in FY05 are the same as those appropriated in the prior year, the Department could not provide any additional CCSA to a district in FY05. If it did, it would clearly contravene the Legislature's clear directive that each district receive no less than the prior year. Thus, the appropriation language, when viewed together with the amount actually appropriated for FY05, evidences a clear Legislative intent to suspend CEIFA.

It is clear that the Legislature suspended the provisions of CEIFA, which cannot coexist with the language in the FY05 Appropriations Act. The holdings in *Hammonton Board of Educ. v. Department of Educ.,* et al., slip op. at 15 (App. Div. 2003) (A-38356-01T5) and in *Board of Educ of the City of Woodbury v. Department of Educ., et. al.*, OAL Dkt. No. EDU 8072-03 make it clear that the Legislature has limited the amount of CCSA to that amount that was provided in the FY04 and FY03 years and, thus, suspended certain provisions of CEIFA.

Petitioner's reliance on *N.J.S.A.* 18A:7F-15, which permits a district to appeal the amount of its CCSA on the basis that the calculation of income within the local share formula is misplaced. This provision is misplaced because this formula is suspended since it is irreconcilable with the fact that the Department was unable to calculate CEIFA and, thus, had no

control or ability to change the calculation of income in the local share formula. Moreover, the Department does not have any authority to transfer revenue between or among State revenue funds, and has not been authorized by the Legislature to provide any additional CCSA other than that which has been specifically appropriated.

CONCLUSION

In conclusion, it is overwhelmingly clear that there is no legal or factual basis upon which relief could be granted to Milford. Any disagreements concerns interpretations of statutes and relevant law, not facts. This matter is ripe for disposition and the law clearly supports Respondent's motion to dismiss. Simply put, the Department is not authorized to recalculate State aid pursuant to the CEIFA provisions which have been suspended by the Legislature for the duration of the FY05 fiscal year. The FY 03 and FY04 calculations cannot be appealed because they are far beyond the 90-day time limitation and there is no overriding public interest that justifies a relaxation of the rule.

ORDER

For the foregoing reasons, I hereby **GRANT** Respondent's Motion to Dismiss and **ORDER** that Petitioner's Verified Petition of Appeal be **DISMISSED**.

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

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

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

3-3-05

DATE

DOUGLAS H. HURD, ALJ

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

3-8-05

DATE

Mailed to Parties:

MAR 9 2005

DATE

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 738-05

(ON REMAND EDU 6012-04)

AGENCY DKT. NO. 178-5/04

BOARD OF EDUCATION OF MILLFORD,

HUNTERDON COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF

EDUCATION, DIVISION OF FINANCE,

OFFICE OF SCHOOL FUNDING,

Respondent.

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Allison Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 3, 2005 Decided: March 3, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 13, 2004, Petitioner, the Milford Borough Board of Education, filed a Verified Petition of Appeal to recalculate State aid pursuant to *N.J.S.A.* 18A:7F-15. On June 4, 2004,

Respondent, the State Department of Education, filed a motion to dismiss. The Bureau of Controversies and Disputes in the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on July 14, 2004.

On October 7, 2004, the Petitioner filed a brief in opposition to Respondent's Motion to Dismiss. Respondent's reply brief was filed on November 15, 2004. An Initial Decision, dated December 15, 2004, was issued granting Respondent's motion to dismiss. A Final Decision, dated January 31, 2005, was issued remanding the matter to the Office of Administrative Law for revision of the Initial Decision and/or further proceedings as necessary, consistent with the concerns set forth therein.

ANALYSIS

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). The standard for granting summary judgment (decision) is found in *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
> *Id.* at 541.

The *Brill* standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose." *Id.* at

541. In addressing whether the *Brill* standard has been met in this case, further guidance is found in *Rule* 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefore favoring the non-moving party, would require submission of the issues to the trier of fact.

Petitioner challenges the calculation of the Core Curriculum Standards Aid component of its Comprehensive Education Improvement and Financing Act aid for the years 2002-2003, 2003-2004 and 2004-2005. Petitioner in its exceptions contends that the Initial Decision violated the *Brill* mandate because there are genuine issues in dispute with respect to material facts. Petitioner in its exceptions alleges three material issues are in dispute.

First, Petitioner claims that the dispute regarding whether the CEIFA aid was calculated properly is material fact in dispute. Second, Petitioner claims a material fact is in dispute regarding whether the provisions of the Appropriations Act provide a remedy to the alleged miscalculation or whether the Act allows monies to be transferred from Fund to Fund. Third, Petitioner contends a material fact is in dispute regarding whether CEIFA has been suspended.

I **FIND** and **CONCLUDE** that the three disputed facts alleged above do not bar a finding and conclusion that summary decision is appropriate. The three issues raised by Petitioner are disputes about the law and interpretations of statutes, not disputes about facts. Each issue can be resolved simply by reviewing the appropriate statutes, and exhibits accompanying the parties' briefs.

There are simply no material facts in dispute which warrant discovery or a hearing in this matter. The disputes in this matter concern interpretations of relevant statutes, including CEIFA and the FY05 Appropriations Act. The basic facts of this matter are as follows:

The amount of Core Curriculum Standards Aid appropriated by the Legislature for the 2002-2003 school year was $3,080,318.00. The amount of CCSA appropriated by the Legislature for the 2003-2004 and 2004-2005 school years was likewise $3,080,318.00 for each

year. The last time the Department of Education calculated State aid pursuant to CEIFA was during the 2001-2002 school year.

1. 2002-2003 and 2003-2004 Calculations:

The only material facts on this issue concern the Petitioner's failure to appeal the 2002-2003 and 2003-2004 aid calculations within 90 days as required by *N.J.A.C.* 6A:3-1.3(d). From the briefs and attached exhibits, I find that there is no question that Petitioner filed its appeal of the FY03 and FY04 calculations long after the 90-day time period expired.

With respect to the challenge to the 2002-2003 and 2003-2004 calculation, the Department contends that the Petitioner's claim is time barred because the petition was not filed within ninety days of the date it received notice of its State aid awards. *N.J.A.C.* 6A:3-1.3(d). In my Initial Decision, I agreed with the Respondent that the 90-day time limitation should not be relaxed. After reviewing the exceptions to the Initial Decision and relevant law, I continue to **FIND** and **CONCLUDE** that the 90-limitation applies and should not be relaxed.

The 90-day limitations rule has been strictly construed by the Commissioner. *John Portee v. Bd. Of Educ. of the City of Newark,* 94 *N.J.A.R.* 2d (EDU) 381 (Apr. 14 1994). Time limitations will be relaxed "only where there is some compelling reason for the same, such as the presence of substantial constitutional or other issue of fundamental interest beyond that of concern only to the parties themselves." *Kaprow v. Bd. Of Educ. of Berkley Twp.,* 131 *N.J.* 572, 587 (1993). In the instant matter, Milford's petition raises no constitutional issue, nor does it provide any rationale or justification for the delay.

Petitioner contends that the 90-day limitation should be relaxed since the issue concerns taxpayer money, which is an issue of public interest. I continue to disagree with Petitioner's contention that the time limitation should be relaxed in the public interest. Although the public has an interest in assuring that taxpayer funds are appropriately spent, the public also has an interest in the prompt resolution of disputes arising under school laws. *See Morris-Union Juncture Commission*, 92 *N.J.A.R.* 3d (EDU) 453 (Jul. 22, 1992). Further, Milford has not set forth what, if any, harm taxpayers, students or the administration faced due to the State aid

awards in the FY03 and FY04 school years. Moreover, retroactive relief is not going to alter the quality of education provided during those school years.

In summary, Petitioner has failed to justify a relaxation of the 90-day time limitations provided for in *N.J.A.C.* 6A:3-1.3(d).

2. 2004-2005 Calculation:

For FY05, the Legislature appropriated $3,080,318.00 for CCSA. This is the same amount that the Legislature appropriated for the FY 04 and FY03 school years respectively. The legislative language in the FY05 Appropriations Act provides that each district shall receive no less of a total State aid amount payable for the FY 05 school year than the district's total State aid amount payable for the FY04 school year. The legislative language does not state that a district could not receive more in FY05 than in the prior year. However, what is important is that the actual amount of funds appropriated by the Legislature was the same amount as in prior years. Since the CCSA funds actually appropriated in FY05 are the same as those appropriated in the prior year, the Department could not provide any additional CCSA to a district in FY05. If it did, it would clearly contravene the Legislature's clear directive that each district receive no less than the prior year. Thus, the appropriation language, when viewed together with the amount actually appropriated for FY05, evidences a clear Legislative intent to suspend CEIFA.

It is clear that the Legislature suspended the provisions of CEIFA, which cannot coexist with the language in the FY05 Appropriations Act. The holdings in *Hammonton Board of Educ. v. Department of Educ.,* et al., slip op. at 15 (App. Div. 2003) (A-38356-01T5) and in *Board of Educ of the City of Woodbury v. Department of Educ., et. al.*, OAL Dkt. No. EDU 8072-03 make it clear that the Legislature has limited the amount of CCSA to that amount that was provided in the FY04 and FY03 years and, thus, suspended certain provisions of CEIFA.

Petitioner's reliance on *N.J.S.A.* 18A:7F-15, which permits a district to appeal the amount of its CCSA on the basis that the calculation of income within the local share formula is misplaced. This provision is misplaced because this formula is suspended since it is irreconcilable with the fact that the Department was unable to calculate CEIFA and, thus, had no

control or ability to change the calculation of income in the local share formula. Moreover, the Department does not have any authority to transfer revenue between or among State revenue funds, and has not been authorized by the Legislature to provide any additional CCSA other than that which has been specifically appropriated.

CONCLUSION

In conclusion, it is overwhelmingly clear that there is no legal or factual basis upon which relief could be granted to Milford. Any disagreements concerns interpretations of statutes and relevant law, not facts. This matter is ripe for disposition and the law clearly supports Respondent's motion to dismiss. Simply put, the Department is not authorized to recalculate State aid pursuant to the CEIFA provisions which have been suspended by the Legislature for the duration of the FY05 fiscal year. The FY 03 and FY04 calculations cannot be appealed because they are far beyond the 90-day time limitation and there is no overriding public interest that justifies a relaxation of the rule.

ORDER

For the foregoing reasons, I hereby **GRANT** Respondent's Motion to Dismiss and **ORDER** that Petitioner's Verified Petition of Appeal be **DISMISSED**.

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

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

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

3-3-05

DATE

DOIUGLAS H. HURD, ALJ

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

3-8-05

DATE

Mailed to Parties:

MAR 9 2005

DATE

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

205-05

OAL DKT. NO. EDU 03643-05
(EDU 11429-03 ON REMAND)

AGENCY DKT. NO. 384-10/03

DAISY LAZO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter, the proposed settlement agreement, as revised on remand, 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 settlement, as revised on remand, and adopts same as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/7/05

Date of Mailing: 6/7/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3643-05
OAL DKT. NO. EDU 11429-03–On Remand
AGENCY DKT. NO. 384-10/03

DAISY LAZO,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

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

Mark A. Tabakin, Esq., for respondent
(Weiner Lesniak, LLP, attorneys)

Record Closed: April 22, 2005 Decided: May 3, 2005

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

On or about October 20, 2003, petitioner, Daisy Lazo, filed a verified petition of appeal with the Commissioner of Education, alleging that she gained tenure pursuant to *N.J.S.A.* 18A:28-5 and thus was entitled to a one-year maternity/child rearing leave of absence. On October 29, 2003, respondent Board of Education of the City of

Englewood (Board) filed its answer requesting dismissal of the petition. On December 2, 2003, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on December 18, 2003, and a telephone prehearing conference scheduled for January 27, 2004. It should be noted that on or about November 17, 2003, respondent filed a motion for summary decision in the above-referenced matter. During the telephone prehearing on January 27, 2004, the issues were isolated and, in light of the pending motion, a hearing was not scheduled. Counsel were advised to file a joint stipulation of facts on or before February 20, 2004.

Subsequent to the receipt of the stipulation of facts, oral argument on the pending motion was scheduled for April 21, 2004. However, settlement conferences held on that date and continued on July 2, 2004 resulted in a tentative settlement, which required the approval of the Board. On or about November 3, 2004, the undersigned was advised that the Board had approved the settlement, and a signed settlement agreement would be filed. The signed Settlement Agreement was received on December 30, 2004.

Subsequent to the receipt of the Settlement Agreement, the undersigned issued an Initial Decision approving the settlement and ordering that the proceedings be concluded. By decision dated March 2, 2005, the Commissioner found: (1) an unidentified individual had signed the Settlement Agreement and General Release on behalf of the Board; (2) neither the file nor the Settlement Agreement contained a copy of the Board's resolution approving the settlement and designating that individual to sign the agreement on its behalf; and (3) the agreement was not signed by the Board attorney, the Board's duly authorized representative in litigation. Thus, the Commissioner did not approve the settlement and remanded the matter on April 4, 2005 to the OAL for revision of the Settlement Agreement. The remand was received

by the undersigned judge on April 14, 2005, at which time the parties were contacted in an effort to conform the settlement to address the Commissioner's concerns.

On April 22, 2005, the undersigned received an original signed Settlement Agreement and Certified Board Resolution approving the settlement. It is noted that this Settlement Agreement is signed by Board attorney, Mark Tabakin, as well as David Matthews, President of the Board of Education. Further, the Board Resolution authorizes the Board President and Board Secretary to execute the Settlement Agreement.

Thus, I **CONCLUDE** that the Commissioner's objections have been addressed and that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and should be approved. I, therefore, approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 3, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

May 6, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the Englewood Board of Education ("Board") and Daisy Lazo ("Lazo"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about October 17, 2003, Lazo filed a Verified Petition of Appeal with the Commissioner of Education alleging that she acquired tenure on or about September 1, 2003, and that the Board improperly concluded that she did not acquire tenure pursuant to N.J.S.A. 18A:28-5, thereby depriving her of a maternity/child rearing leave of absence in accordance with the parties' collective negotiations agreement; and

WHEREAS, the parties elect to settle all outstanding matters and allegations in dispute in lieu of continuing to litigate the matter, so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Lazo deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding Lazo's position with the Board; and

WHEREAS, the Board and Lazo are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or representative of their choice.

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board" as used herein, shall at all times mean the Englewood Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, successors, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. "Lazo," as used herein, shall mean Daisy Lazo, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. The Board and Lazo agree that, on or about November 26, 2003, Lazo fulfilled the employment service and certification requirements of N.J.S.A. 18A:28-5 and acquired tenure.

4. In consideration of the Board's covenant set forth in Paragraph 3, Lazo agrees that her attendance record will reflect an unpaid leave of absence from November 27, 2003 until June 30, 2005.

5. Lazo agrees that during her unpaid leave of absence, she waives any entitlement she may have for paid health benefits as provided in any collective negotiation agreement, past practice, Board Resolution, policy or applicable statutes and regulations. Therefore, Lazo is responsible to arrange and pay for health benefits during her unpaid leave of absence. Lazo may pay the Board the full amount of the cost to the Board of providing her health benefits in order to maintain her health benefit coverage during this time.

6. Lazo shall forfeit any right she may have to accrue benefits during her unpaid leave as provided in any collective negotiations agreement, past practice, Board Resolution, policy or applicable statutes and regulations. Benefits includes, but is not limited to, seniority, vacation time, sick days, personal days, compensatory days, holidays and the like. Lazo acknowledges that any and all benefits that she may have been entitled to accrue during her unpaid leave are forfeited and she will not receive any monetary payments or credits of any kind for any benefits during her unpaid leave.

7. Lazo releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Agreement. This Agreement releases all claims, including those of which Lazo is aware or not aware and those not mentioned in this Agreement. Lazo specifically acknowledges and agrees that this is a full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by Lazo for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Lazo's employment with the Board, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth

Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not.

8. Lazo agrees that in consideration of the promises set forth above, neither party shall: (a) file an appeal with the Commissioner of Education seeking any type of relief whatsoever from the Board; (b) file a grievance or seek arbitration over the unpaid leave, or forfeiture of health care coverage or Benefits or any other issue whatsoever relative to Lazo's unpaid leave or the underlying facts; and (c) initiate any type of judicial or administrative action of any type or nature in connection with Lazo's unpaid leave or the underlying facts. The parties further agree and understand that this Agreement is a full and final waiver and release between them covering any and all claims between the parties.

9. The parties further agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Lazo's unpaid leave of absence. By entering into this Agreement, neither party admits that it has violated any contractual provisions of the collective negotiation agreement or statutory provision. Thus, the furnishing of the consideration for this Agreement by the parties shall not be deemed or construed as an admission of liability or responsibility by either party at any time for any purpose. The parties hereto expressly agree that the terms of this Agreement shall be non-precedential for any purpose whatsoever.

10. Lazo expressly agrees and understands that the promises and conditions set forth herein are premised and conditioned upon her forfeiture health benefits and other benefits as provided in Paragraphs 5 and 6.

11. This Agreement shall be irrevocable, fully binding and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

12. In the event that any one or more of the provisions of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

13. This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

14. This Agreement supersedes all prior written and/or oral agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

15. The waiver by Lazo and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

16. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Lazo and the Board.

17. This Agreement shall become irrevocable and effective immediately following execution by Lazo and the Board. However, both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgments shall be rendered null and

void and the parties shall be returned to the status quo existing prior to this Agreement.

18. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

19. This Agreement contains a settlement and stipulated dismissal of claims. By signing this Agreement the parties affirm that they have read this Agreement carefully and that they fully understood the terms and the provisions of this Agreement before signing. Lazo expressly states that she has had the opportunity to consult with an attorney with respect to the terms of this Agreement and knowingly, freely and without coercion enters into the Agreement by affixing her signature hereto.

NOW, THEREFORE, the parties, by their designated representative do set forth their signatures in confirmation of the above recitals and agreements to be effective on July __, 2004.

Daisy Lazo
DAISY LAZO
DATED: 9/16/04

Gregory T. Syrek
GREGORY T. SYREK, ESQUIRE

David B. Mathews
For the Board of Education
David Mathews, Bd. Pres.
DATED: 11/11/04

Mark Tabakin
Mark Tabakin
Board Attorney
4/12/05

STATE OF NEW JERSEY)
) ss.
COUNTY OF Passaic)

I, Gregory T. Syrek, ~~a Notary Public~~, do hereby certify that Daisy Lazo, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that she signed and delivered the said instrument as her free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 16 day of ~~July~~ Sept, 2004.

~~Notary Public~~
An Attorney at Law
of New Jersey

\\SERVER2\SYS\wp-data\lit\matters\ENG-135 Lazo Settlement Agreement 7-07-04.bja.doc

206-05

OAL DKT. NO. EDU 3242-05
AGENCY DKT. NO. 454-12/04

A. McA., on behalf of minor children, A. McA and J. McA.	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	DECISION
RESPONDENT.	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in Agency Dkt. No. 454-12/04.[2] The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/7/05
Date of Mailing: 6/7/05

[1] It is noted that the document specifying settlement terms in this matter is captioned "Consent Order."

[2] The parties are reminded that the Commissioner's acceptance of settlement of the matter currently before him does not operate to settle or withdraw the matter currently before the State Board of Education, State Board Docket #52-04. Any requested action on the State Board case must be pursued in accordance with the rules and regulations of that body, *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3242-05
AGENCY DKT. NO. 50/04

A.M., on behalf of minor
children, A.MC. and J.MC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

Ashton E. Thomas, Esq., for petitioner

John P. Harrington, Esq., for respondent
(Appruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May 5, 2005 Decided: May 10, 2005

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

On or about December 22, 2004, petitioner, A.M. on behalf of her minor children, filed a petition of appeal with the Commissioner of Education, alleging that her children were improperly removed from the Union Township school district on the incorrect assumption that they resided in Newark, and that respondent should be directed to enroll the children in the Union Township school district until this matter was heard. On

or about December 29, 2004, respondent moved for emergent relief, pursuant to *N.J.A.C.* 6A:4-2.4 and *N.J.A.C.* 6A:4-1.8, from the requirement to reenroll these students in Union for the school year 2004-2005 during the pendency of this second residence appeal filed by petitioner.[1] Petitioner filed a letter response on April 4, 2005. On March 17, 2005, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned on March 28, 2005, and conference calls were held with counsel in an effort to resolve this case, as well as the prior matter which involved the residency of petitioner's children for the school year 2003-2004. As a result of settlement conferences held between the parties, a settlement was reached which resolved the above-referenced matter, and petitioner's residency appeal for the school year 2003-2004, decided by the undersigned judge and adopted by the Commissioner (see footnote 1).

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

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

---

[1] Petitioner previously filed a residency appeal regarding the school year 2003-2004. That appeal (OAL Dkt. No. 3805-04, Agency Dkt. No. 50-2/04) was heard by the undersigned on August 27, 2004. The Initial Decision signed on October 8, 2004 found that petitioner and her children were not domiciled in Union and ineligible for attendance in the Union School District. Tuition costs for the period of A.MC. and J.MC.'s ineligible attendance in school year 2003-2004 were assessed against petitioner. The Initial Decision was adopted by the Commissioner of Education on November 17, 2004. By letter dated December 23, 2004, the Commissioner determined not to grant petitioner's motion for a stay, pending appeal to the State Board, or reconsider his decision.

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

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

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

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

May 11, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5-13-05
DATE

M. Kathleen Dunscomb /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 2005
DATE

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

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAY -5 P 2:16

ASHTON E. THOMAS, ESQ.
125 Broad Street, Suite 804
Elizabeth, New Jersey 07201
(9 0 8) 289- 3640
Attorney for Petitioner

A.M., on behalf of minor children A.M.C and J.M.C.,	OFFICE OF ADMINISTRATIVE LAW
	OAL DKT. NO. EDU 3805-04
	C 466-04
PETITIONER,	SB 52-04
V.	AGENCY DKT. NO. 50-2/04; 454-12/04
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY	CONSENT ORDER
RESPONDENT	

This matter having been opened upon application of Ashton E. Thomas, Esq., attorney for Petitioner, A.M. to consider a controversy which has arisen between petitioner and respondent, Board of Education of the Township of Union, represented by John P.

4. The petitioner agrees to withdraw a current petition before the Office of Administrative Law docketed 454-12/04.

5. The respondent agrees to vacate a judgment against petitioner entered in the amount of $40,254.60 on the 8th day of October, 2004 by the Honorable Elinor R. Reiner, ALJ.

6. The petitioner agrees to tender to the residency office of the Union Township Board of Education a money order or a cashier's check payable to "Union Township Board of Education" in the amount of $1000.00 in satisfaction of all claims between the parties.

7. This Consent Order will not go into effect until such payment is made in full.

ASHTON E. THOMAS, ESQ.
ATTORNEY FOR PETITIONER

JOHN P. HARRINGTON, ESQ
ATTORNEY FOR RESPONDENT

ELINOR R. REINER, ALJ

207-05

OAL DKT. NO. EDU 1362-03
AGENCY DKT. NO. 73-3/01

JANICE HUNTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/7/05

Date of Mailing: 6/7/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1362-03

AGENCY DKT. NO. 73-3/02

JANICE HUNTER,

Petitioner,

v.

IRVINGTON BOARD OF EDUCATION,

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner (Oxfeld & Cohen, PC, attorneys)

Lester E. Taylor, Esq., for Respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: May 11, 2005 Decided: May 13, 2005

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 31, 2003, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 and assigned to Administrative Law Assignment Judge Thomas E. Clancy. Petitioner asserted that the Board failed to pay full salary without loss of sick time for injury sustained in the course of employment.

On February 28, 2003, Judge Clancy placed this matter on OAL's inactive list for six months pending the outcome of a companion Worker's Compensation petition. On May 19, 2003, this office was advised by Petitioner's counsel that the Worker's Compensation matter had been resolved and requested the case be restored to active status. Subsequently, the case was assigned to the undersigned.

A telephone prehearing conference was scheduled for July 23, 2003; however, it was adjourned to September 17, 2003. During the conference, the parties agreed to file a motion for summary judgment and a briefing schedule was set. After the submission of all documents, on March 23, 2004, I issued an Order denying the application in its entirety. A hearing was scheduled on October 18, 2004; however, the hearing adjourned due to incomplete discovery. On December 14, 2004, a telephone status conference was held and the parties agreed to settle the case.

On May 11, 2005, the parties submitted a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 13, 2005
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

May 18, 2005
DATE

K. Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 20 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 MAY 11 P 4:46

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDU 1362-03
Agency Dkt. No. 73-3/02

JANICE HUNTER,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	
Respondent.	:	

Janice Hunter, Petitioner in this matter, and the Board of Education of the City of Irvington, Respondent in this matter, hereby agreed to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's absences for the following dates:

December 18, 2000

December 19, 2000

December 20, 2000

December 21, 2000

December 22, 2000

shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-21;

2. The Respondent shall return to the Petitioner's accumulated sick days the five sick days for which she was charged for her absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future as needed;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

Dr. Janice E. Hunter
DR. JANICE E. HUNTER

Dated: 5/7/05

IRVINGTON BOARD OF EDUCATION
By:

Ernest H. Smith Jr.
DR. ERNEST S. SMITH, JR.
Superintendent of Schools

Dated:

208-05

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
ROBERT MARINNIE,	:	
RESPONDENT.	:	

SYNOPSIS

The Board of Education of the Borough of Palmyra filed a Petition of Appeal with request for emergent relief, seeking removal of Board member Robert Marinnie for alleged conflict of interest, pursuant to *N.J.S.A.* 18A:12-2, as the result of a Tort Claim Notice against the Board filed by respondent's adult son, who resides with his parents. Oral argument and limited testimony were presented at an emergent relief hearing.

The ALJ ordered the respondent disqualified from holding office as a member of the Palmyra Board of Education, finding, *inter alia*, that respondent had a direct interest in the Tort Claim Notice brought by his son against the Board and had consequently engaged in a number of actions inappropriate to his position on the Board.

The Commissioner adopted the recommended order of the ALJ as the final decision in this matter, rendering his own decision on a summary basis. The Commissioner did not adopt the ALJ's conclusions regarding respondent's alleged misconduct, finding them to be immaterial to a determination under *N.J.S.A.* 18A:12-2, but found instead that the specific factual circumstances of respondent's relationship to his immediate family placed him in a situation where his interest in the lawsuit being pursued by his son was inherently incompatible with board membership. Accordingly, the Commissioner ordered respondent removed as a member of the Palmyra Board of Education as of the date of this decision, and directed the County Superintendent to fill the resulting vacancy pursuant to *N.J.S.A.* 18A:12-15a.

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 8, 2005

OAL DKT. NO. EDU 2611-05
AGENCY DKT. NO. 96-4/05

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
ROBERT MARINNIE,	:	
RESPONDENT.	:	

The record of this matter, including the audiotape of hearing, and the Order Granting Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed. In accordance with the Department's notice of April 29, 2005, proposing to consider the OAL Order as an Initial Decision resolving this matter in its entirety, respondent submitted objections to which the Board of Education (Board) duly replied.[1]

In his objections, respondent contends that concluding the matter at this point would deny him his due process rights and violate the standards for issuance of summary decision, which is what the Order would effectively become if it is considered an Initial Decision as proposed. Respondent claims that material facts are in dispute, including but not limited to: 1) whether there was a "conspiracy" between respondent and other board members to discover information to help in respondent's son's litigation; 2) whether respondent was seeking information to the detriment of the Board; 3) the type of seminar attended by respondent and the purpose of his attendance; 4) why other Board

[1] Respondent objected to the Board's reply on grounds of lateness, but, as correctly pointed out by the Board in a subsequent communication, the requisite filing period was five *working* days, not five calendar days. Accordingly, the Board's submission was timely filed. See also *N.J.A.C.* 6A:3-1.2.

members discussed the issue underlying respondent's son's Tort Claim Notice while respondent remained silent; and 5) whether respondent was provided with confidential information or provided such to his son. (Respondent's Objections at 1-3) Respondent contends that the Administrative Law Judge (ALJ) made erroneous conclusions regarding the first four of these issues, which can only be proven by the testimony of witnesses not present at the emergent hearing, and that respondent was not asked, nor did anyone testify, as to whether confidential information was ever discussed with or provided to him. Respondent further claims that his due process rights were violated because, although it was not the intent of the ALJ to make a final determination in this matter, the ALJ nonetheless reached definite conclusions regarding respondent's conduct and that of other Board members based on unsworn statements by the Board attorney—whom respondent had no opportunity to cross-examine—and on testimony by respondent that was clearly understood to be limited in nature. (*Id.* at 4-5)

In reply, the Board proffers that respondent suffered no denial of due process, vigorously opposing respondent's claim that the ALJ reached conclusions based on the Board attorney's unsworn and unchallenged statements. To the contrary, the Board contends, the ALJ's decision is based entirely on the Board's complaint as verified by the Board Secretary; the statements of respondent's attorney regarding her own involvement in the tort claim and ethics matters under discussion; and, above all, respondent's sworn testimony, which was freely offered in opposition to the verified complaint, with no objection to the Board's cross-examination and no attempt on re-direct to clarify or rehabilitate respondent's previous statements. The Board further argues, in reply to respondent's claim regarding the interim nature of the ALJ's order,

that the ALJ was "very clear in her decision that respondent shall be removed as a board member based on the record presented, especially the testimony of respondent himself." (Board's Reply at 1-2, quotation at 2)[2]

Upon careful review and consideration, the Commissioner determines to adopt as the final decision in this matter the recommended order of the ALJ that respondent be removed as a member of the Palmyra Board of Education. However, he does so for the reasons set forth below rather than those stated by the ALJ.

In the Initial Decision, the ALJ concludes, for purposes of emergent analysis, that respondent engaged in a number of inappropriate actions, conclusions to which respondent takes exception because the ALJ reached them in the absence of a plenary hearing. The Commissioner, however, finds that none of these conclusions are necessary for an analysis of inconsistent interests under *N.J.S.A.* 18A:12-2, which hinges not on a board member's *conduct*, as it would if similar allegations were made pursuant to the School Ethics Act, but on personal circumstances which may place him or her in a situation that is inherently incompatible with board membership regardless of any actions taken—or not—in response to them. The Commissioner, therefore, does not adopt the ALJ's factual findings as set forth in the Initial Decision at 8-10, and, indeed, makes no findings of any kind with respect to respondent's conduct as a Board member, as opposed to his status.[3]

---

[2] The Board objects to any consideration of the affidavit included with respondent's exceptions, arguing that such submission is precluded by *N.J.A.C.* 1-1:18.4(c) and that it represents, at most, "a futile attempt to recant damaging testimony that was offered at the hearing on April 25." (Board's Reply Exceptions at 1)

[3] Even if the School Ethics Act had been invoked in this matter, the Commissioner's jurisdiction would not extend to determining whether violations of the Act had occurred. *N.J.S.A.* 18A:12-21 *et seq.*

N.J.S.A. 18A:12-2 requires the Commissioner to ascertain whether respondent has a direct or indirect interest in a claim against the board of education so as to disqualify him as a board member while the claim is pending.[4] Upon review of the record in the present instance, the Commissioner finds that respondent's own testimony provides ample evidence to conclude that, under the particular circumstances operative herein, respondent has at the very least an indirect interest in his adult son's tort claim against the district.

The record reflects that respondent's son (Robert) graduated from the district's high school in June 2004 and entered Cheyney State College in Pennsylvania that fall. He did not return to college following Thanksgiving break, having filed a Tort Claim Notice dated November 19, 2004, that states in substantive part:

> On or about August 23, 2004 I was advised that I may be ineligible to participate in the NCAA Division II athletics because of the method in which the Clearinghouse received my transcript and SAT scores [reference to attachment]. Shortly thereafter and upon proper receipt of the documents, I was advised that I was ineligible to play because I was not given the proper courses in high school such as a foreign language and because my SAT score was low.***
>
> Because I was a special education student with an IEP. (*sic*) During my attendance at Palmyra High School I was eligible for time consideration on the SAT, however the school failed to assist me or at a minimum provide me with this information. I have subsequently learned that the Palmyra Board of Education did not have a curriculum as required by New Jersey law and this along with the failure to provide an appropriate IEP with the necessary courses caused my lack of proper prerequisites in order to qualify for the NCAA Clearinghouse.
>
> As a direct result of Palmyra Board of Education's failure to provide an appropriate education, I am currently ineligible to play any collegiate sports. I am required to take college remedial courses in order

[4] It is well established, and the parties do not attempt to argue otherwise, that a notice of tort claim constitutes a "claim against the board" pursuant to *N.J.S.A.* 18A:12-2. *Board of Education of the Borough of Berlin, Camden County v. Charlotte Lee*, decided by the Commissioner June 14, 2002 (#238-02), slip opinion at 7-8.

to bring me to a freshman level, and I am precluded from any possibility for professional scouting.

Witnesses include all school administration, all school board members during the years Robert *(sic)* attended school, parents, guidance and teaching faculty, prior students during the year Robert *(sic)* attended school. Addresses of all these witnesses is *(sic)* in the possession of the school.

***Individuals responsible include all school administration, board members, and staff that are responsible for curriculum, guidance and special education during the time I attended Palmyra High School.

***Insurance is not applicable to this matter.

To the best of my knowledge there have been no statements or admissions made with regards to this matter except that it has come to my attention that the Palmyra Board of Education does not have an adopted curriculum.

***

The damages for the above matter include tuition, books and fees for courses required to complete the high school education not provided by the Board as well as the value of a loss year in participating in sports and be scouted by professionals *(sic)*. The necessary attendance of extra school time in order to complete the college education due to having to complete the high school courses first. The delay in the ability to work full time or play sports professionally. The value requires professional computation, but I estimate the amount to exceed $1,000,000.00 based upon salaries of professional athletes.

The record further reflects that: Robert is 19 years old, single, and living at home with respondent and his wife, Robert's mother. After leaving school, Robert worked part-time at a seasonal job, which ended after the holidays, and started working full-time in early April 2005. He is presently employed at S&T Lubrication, Inc., working approximately 35 hours per week at the rate of $7.50 per hour, based on the pay stubs submitted by respondent.

Neither respondent nor his son owns a car. The household has two cars, one driven by Robert and his mother, the other by respondent; both are titled to respondent's wife, and she is the insurance policyholder for both, with Robert and respondent as covered drivers. Robert gives his mother money toward the loan on their

jointly driven car, as well as for room and board; respondent has no knowledge of how much. Robert buys his own clothes; respondent's wife gives him money. Family medical insurance is provided through respondent's wife's employer; Robert has ceased to be eligible for his prior coverage because he is no longer a full-time student, and respondent does not know what new arrangements, if any, have now been made.

Respondent earns "some money" as a self-employed handyman. His wife is employed in the billing department of a medical center and earned approximately $34,000 in 2003 and $35,000 in 2004 based on her income tax returns. Respondent and his wife are "totally separate" financially; they have held nothing jointly since "before 2000." They do not file joint income tax returns. Respondent did not file income tax returns for 2002, 2003 or 2004; he has no knowledge of his tax returns, which are done by his sister on a "five-year plan." Robert was claimed as a dependent on his mother's tax returns for 2003 and 2004; respondent does not provide support for his son.

Respondent does not know what his son earns or how many hours he works, or how much money he gives his mother toward loans and expenses. He does not know what colleges his son applied to, what courses he took, how much college cost, how it was paid for (except that he didn't sign for any loans), what remedial education courses Robert took and at what cost, etc.; all of this was or is handled by his wife. Respondent has no checking account; all checks are signed by his wife from her account. Respondent and his wife rent their home.

These constitute the facts material to the pertinent inquiry in this matter. Although respondent may dispute the conclusions to be drawn from them, the facts themselves are based entirely on respondent's own documents and testimony; even

granting respondent every inference, therefore, the matter is amenable to summary disposition on the present record.[5] *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000.

What these uncontroverted facts demonstrate is that respondent and his son are two fully integrated members of a family of three adults that functions as a single household unit. In such a situation, the fact that it is respondent's wife rather than respondent who is the principal breadwinner and who handles the family's financial and administrative affairs, owns the family assets and has all the direct dealings with Robert in these regards cannot serve to insulate respondent from the obvious interest and benefit that would accrue to any member of this household by virtue of a lawsuit brought by one or both of the others; indeed, respondent himself conceded on the record that the entire family would likely benefit if Robert wins his case against the Board.

Contrary to respondent's contention that this matter is about "the Board member, not his family," because of the manner in which respondent's household is constituted, this case cannot be reasonably viewed as being solely about respondent. The Commissioner finds it disingenuous to argue, as respondent does, that Robert's situation

[5] The Commissioner reiterates that the facts in dispute between the parties substantially relate to respondent's conduct as a Board member and to the conduct of other Board members, and, as such, are not material to the determination herein.

is irrelevant because he is "emancipated"—that is, because he is 19, now working full-time, and in control of his own lawsuit[6]—and there is no proof of direct financial benefit to respondent individually. Although a Board member's interest need not be financial to be disqualifying under *N.J.S.A.* 18A:12-2,[7] the circumstances in this matter are such that respondent would clearly benefit "in a substantial and material way" (*Holmdel, supra*, at 680) if his son—who presently lives with respondent and his wife, has had and continues to have his educational and/or living expenses subsidized by them,[8] and claims to have been prevented by the Board's tortious conduct from attaining his anticipated educational and career advancement[9]—were to prevail in a lawsuit seeking in excess of one million dollars in compensation for educational costs and lost wages.[10] Under facts of this matter, Robert need not be considered "dependent" in the legal sense argued by respondent in order for respondent to have an interest in his son's claim against the Board; indeed, the situation presented here is more analogous to that of a Board member disqualified because a spouse who is employed and stands as a legal equal has a claim of

---

[6] Respondent argues: "An emancipated child [is one who] is self-supporting and who has moved beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own. (citation omitted) Robert is emancipated. He works fill time and supports himself. Respondent is unable to change his son's position with regards to the Tort Claim Notice that was filed by his son. Robert is no different than the adult in *Board of Education of the Township of Brick, Ocean County v. Edward Mercer,* 96 *N.J.A.R.*2d (EDU) 5 (citation corrected) who lived at home but supported himself. The Commissioner in *Brick* determined the son was emancipated." (Response to Petitioner's Brief for Summary Disposition at 2)

[7] "The interest which disqualifies is not necessarily a direct pecuniary interest, nor is the amount of such an interest of paramount importance; it is based on the moral rule that no man can serve two masters whose interests conflict." *Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502 (App. Div. 1956).

[8] Again, under the particular facts of this matter, it is immaterial that respondent's wife rather than respondent actually earns and handles the money and writes the checks.

[9] Robert's present hourly wages translate into an estimated annual gross salary of approximately $13,000 per 50-week work year, based on a 35-hour work week.

[10] Although the waivers and/or releases respondent's papers indicate he and his wife have signed or would sign are not on record, under the particular facts of this matter, the Commissioner would not conclude differently even if they were.

his or her own against the district, from which the Board member has been shown to be likely to benefit materially and substantially. See, for example, *Taliaferro vs. Hawthorne Board of Education,* 94 *N.J.A.R.*2d (EDU) 197.[11]

With respect to the situation in which respondent would be placed if he were to remain on the Board, regardless of any efforts on his part to avoid misconduct, the Commissioner finds that—particularly given the broad scope of Robert's claim and list of responsible parties—it would be virtually impossible for respondent to function as a Board member in the Palmyra School District and not see and hear things which would inevitably bear upon his son's lawsuit. To the contrary, respondent would routinely be privy to matters relating to curriculum, guidance and special education,[12] as well as to personnel decisions pertaining to the broad array of district staff named as responsible parties in the Tort Claim Notice.

For example, although respondent clearly did not seek Board membership to further his son's lawsuit—the timing of events would have made this impossible—during the course of respondent's term, one of the suit's central issues became a matter of discussion in the district, "something that was unfolding before the Board," in the words of respondent's attorney. Even if respondent did not collude, once he was on the Board, to bring issues of interest to his son to the Board's attention, he undisputedly heard the

---

[11] There are a number of factual differences between the situation in *Brick, supra*, and the situation here, including that in the *Brick* matter, the son was fully self-supporting (earning $20,000 per year in 1994) and, despite living at home, had since the age of 18 received no support whatsoever from his parents for education, automobile, insurance, medical or living expenses. Notwithstanding, to the extent that the *Brick* decision's focus on "emancipation" may be read as inconsistent with the decision herein, the Commissioner is not bound by—and here repudiates—such interpretation. (See *In re Masiello,* 25 *N.J.* 590, 598-99 (1958) and *N.L.R.B. v. J. Weingarten, Inc.*, 420 *U.S.* 251 (1975), concerning the role of precedents in administrative proceedings.)

[12] Respondent himself stated that he could not remember the timing of certain discussions because special education issues come up "all the time." He also stated that the district's curriculum, and its lack of approval, was a matter of ongoing discussion.

discussions on these points once they were raised. Even if respondent did not travel to the Board's insurance office for the purpose of dropping off his son's Tort Claim Notice, but to drop off papers related to a Board matter of his own at the administration's request, respondent himself indicates that he had the notice with him in his personal "Board file" and gave it to the Board's insurance office when staff noticed it in the file respondent was showing them; indeed, the potential for legal pursuit of Robert's situation was first raised in a conversation between respondent and the attorney with whom he was conferring on a school ethics matter, even if that attorney did not ultimately represent Robert beyond meeting with him to discuss the possibility of a tort claim and then filing the notice of claim on his behalf so as not to risk violating the statute of limitations.[13] Even if the information respondent obtained at the district's special education in-service program could have been obtained elsewhere by any parent or member of the public, and even if respondent was not the only Board member in attendance and had legitimate reasons to attend the program, it was respondent's status as a Board member that placed him in a situation where he could hear information pertinent to his son's lawsuit in a context directly related to the Palmyra School District and its staff.[14]

For the Commissioner to find that respondent's dual interests as a Board member and Robert's father conflict in a manner that violates *N.J.S.A.* 18A:12-2, as well as its concomitant moral rule that "no man can serve two masters whose interests conflict" (*Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502

[13] This statement is based on respondent's attorney's explanation at hearing with regard to her involvement in Robert's tort claim, in addition to respondent's testimony and documents.

[14] Notwithstanding that he disputes the statement on exception, Respondent admitted on cross-examination that he likely decided to attend the specific session on special education because of his son's situation; however, as indicated above, it is the *opportunity* for such access, not the motivation for taking advantage of it, that is determinative herein.

(App. Div. 1956)), the Commissioner need not conclude that respondent actively shared privileged information with his son, or as the Board puts it, that he "aided and abetted" his son's legal action to such an extent that his "fingerprints" are "all over" the Tort Claim Notice. Rather, it is enough that the respondent, simply by virtue of his membership on the Board, is regularly in position to be placed in "a situation of temptation to serve his own purpose to the prejudice of those for whom the law authorized him to act as a public official"— precisely the evil sought to be avoided by the statute.[15] *Holmdel, supra*, at 676, quoting *S&L Associates, Inc. v. Washington Township,* 61 *N.J. Super.* 312, 329 (App. Div. 1960) Although respondent suggests that the allegations against him may be in retaliation for views he has expressed as a Board member, or because of the importance of his vote on a divided Board, the Commissioner stresses that the outcome of this matter is controlled by the determination of whether respondent has a conflict of interest in violation of law, and not on the motivation for submitting the matter for adjudication.

Accordingly, for the reasons expressed herein, respondent Robert Marinnie is found to have a conflict of interest in violation of *N.J.S.A.* 18A:12-2 and is, therefore, removed as a member of the Palmyra Board of Education as of the filing date of this decision. Pursuant to *N.J.S.A.* 18A:12-15a, the Burlington County Superintendent of Schools is directed to fill the resulting vacancy for the remaining length of respondent's term, which is due to expire upon the Board's reorganization following the April 2006 annual school election. Because the Commissioner's decision resolves this

[15] Although respondent testified that he "never" talks to his son about "what goes on at the school board," respondent's attorney herself recognized that it was virtually impossible for some communication not to occur, even inadvertently. As she stated: "Do I say that they don't talk to each other? That would be ridiculous – they live together."

matter without need for further proceedings, the Clerk of the OAL is requested to return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.[16]

COMMISSIONER OF EDUCATION

Date of Decision: 6/8/05

Date of Mailing: 6/8/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 2611-05
AGENCY REF. NO. 96-4/05

BOARD OF EDUCATION OF
THE BOROUGH OF PALMYRA,
BURLINGTON COUNTY,
Petitioner,

v.

ROBERT MARINNIE,
Respondent.

Joseph F. Betley, Esq., for petitioner (Capehart & Scatchard, attorneys)
Carol Rogers Cobb, Esq., for respondent (Giansante & Cobb, attorneys)

Record Closed: April 25, 2005 Decided: April 26, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, the petitioner Board seeks removal of Board member, Robert Marinnie, alleging a conflict of interested pursuant to *N.J.S.A.* 18A:2-2 due to his son having filed a Notice of Tort Claim against the Board. The Board seeks emergent relief as a re-organization meeting is scheduled for April 26, 2005. The sole issue presented is whether respondent, Robert Marinnie

may hold office as a member of the petitioner, Board of Education of the Borough of Palmyra (hereinafter "BOE"). Petitioner filed a verified petition and request for emergent relief requesting the Commissioner of Education take original and immediate jurisdiction pursuant to *N.J.A.C.* 1:1-12.6(c) on April 21, 2005. The matter was then transmitted to the Office of Administrative Law (OAL) on April 22, 2005 and scheduled for an emergent relief hearing on April 25, 2005. Oral argument and limited testimony of the respondent was presented that day along with pleadings filed in connection with this matter previously and the record on the emergent relief application then closed.

FACTUAL DISCUSSION

The BOE is a Public School Board of Education organized under Title 18A of the New Jersey Statutes. Respondent is a duly elected member of the Board. His initial three year term on the Board will expire upon the re-organization scheduled to take place in April 2006.

Respondent's son, Robert Marinnie, Jr., is a 2004 graduate of the high school and is 19 years old. He was enrolled to attend Cheyney State College in Pennsylvania in the Fall of 2004. According to the limited testimony of his father, the respondent, Robert Marinnie, Jr., did not return to school after Thanksgiving break in late November, early December 2004. On or about December 22, 2004, a Notice Tort Claim was hand delivered by respondent to the business office of the New Jersey School Board Association Insurance Group ("NJSBAIG"), the insurance provider for the Board. Ms. Cobb advised that she had forwarded the Notice of Tort Claim by certified mail and that the green card was returned to Robert Marinnie, Jr. She does not represent Robert Marinnie, Jr., but he indicated to her that he wanted to sue his school and asked her how he could accomplish that. She indicated to him that he was required to file a Notice of Tort Claim. She also indicated to him that her law firm does not ordinarily handle that type of legal work, but because the time period to file the Notice of Tort Claim was about to expire, she filed the Notice of Tort Claim on his behalf as was the standard practice of her office in order to avoid a potential malpractice concern. While she filed that Notice of Tort Claim, she does not represent Robert Marinnie, Jr. Prior to filing the Notice of Tort Claim, she contacted the Palmyra BOE Business office to inquire whether it utilized a particular form. She ultimately was retained by Robert Marinnie, Sr. in connection with an unrelated ethics litigation filed by another Board

of Education member against him. Mr. Marinnie, Sr. retained her in January or February of 2005. He had contacted her originally with regard to the ethics complaint and also indicated to her during the course of the conversation that he was concerned about his son.

The Notice of Tort Claim indicates that Robert Marinnie, Jr. lives with his parents at 212 West Broad Street, in Palmyra and that he is not married. It also indicates that Mr. Marinnie, Jr. has been ruled ineligible to participate in inter-collegiate athletics because he did not complete a foreign language course while in high school and because of a low SAT score. The Tort Claim Notice further provides that as Robert Marinnie, Jr. was a special education student while enrolled at the Palmyra School District, he would have been eligible for time consideration on the SAT and that this was not provided to him. The Tort Claim Notice also alleges that the BOE did not have a curriculum as required by New Jersey law and that this failure caused him to lack the proper prerequisite courses for NCAA eligibility. As a result, he had to take college remedial courses in order to become a freshman and he was not eligible to participate in athletics. He seeks approximately one million dollars in damages.

It is the Board's contention that pursuant to *N.J.S.A.* 18A:12-2 respondent, Robert Marinnie, Sr., has a direct conflict and therefore should be removed from the Board prior to the reorganization meeting. In addition, it is the BOE's contention that Robert Marinnie, Jr. is not an emancipated adult.

Robert Marinnie, Sr. testified on his behalf on issues limited to a potential conflict of interest as well as whether his son is emancipated. His son lives at home and is not currently attending school. He did not return to school after the Thanksgiving break in 2004. He is not currently registered at school and he is working. After leaving school, he obtained a part-time job at the Marketplace in Cinnaminson. This was seasonal work and he was let go after the end of the holiday season. He is presently working at a place his father described as "like Jiffy Lube, but not Jiffy Lube." He does not know the nature of this son's work at that establishment. Exhibits to the Answer and Response to the Petition for Emergent Relief filed by the respondent indicate that Robert Marinnie, Jr. is employed at S & T Lubrication, Inc. He earns $7.50 an hour. He began working there recently.

Robert Marinnie, Sr. does not own a car. There are two cars in the household and both of them are owned by his wife. Robert Jr. and his wife drive the 2002 Mazda Protégé and he drives the 2000 Plymouth Neon. There is no loan on that car. He is listed as an additional insured on his wife's Allstate policy. There is a car loan on the 2002 Protégé driven by his wife and his son. His son uses the car to drive to work. He also gives his mother money to pay toward the loan but he is not aware of that amount. In addition, Robert Marinnie, Jr. gives his mother money each week for room and board. Robert Marinnie, Sr. is not involved in that arrangement.

As part of the proofs submitted by the respondent regarding his son's alleged emancipation, respondent submitted Individual Tax Returns for the years 2003 and 2004 filed by his wife, Eloise, residing at the same address and listing their son, Robert Marinnie, Jr., as a dependent. Mr. Marinnie testified that he does not claim his son Robert as a dependent on his tax returns and that he has not filed tax return for the last three years. He did not file an extension this year and he testified that he is on a "four to five year plan" and that his tax return filings are taken care of by his sister. He did have income for the last three years. He is a handy-man by trade.

When he became a Board member in 2003, he was not aware of a conflict within the Board relating to the curriculum at the District's schools. He first became aware of it when he attended "Boot Camp" in Princeton.

Mr. Marinnie, Sr. attended a special education seminar in September of 2004 given by counsel for the Board, Mr. Joseph Betley and his partner. He testified on direct examination that he probably found out about the seminar during a Board meeting and that he attended maybe half of it. He doesn't really recall the discussion, but generally it was about special education law. He recalls asking Mr. Betley for a copy of written materials.

With regard to the BOE's contention that he hand-delivered the Notice of Tort Claim on behalf of his son, Mr. Marinnie, Sr. testified that he received a call from Business Administrator Moore indicating that she needed "paper work" from him that day as the insurance carrier needed that information that day. He testified that he told her he could not get to her office that day but that he "happened to be going to Burlington" anyway, and as this was where the insurance

carrier's office was located, he could bring the materials with him. He testified that he brought an entire file with him which included materials regarding the ethics suit pending against him as well as his son's Notice of Tort Claim. Mr. McCabe asked him about a particular document in his file. He responded that it was a Notice of Tort Claim filed by his son. Mr. McCabe then took a copy of the Notice of Tort Claim.

In late August, early September, 2004, he attended a BOE meeting. During this meeting, Board members Rich Brooks and Bob Bostock brought up the issue of the curriculum for special education students and MCAA eligibility. He was not aware that topic would be brought up that evening.[1]

He testified that the Board could be evenly split with the new members and that his vote could "definitely" make a difference.

He testified he has no control over what his son does and does not know whether this son would give up his claim.

He testified that he imagines his family would benefit if his son was meritorious on the claim filed against the Board.[2]

On cross-examination, he testified that while his son was enrolled as a full-time student at Cheyney State, he was covered under his mother's medical insurance. His wife is employed at Lady of Lourdes Hospital in the billing department. He has medical insurance through his wife's employer. His son is not presently covered under his wife's plan because he is no longer a full-time student. He does not know whether his son has medical coverage at this time.

He testified he has no knowledge of any financial transactions that take place between his son and his wife.

---

[1] The specific topic raised by either Mr. Brooks and/or Mr. Bostock was special education students who graduated in 2004 and the requirements for NCAA athletic eligibility. *See* exhibit B to the verified petition.

[2] Respondent' brief indicates he and his wife have executed waivers of any claims. Same have not been provided. Respondent's brief also indicates he and his wife are willing to sign releases to the Board.

His son was enrolled as a full-time student at Cheyney State in September of 2004. He does not know what tuition, room and board cost. His son lived on campus for the brief period of time that he was enrolled. He testified that his son received grants and loans. His wife paid tuition. His son signed loan papers but he doesn't know whether his wife co-signed on the loan or not. He did not sign on the loan. He does not know anything with regard to any other financial aid his son might have received. He does know that his son did not pay tuition on his own. He doesn't know who paid for the textbooks but his wife probably did. He did not complete a student aid application form on behalf of his son and he does not know if his wife did. He doesn't know whether his son applied to other schools.

He testified that there was an interest from a neighboring school district coach with regard to his son playing football and track at Cheyney State. His son was actually interested in playing those sports in addition to basketball, but he could not play because of the low SAT score as well as not having taken a foreign language course. He does not know who paid for the remedial courses that his son was required to take as a freshman at Cheyney State. He testified that his wife handled most of that.

When he became a duly elected member of the Board in 2003, Mr. Brooks and Mr. Bostock also came on the Board at the same time. He testified that they generally voted as a bloc. He never criticized the Administration for lack of an approved curriculum, but Messrs. Bostock and Brooks did.

He testified that his son did not learn of the "lack of adopted curriculum" at Palmyra from him, but rather from reading the *Newsweekly* newspaper. He never discussed the matter with his son. The newspaper is at his home everyday and his son reads the newspaper everyday.

He testified that he "might have" spoken with Mr. Brooks regarding his son's inability to participate in collegiate sports, but he is "not exactly sure when it took place." When Mr. Brooks raised the issue at a Board of Education meeting, he did not say anything because he "felt it might have been a conflict of interest if (he) said anything." He was then more emphatic in his response by indicating that it "would be a conflict of interest for (him) to say anything." After Mr. Brooks' inquiry on this issue at the Board of Education meeting, Vice-Principal Mr. Mitchell

researched the matter and made a presentation on that issue. He does not recall whether he received any written information with regard to this issue.[3] He testified that he recalled thinking during the meeting that since his son had a problem, it was "not advisable" for him to say anything. He felt that he might have a conflict with regard to that information. However, he never thought that he should let other Board members know that this information had a direct impact on his son's situation.

He testified that the special education seminar given by Mr. Betley was also attended by another Board of Education member, Mary Holloway. He testified that he was the only Board of Education member at that meeting who had a special education student that graduated from the school in the year 2004. At the time he attended that meeting, he was aware that his son was ineligible to participate in sports at the Cheyney. At the time that he attended the seminar, he believed his son's IEP while an in-district student was inappropriate. However, he did not say anything to Mr. Betley regarding his son's IEP. He did say something to Mr. Betley regarding his nephew's IEP. His nephew, Andre Harris, graduated from the school in 2003. He testified that he did not choose to attend the seminar on Special Education. He went to the school for the orientation program. He did not know that Mr. Betley was going to be there. He then testified that he knew Mr. Betley's law firm would be there to speak on special education rights. He also testified that he attended the seminar because he knew of his son's situation.

He and his wife do not have a joint checking account. He has no checking account. He and his wife have not held joint finances since before the year 2000. They do not own their home; they pay rent.

LEGAL ANALYSIS

N.J.S.A. 18A:12-2 provides

> No member of any Board of Education shall be interested directly or indirectly in any contract with or claim against the Board, nor, in the case of local and regional school districts, shall he hold office

[3] Principal Mitchell issued two confidential memoranda distributed to BOE members on September 20, 2004 and October 15, 2004, respectively. *See* exhibit B to verified petition.

> as mayor or as member of the governing body of municipality, nor, in the case of county special services school districts and county vocational school districts shall he hold office as a member of the governing body of a county.

The standard for the granting of emergent relief is set forth at *N.J.A.C.* 6A:3-1.6(b),

> motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982): 1. the petitioner will suffer irreparable harm if the requested relief is not granted; 2. the legal right underlying petitioner's claim is settled; 3. the petitioner has a likelihood of prevailing on the merits of the underlying claim; and 4. when the equities and interest of the parties are balanced, the petitioner will suffer greater harm that the respondent will suffer if the requested relief is not granted.

I find that the petitioner has met the standards for the granting of the emergent relief requested and hereby **GRANT** such relief. I **FIND** the petitioner has demonstrated through Mr. Marinnie, Sr.'s own limited testimony that he has a direct interest in the claim against the Board filed by his son. The issue of whether his son is truly emancipated from his father or not is not reached as part of this application for emergent relief. It need not be decided; however, in order to award emergent relief in this instance as I **FIND** that it is not the dispositive issue in this matter. Mr. Marinnie, Sr. testified that he and Board members Brooks and Bostock generally voted as a bloc. At the time that Mr. Brooks and/or Bostock raised the precise issue of concern to his son, he was aware that his son was ineligible to participate in the collegiate athletics program at Cheyney State College. He choose to remain silent on the issue knowing that he had a conflict of interest. At the time that he attended the special education seminar provided by Mr. Betley and his partner in September of 2004, he knew that his son was ineligible to participate in the Athletic Program at Cheyney State and that is why he attended the seminar. At that time that he contacted his attorney to discuss an unrelated matter pending against him, he apprised her of his son's situation. His son then met with her with the intention of suing the school district and a Notice of Tort Claim was filed on his behalf on or about November 19, 2004. The meeting between Mr. Marinnie, Jr. and Ms. Cobb must have taken place on or by November 12, 2004 because that is the date by which he indicates in the Notice of Tort Claim that the administrative

office for Palmyra was contacted to inquire as the whether or not the Board had adopted an official form for the filing of claims. This was after the September seminar that Mr. Marinnie, Sr. attended and after the meeting attended by Mr. Marinnie, Sr. for which he remained silent during Mr. Bostock and/or Brooks inquiry regarding the precise issue relevant to his son that is now the subject to a pending law suit. He remained silent knowing he had a conflict of interest when Mr. Mitchell addressed the issue after engaging in an investigation on the matter. And he remained silent when he received two separate confidential communications as a Board member on that issue. Interestingly the issue was raised by Messrs. Brooks and/or Bostock shortly after the August 23, 2004 letter directed to Robert Marinnie, Jr. regarding his SAT results.

Respondent asserts that the second and third prong of the *Crowe v. DeGioia* standard has been met as the mere filing of the Notice of Tort Claim triggers the disqualification mandated by *N.J.S.A.* 18A:12-2. Mr. Marinnie cannot be disqualified on a piece mail basis on issues dealing with his son's law suit. Pursuant to *N.J.S.A.* 18A:12-2, Mr. Marinnie, Jr. must either abandon his law suit, or his father must forfeit his seat on the Board. Mr. Marinnie, Sr. testified that he has no control of whether his son abandons the law suit. Petitioner cites to the Commissioner of Education's decision in *Board of Education of the Township of Holmdel v. O'Connell* in which the Commissioner, in analyzing the statute, discussed conflict of interest thusly

> Case law has further established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that the Board member would benefit in substantial and material way from said claim. If so, the statute should be applied and the Board member be disqualified from serving on said Board. ... The rule applies not only to a pecuniary interest, but also to a psychological or personal interest as well. ... The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interest conflict. Basically, the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purpose to the prejudice of those for whom the law authorized him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect.

It is clear that respondent herein recognized the conflict himself when he sat silently while two other members of the Board whom he testified vote as a bloc generally along with him, raised the issue that became the basis for his son's Notice of Tort Claim filed a few months thereafter. His son received a letter questioning his ability to be eligible sometime after August 23, 2004.[4] He remained silent after the fact inquiry was completed and discussed by Mr. Mitchell at another meeting and he received two confidential memorandum on the issue. By his own admission, he attended Mr. Betley's seminar for this reason. The petitioner contends that this conflict of interests is of a material and substantial degree because in his capacity as Board member, he is providing information to his son in pursuit of litigation. Petitioner asserts that the inquiry on the issue can not reasonably be considered a coincidental event. The petitioner further asserts that it would suffer irreparable harm if Mr. Marinnie were permitted to continue on the Board as every vote would then come into question, particularly with a closely divided Board, if a Final Decision ultimately found that he was disqualified from the Board due to a conflict of interest, pursuant to *N.J.S.A.* 18A:12-2. Finally, the petitioner argues that in balancing the equities, the harm to the Board and the public interest is greater than allowing respondent to serve on the Board for the reasons previously mentioned. Mr. Marinnie cannot meet his fiduciary responsibilities to the Board and the public due to the conflict of interest.

Respondent asserts that Mr. Marinnie, Jr. is emancipated from his father and that respondent has not demonstrated that a conflict of interest exists as there is no proof that Mr. Marinnie, Sr. would derive any financial benefit should his son be meritorious on his claim.

ORDER

Based on the foregoing, emergent relief is hereby **GRANTED** to the petitioner. I hereby **ORDER** the respondent disqualified from holding office as a member of the Board of Education and I refer to the County Superintendent of Schools the decision relative to the filling of the membership of the Board of Education pursuant to *N.J.S.A.* 18A:12-15.

[4] It should be noted that the NCAA Initial Eligibility correspondence produced merely indicates that the June 2003 SAT test result was received from an unacceptable source, *See* exhibit A to verified petition. The actual ineligibility letter has not been produced.

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

April 26, 2005
DATE

ANA C. VISCOMI, ALJ

/tmp

209-05

#209-05

IN THE MATTER OF THE TENURE :

HEARING OF JEANNE COOK, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF OLD BRIDGE, MIDDLESEX :

COUNTY. :

SYNOPSIS

On November 15, 2002, the Board certified tenure charges of excessive absenteeism, tardiness, insubordination, and unbecoming conduct against respondent special education teacher. Respondent denied the charges and alleged the Board failed to provide her with a reasonable accommodation for a disability as required by the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 *et seq.* Respondent had filed a related LAD claim in Superior Court prior to the Board's certification of tenure charges in the instant case.

Subsequent to the transmittal of this matter to the OAL, a request to stay the case for the outcome of the civil suit brought by respondent against the Board was denied; a ruling was issued granting summary decision to respondent for back pay and pay for the duration of this action; and the Board's motion for summary decision on the four tenure charges was denied as to the issues of insubordination, tardiness and conduct unbecoming. The ALJ, however, found the matter to be ripe for disposition by summary decision on the issue of excessive absenteeism, and concluded that the conduct of the respondent amounted to chronic and excessive absenteeism, resulting in an adverse effect on the school children of the District. The ALJ granted the Board's motion for summary decision that the respondent was chronically and excessively absent, and ordered her removed from her position as a teacher in Old Bridge School District. Subsequently, the order of the Superior Court, based on the jury verdict in the related LAD matter, directed respondent's reinstatement; ordered the parties to engage in the interactive process to provide respondent with a reasonable accommodation for her disability; dismissed the tenure charges; and barred the aforementioned findings of the ALJ based on the principles of *res judicata* and *collateral estoppel.*

The Commissioner considered this matter in light of the Superior Court's Decision and Orders, and initially pointed out that it is well established by case law that the dismissal of tenure charges falls within the exclusive jurisdiction of the Commissioner. Accordingly, upon exhaustive review of the record, the Initial Decision, the parties' exceptions and additional submissions, and the Superior Court's determinations in the related LAD matter, the Commissioner found that there is no basis on which to conclude that respondent is guilty of chronic and excessive absenteeism or that tenure proceedings on the other charges in this matter may continue in light of the court's determination that the Board failed to accommodate respondent's handicap and that the tenure charges herein were filed in retaliation for the filing of respondent's LAD claim in Superior Court. The Commissioner therefore denied the Board's motion for summary decision and dismissed the tenure charges.

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

OAL DKT. NO. EDU 8568-02
AGENCY DKT. NO. 374-11/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE COOK,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF OLD BRIDGE, MIDDLESEX	:	
COUNTY.	:	

Respondent's exceptions and the Old Bridge Township Board of Education's (Board) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4. In her exceptions, respondent reported that a related New Jersey Law Against Discrimination (LAD) claim in Superior Court had been decided in her favor by a jury on or about December 20, 2004 and that she had filed a motion seeking an order requiring the Board to return her to the work place and to provide a reasonable accommodation for her handicap. (Respondent's Exceptions at 3)

Subsequently, by letter of February 24, 2005, respondent forwarded the Decision and Order of Judge Edward J. Ryan of the Superior Court, Law Division, Civil Part, dated February 18, 2005, wherein, based upon the jury verdict, the Board was found to be in violation of the LAD because it had failed to provide respondent with a reasonable accommodation for her handicap and the tenure charges filed by the Board herein were found to be retaliatory in nature. As a result, Judge Ryan ordered, *inter alia*, that: 1) respondent was to be reinstated with salary and step increases corresponding to those she would have received absent the Board's LAD violations; 2) the parties were to engage in a full interactive process in order to provide

respondent a reasonable accommodation upon her reinstatement; and 3) the tenure charges were to be dismissed.

By letter of March 1, 2005, the Director of the Bureau of Controversies requested that the parties submit letter briefs or memoranda of law addressing what effect, if any, the February 18 Superior Court decision had on the unadjudicated tenure charges against respondent. Both the Board's Letter Brief and respondent's Memorandum of Law were filed on March 14, 2005 and respondent filed a reply brief on March 21, 2005. In the interim, under cover letter, dated March 15, 2005, respondent submitted Judge Ryan's March 11, 2005 Order for Reinstatement and Additional Equitable Relief, in which he directed respondent's reinstatement, ordered the parties to engage in the interactive process to provide respondent with a reasonable accommodation for her disability, dismissed the tenure charges and concluded that the Administrative Law Judge's decision was barred by the principles of *res judicata* and *collateral estoppel.*

In considering this matter in light of the Superior Court's Decision and Orders, the Commissioner initially points out that the dismissal of tenure charges falls within the exclusive jurisdiction of the Commissioner. As set forth by the State Board in *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 849:

> What constitutes grounds for a tenure dismissal is a question of fact and within the exclusive jurisdiction of the Commissioner of Education, who has the duty to conduct the hearing and render a decision. *In the Matter of the Tenure Hearing of David Fulcomer*, 93 *N.J. Super*. 404, 412 (App. Div. 1967).
>
> The Commissioner's exclusive authority to decide these cases necessarily entails the determination of any and all matters pertinent thereto in order to make a complete disposition of the case.

Accordingly, the Commission has conducted an exhaustive review of the record, the Initial Decision, the parties' exceptions and additional submissions and the court's determinations in the related LAD matter. Upon such review, the Commissioner finds that there is no basis on which he may conclude that respondent is guilty of chronic and excessive absenteeism or that tenure proceedings on the other charges in this matter may continue in light of the court's determination that the Board failed to accommodate respondent's handicap and that the tenure charges herein were filed in retaliation for the filing of respondent's LAD claim in Superior Court.

Given this conclusion, the Commissioner has determined to deny the Board's motion for summary decision and dismiss the tenure charges in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/9/ 05

Date of Mailing: 6/10/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8568-02
AGENCY DKT. NO. 374-11/02

IN THE MATTER OF THE TENURE HEARING OF JEANNE COOK, SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

Philip E. Stern, Esq., for petitioner, Old Bridge Township (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

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

Record Closed: January 24, 2005 Decided: January 26, 2005

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 15, 2002, petitioner, Old Bridge Township Board of Education (hereinafter BOE), certified tenure charges against the respondent, Jeanne Cook, alleging that she is guilty of excessive absenteeism, tardiness, unbecoming conduct, and insubordination. On December 3, 2002, respondent filed a petition of appeal (Answer) with the Commissioner of Education denying the charges and alleging that the BOE failed to provide respondent with a reasonable accommodation as required by the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et*

seq. The matter was transmitted to the OAL on December 18, 2002, and assigned to ALJ Reback. On March 27, 2003, ALJ Reback denied a request to stay the present case for the outcome of a civil suit brought by Cook against the Old Bridge Township Board of Education. On June 20, 2003, ALJ Reback issued a ruling granting summary decision to respondent for back pay and pay for the duration of this action. The hearing date of August 22, 2003, was adjourned at the request of both parties to submit briefs for summary decision. On June 17, 2004, the matter was reassigned to me to conduct a conference call on the same day. On that date a briefing schedule was agreed upon and briefs were received from both parties.

On July 30, 2004, the BOE filed a motion for summary decision alleging that the Old Bridge Board of Education properly issued tenure charges against respondent for excessive absenteeism, tardiness, conduct unbecoming and insubordination. After numerous requests, the parties submitted a joint stipulation of facts on October 12, 2004. Oral argument was scheduled for December 8, 2004. At the conclusion of oral argument, the parties requested ten days to submit briefs. Briefs were received on December 18, 2004. Attorney for the respondent requested either a stay of the proceedings, or additional time for the record to remain open, because the respondent had prevailed in the civil case involving discrimination. The parties were given thirty additional days to supply me any documentation, that the jury award in the discrimination action would have any binding effect before this tribunal. Since no documentation was received, a conference call was conducted on January 24, 2005. During that conference, respondent again requested a stay. Since had no additional documentation regarding the civil case had been produced, and since the failure to provide reasonable accommodations is not a defense to the charge of excessive absenteeism, the request was denied, and the record closed.

STATEMENT OF FACTS

Respondent was initially employed by the Old Bridge Township Board of Education as a substitute special education teacher from January 1987 through June 1987. Beginning in September 1987 respondent was employed on a permanent full-time basis teaching special education at Madison Central High School. Respondent was a special education teacher from September 1987 until June 1997, during which time she taught grades nine through twelve in the area of special education, including language arts, reading, study skills and math. Respondent

worked at Madison from September 1987 until June 1992. In September 1992 respondent took a maternity leave, and returned in February 1993. Upon her return she was assigned to Cedar Ridge High School until June 1993. She returned to Madison in September 1993 teaching ninth to twelfth grades special education. Respondent gave birth to another child in March 1994 and went out on maternity leave for the rest of the school year. She returned to work in September 1994. Respondent taught at Jonas Salk Middle School from 1994 until 2002, when the tenure charges were certified against her.

EXCESSIVE ABSENTEEISM AND TARDINESS

The parties entered into a Joint Stipulation of Facts (J-1), which is summarized below.

1. In school year 1997-1998 respondent's evaluations noted that attendance and tardiness were problems.

2. In the 1998-1999 school year respondent was absent 13 days in the beginning of the school year and then was absent for the entire period between October 7, 1998, and March 22, 1999, totaling 118 school days. During that year, respondent requested and was granted a disability leave due to a medical condition resulting from a 1996 injury.

3. In the 1999-2000 school year respondent was absent 46 days. Of those 46 days, 22 were related to worker's compensation leave.

4. In the 2000-2001 school year respondent was absent 56 full days and 7 half days and was tardy 18 times. Of the 56 absences, 36 were related to a paid suspension directed by the Board of Education.

5. In the 2001-2002 school year respondent was absent 63 full days and 11.5 half days and was tardy 22 times.

The preceding information is undisputed and is thus **FOUND AS FACT**.

Respondent received numerous warnings to improve her attendance:

SCHOOL YEAR	DATES OF WARNINGS
1998-1999	June 4, 1999 (P-5)
1999-2000	November 30, 1999 (P-6), June 15, 2000 (P-7), January 19, 2001 (P-13)
2000-2001	December 12, 2000 (P-17), June 19, 2001 (P-24)
2001-2002	November 29, 2001 (P-34), November 30, 2001 (P-33), February 8, 2002 (P-34), April 23, 2002 (P-28), May 31, 2002 (P-30)

In addition to the warnings for excessive absences, respondent received separate warnings for tardiness on October 23, 2000 (P-11), January 19, 2001 (P-12), May 18, 2001 (P-21), and May 25, 2001 (P-32).

The BOE alleges that the absences had a significant impact on the students and respondent's classes. For example, on April 16, 2002, grades were due in the guidance office by 9:00 a.m. Respondent failed to report to work, and the guidance clerk was left to contact respondent at home to secure her grades by telephone and scan them. On that day, respondent also failed to leave substitute plans in the main office and the plans could not be located in respondent's desk or teaching classrooms. The students were thus deprived of their regular instructor that day, as well as any benefit that could have been derived from a substitute implementing that day's lesson. Respondent also failed to report to work on the following day and was scheduled to attend an IEP meeting on April 18, 2002. The Child Study Team was left to secure student information from other staff members.

Petitioner asserted that during the 2001-2002 school year, respondent's attendance record had a negative impact on the overall instruction of students:

> Your health and attendance remains a concern for us at Salk School. You need to improve attendance so the continuity of instruction does not become an issue to the special needs students you teach.
>
> [P-28.]

Respondent's salary adjustment increment was withheld for the 2002-2003 school year (P-31). Her increment had also been withheld for the 2001-2002 school year (P-23).

In March 1999 respondent returned to work from a leave of absence. She was provided with a schedule accommodation in which she was permitted to arrive at school during first period. Because of her medical condition and related pain, early mornings were extremely difficult and so a free first period would help her start her teaching day in less pain and be more effective as a teacher. For the balance of that school year, respondent taught five classes but was not scheduled for first period (R-7). In late October or early November 1999, respondent requested a $^{4}/_{5}$ position or some other accommodation, such as a transfer to an elementary or middle school that had a later start time (R-9). No such accommodations were made. Respondent alleges that she is a protected individual under the Law Against Discrimination (LAD), and that petitioner has failed to make a reasonable accommodation for her disability. She further alleges that a reasonable accommodation was made to schedule her day with no first-period classes and allow her to arrive at a time later than other teachers are scheduled to arrive. However, that accommodation was later withdrawn and the BOE made no further efforts to accommodate her.

Respondent further argues that she has been praised for her work. She received positive evaluations for her job performance, exclusive of the attendance issues for the 1996-1997 school year (R-2), the 1997-1998 school year (R-3), the 1998-1999 school year (R-8), and the 1999-2000 school year (R-14).

UNBECOMING CONDUCT

The BOE alleges that respondent has committed unbecoming conduct because of improper relationships with her students.

The BOE alleges that in February 2001 a special needs student told the respondent that she feared abuse at home by her mother and her mother's boyfriend, that her mother refused to provide her with shelter, and refused to take her to a physician for a respiratory ailment. Respondent allowed the student to stay in her home for several days and sought medical

treatment for the student, but did not immediately contact the student's parent, the school administration, or the Division of Youth and Family Services (DYFS). During this investigation, petitioner alleged that the respondent provided District students with her home telephone number; invited District students into her home for matters unrelated to school; failed to report to the District an incident when a student entered her home without invitation one evening; entertained conversations with her students about personal events; solicited gifts from her students over the holidays; and accepted gold earrings as a gift from a student and returning them only after several weeks passed. She was directed to refrain from such unprofessional conduct and to exercise better judgment (P-34).

Respondent has denied these allegations. She stated that her telephone number was accessible for students as well as teachers. She denied inviting students to her home. She admitted having conversations with students about day-to-day things. She stated that she never accepted gifts from students, except during the holidays or the end of the school year. She did receive a wrapped box containing gold earrings, but after seeing what the gift was, she thought the gift too personal and returned it.

Respondent also denies any improper conduct concerning allowing the student to stay at her house over the weekend. She stated that she brought the situation to the attention of the school upon her return to school on a Monday.

On another occasion, respondent brought her own children to a parent-teacher conference. Prior to the conference, letters were circulated stating that children were not to attend the evening conferences. Despite this, respondent brought her children and was reprimanded. She was told:

> It was inappropriate for parents to bring their children to our parent conference night. Your choice of bringing your children showed a complete disregard to my memo of November 15, 2001. Your example undermines the objective of the parent conferences. It becomes very difficult to run programs when staff and administration do not work together.
>
> [P-36.]

Respondent indicated that she thought the letter directed parents not to bring any children who would be discussed to the conference. She lost her baby sitter at the last minute and had to bring the children with her that evening. The children were older and occupied themselves while respondent's conference took place.

Another incident involved a student appearing at her home. Respondent had a conversation with the student and told him to leave and he did. The student alleged some improper contact on the part of respondent, which was later unsubstantiated. Respondent was placed on administrative leave without any statements being made to her. The police were contacted but concluded the charges were without merit and respondent was suspended for two months. The investigation concluded that the charges were unsubstantiated.

INSUBORDINATION

The BOE alleges that respondent refused the directives of her supervisor to improve her attendance and instances of lateness. As indicated in the excessive absenteeism section, respondent received at least fifteen written warnings between June 4, 1999, and May 31, 2002.

Despite these warnings, her attendance and tardiness did not improve. Prior to the 2001-2002 school year, respondent was issued at least seven written warnings. Despite these warnings, she was absent 63 full days and 11.5 half days and was tardy 22 times (J-1).

CONCLUSIONS OF LAW

SUMMARY DECISION

The facts involving this motion are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of* America, 142 *N.J.* 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for Summary Decision.

This action is based upon four allegations: excessive absenteeism, tardiness, insubordination, and conduct unbecoming. With respect to the tardiness allegation, respondent has alleged that she had called in and was only a few minutes late on several occasions. She has also raised the question of whether petitioner has made reasonable accommodations for her disability. Respondent also has denied that she has engaged in conduct unbecoming. She alleges that she acted properly with respect to taking care of the special needs student and called the proper authorities at the first available time. She also admitted that she received a gift from a student, but said that she returned the gift after opening it. Insubordination is defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. *In re the Tenure Hearing of Motley, State-Operated Sch. Dist. of Newark*, EDU 7421-97, Initial Decision (May 5, 1999), *aff'd as modified*, Comm'r (August 4, 1999), *aff'd*, State Bd. of Educ. (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. Respondent also denies that she was insubordinate, because she did not intentionally deny any directives from the petitioner. Clearly, there are factual issues with respect to these allegations, and summary decision is **DENIED** as to the issues of insubordination, tardiness, and conduct unbecoming.

However, there does not appear to be any dispute as to facts involving excessive absenteeism. In the 1998-1999 school year respondent was absent 131 days. In the 1999-2000 school year respondent was absent 46 days. In the 2000-2001 school year respondent was absent 56 full days and 7 half days. Of the 56 absences, 36 were related to a paid suspension directed by the Board of Education. In the 2001-2002-school year respondent was absent 63 full days and 11.5 half days. J-1. Therefore, I **FIND** that there are no genuine issues of material fact and that the matter is appropriate for disposition by summary decision.

EXCESSIVE ABSENTEEISM

The Commissioner of Education has sustained tenure charges and ordered dismissal when an employee has committed excessive tardiness and absenteeism. This is true even where the absences are for legitimate medical or health reasons. *In re the Tenure Hearing of Meade-Stephens*, 92 *N.J.A.R.*2d (EDU) 550, *aff'd*, 93 *N.J.A.R.*2d (EDU) 134, *aff'd*, No. A-3076-92 (App. Div. Jan. 10, 1994), *certif. denied*, 137 *N.J.* 167, *cert. denied*, 513 *U.S.* 991, 115 *S. Ct.* 491, 130 *L. Ed.* 2d 403 (1994).

Even if a teacher's performance in the classroom is sufficient and even if the absences were approved leave or sick days to which the teacher was entitled, the absences may nevertheless be considered as material to the issue and can justify removal of the teacher. *Trautwein v. Bd. of Educ. of Bound Brook*, 1980 *S.L.D.* 1539, *certif. denied*, 84 *N.J.* 469 (1980); *In re the Tenure Hearing of Sheets*, 1979 *S.L.D.* 790, 798, *adopted*, State Bd. of Educ., 1980 *S.L.D.* 1536. The point at which the absenteeism is judged to be excessive falls within the reasonable judgment and discretion of the local school district. *Trautwein, supra*, 1980 *S.L.D.* 1539. Thus, excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause," within the meaning of *N.J.S.A.* 18A:6-10, to warrant dismissal from employment. *In re the Tenure Hearing of Hernandez*, EDU 3126-01, Initial Decision (August 24, 2001), *adopted*, Comm'r (October 15, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>.

In *Meade-Stephens, supra*, 92 *N.J.A.R.*2d (EDU) 550, the Commissioner terminated a tenured teacher for chronic absenteeism and tardiness. In 1985-1986 Meade-Stephens had 37 absences and 16 instances of tardiness, in 1986-1987 she had 69.5 absences, in 1988-1989 she had 45.4 absences, and in 1989-1990 she had 16.5 absences and 44 instances of tardiness. Some of these absences resulted from board-approved leaves of absence. The administration warned the teacher that her attendance needed to improve and the board withheld her increment, but she failed to change her attendance patterns. This pattern of attendance resulted in a pronounced and inexcusable deficit in the education of Meade-Stephens's students. In the present case, respondent's absence pattern was even more pronounced. She was absent 131 days in the 1998-1999 school year, 46 days in the 1999-2000 school year, 56 full days and 7 half days in the 2000-2001, and 63 full days and 11.5 half days in the 2001-2002 school year (J-1). Respondent was given eleven warnings regarding her excessive absences.

In order for a board of education to terminate a tenured employee for excessive absenteeism, the board must demonstrate:

> (1) the particular circumstances of the absences and not merely the number of absences; (2) the impact that the absences had on the

> continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences.
>
> [*In re the Tenure Hearing of White*, 92 *N.J.A.R.*2d (EDU) 157, 161 (quoting *Kelsey v. Bd. of Educ. of Trenton*, EDU 5773-88, Comm'r Decision (May 11, 1989)).]

Clearly, the absences in this matter are excessive and respondent received several warnings. At issue is the impact of the absences on the continuity of instruction.

There appears to be no Appellate Division case directly on point, however *In the Matter of the Tenure Hearing of Kacprowicz*, 93 *N.J.A.R.*2d (EDU) 147, 153, *aff'd*, State Board of Educ., 93 *N.J.A.R.*2d (EDU) 604, *aff'd*, 95 *N.J.A.R.*2d (EDU) 105, was affirmed by both the Commissioner and the Appellate Division (C-1). In that case, a teacher was absent, on average, approximately 28 days per year over an eight-year period. There was no question that the teacher's absences over the years were for legitimate reasons. Thus, the central issue to be determined in that case was the effect of the absences on the children of the school district. ALJ Martone concluded:

> Common sense dictates that a teacher's continued absences ranging from 46 days in school year 1985-86 to 13 days (plus 39 days for a school accident) in school year 1989-90 must have had a negative impact upon [the teacher's] pupils. The pattern of absences shown in [Mr. Kacprowicz's] attendance records show frequent absences which necessarily disrupted the required continuity of instruction necessary to provide the opportunity for a pupil's maximum educational progress. Accordingly, in this case, I **FIND** that the [school district's] responsibility to [a teacher] who is plagued with illness and medical problems is far outweighed by the excessive number of absences of [Mr. Kacprowicz].
>
> [*Kacprowicz, supra*, 93 *N.J.A.R.*2d (EDU) at 152.]

In the present case, respondent's absences were more excessive. She was absent approximately 296 days over a four-year period, which averages to more than 74 days per year. The impact was even more pronounced in this case, where respondent taught special education students, who needed additional continuity and consistency.

State-Operated School District of Jersey City v. Pellecchio, 92 *N.J.A.R.*2d (EDU) 267, *aff'd*, 93 *N.J.A.R.*2d (EDU) 30, also addressed this issue. In that case, the teacher was absent approximately 242 times over a nine-year period, which averages to approximately 26 absences per year, which is considerably less than the present case. In reaching her decision, ALJ Reiner stated:

> The rationale underlying the principle that chronic or excessive absenteeism is conduct, which warrants dismissal, has been articulated in various ways. The ALJ in *Trenton Bd. of Ed. v. Williamson* [EDU 7335-85, Initial Decision (Apr. 14, 1986), *aff'd*, Comm'r (May 28, 1986)], in rather conclusive fashion, held that "there is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." *Williamson* at 4, citing *Angelucci v. West Orange Bd. of Educ.*, 1980 *S.L.D.* 1066.
>
> In *the Matter of the Tenure Hearing of Reilly*, 1977 *S.L.D.* 403, the rationale was more fully set forth by the Commissioner. "Frequent absences of teachers from regular classroom activity disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who don't have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. The regular contact of pupils with their assigned teachers is vital to this process." *Reilly*, 1977 *S.L.D.* at 414.
>
> [*Pellecchio, supra*, 92 *N.J.A.R.*2d (EDU) at 270.]

The ALJ in *Pellecchio* concluded that Pellecchio could not rely on the fact that most of his absences were due to a physiological ailment as an argument in mitigation of the penalty of dismissal.

It has also been held that once a board of education shows excessive absenteeism, the burden shifts to the teacher to show that performance is unaffected by continued absences, notwithstanding the legitimacy of excuse. *Smith v. Bd. of Educ. of Trenton*, OAL Dkt. No. EDU 5255-88, Commissioner's Decision (April 18, 1989).

In applying the analysis set forth in *White, supra*, 92 *N.J.A.R.*2d (EDU) 151, to the present case, the BOE has satisfied the three-prong test. First, respondent averaged 74 absences per year over a four-year period while teaching a special education class, which requires even more continuity than a regular class.

Second, pursuant to *Kacprowicz* and *Pellecchio*, the BOE has shown an impact on the continuity of instruction. Both *Kacprowicz* and *Pellecchio* had similar fact patterns to the present case, except the absences in the present case are far more excessive. Kacprowicz was absent, on average, approximately 28 days per year over an eight-year period. Pellecchio was absent approximately 242 times over a nine-year period. In the present case, respondent was absent approximately 296 times in a four-year period. The ALJs in both *Kacprowicz* and *Pellecchio* found the teacher's conduct to be chronic and excessive absenteeism and to have a significant adverse effect on the students of the school district. Since the absenteeism in the present situation is far more pronounced, I **FIND** that there was a significant adverse impact on the continuity of instruction.

Third, it is clear that respondent received numerous warnings with respect to her attendance problems. She received 11 written warnings between 1999 and 2002. I therefore **FIND** that respondent received adequate warnings, as well as the denial of pay-raise increments.

Respondent has asserted that petitioner has failed to make reasonable accommodations for her, which has contributed to her absenteeism. Although the Law Against Discrimination may require the petitioner to modify respondent's work schedule to accommodate her tardiness, petitioner is not required to accommodate her absenteeism. In *Svarnas v. AT&T Communications*, 326 *N.J. Super.* 59 (App. Div. 1999), Svarnas suffered injuries in an automobile accident and missed more than 600 days over a twenty-two-year period. If she was calculated to work 5 days a week with 3 weeks' vacation, 15 holidays and 10 sick days, she was absent approximately 13 percent of her required work schedule. The court concluded that even if the accommodations were made, it would not have solved the problem because "the fact remains that neither of those accommodations would have solved the underlying problem that led to plaintiff's dismissal her inability to show up for work on a consistent and reliable basis over a prolonged period of time." 326 *N.J. Super.* at 81. The court agreed with the trial judge, who had

concluded that "no accommodation was required in this case because plaintiff was not otherwise qualified to do her work. That is, she could not be so qualified because she was not there." *Id.* at 72.

The court further concluded that "[t]he authorities recognize that reasonably regular, reliable, and predictable attendance is a necessary element of most jobs." *Id.* at 78. "An employee who demonstrates an inability to attend work with any degree of predictability and reliability cannot be reasonably accommodated." *Id.* at 78 (*citing Santiago v. Temple Univ.*, 739 *F. Supp.* 974 (E.D. Pa. 1990), *aff'd*, 928 *F.*2d 396 (3d Cir. 1991)).

In the present case, petitioner does not have an obligation to accommodate respondent for her excessive absenteeism. Teachers must be present to interact with students. Education must occur over a regular period of time with continuous interaction. Respondent has not shown an ability to regularly participate in that process.

Based on the foregoing, I **CONCLUDE** that the conduct of the respondent amounts to chronic and excessive absenteeism, resulting in a significant adverse effect on the school children of the school district, and I **CONCLUDE** that respondent should be removed from her position of teacher in the Township of Old Bridge School District.

ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision that respondent was chronically and excessively absent is hereby **GRANTED**. It is further **ORDERED** that respondent, Jeanne Cook be **REMOVED** from her position as a teacher in the State-Operated School District of the City of Old Bridge, Middlesex County.

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

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

1-26-05
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

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

1-26-05
DATE

Mailed to Parties:

JAN 28 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For the Petitioner:

For the Respondent:

EXHIBITS

For the Petitioner:

P-1 Deposition of respondent

P-2 Evaluation Report – 1996-1997 school year

P-3 Evaluation Report – 1997-1998 school year

P-4 Amended Complaint

P-5 Evaluation Report – 1998-1999 school year

P-6 Letter dated November 30, 1999, regarding attendance

P-7 Evaluation Report – 1999-2000 school year

P-8 Teacher Observation form, dated January 28, 2000

P-9 Summary of Tardiness for 2000-2001 school year

P-10 Sign-in sheets for 2000-2001 school year

P-11 Letter to respondent, dated 10/23/00

P-12 Notice of January 24, 2001, meeting and summary

P-13 Summary of Attendance Conference, dated November 14, 2000, and letters from Dr. George

P-14 Letter to Dr. George, dated November 29, 2000

P-15 Correspondent concerning November 30, December 1 and December 4

P-16 Letter to Dr. George, dated December 14, 2000

P-17 Letter to respondent, dated December 14, 2000

P-18 Letter to Dr. George, dated January 2, 2001

P-19 Memo to Dr. George, dated January 19, 2001

P-20 Teacher sign-in sheets, 2001 school year

P-21 Memorandum from Administration, dated May 18, 2001

P-22 Late times for June 2001

P-23 Letter to respondent, dated May 24, 2001

P-24 Professional Evaluation Report for 2000-2001 school year

P-25 Sign-in sheets, July 1, 2001, to June 30, 2002

P-26 Sign-in sheets, 2001-2002

P-27 Letter to Dr. George, dated January 15, 2002

P-28 Letter to respondent, dated April 23, 2002

P-29 Attendance Report July 1, 2001, to June 30, 2002

P-30 Professional Staff Evaluation Report, dated May 31, 2002

P-31 Letter to respondent dated May 29, 2002

P-32 Memo to respondent dated May 25, 2001

P-33 Summary of Attendance Conference

P-34 Letter to respondent dated February 8, 2001

P-35 Summary of times for arrival dated June 4, 2002

P-36 Complaint

For the Respondent:

R-1 Deposition of respondent, p. 22

R-2 Evaluation Report – 1996-1997 school year

R-3 Evaluation Report – 1997-1998 school year

R-4 Deposition of respondent, p. 56

R-5 Deposition of respondent, p. 95

R-6 Deposition of respondent (T54-9 to 25)

R-7 Deposition of respondent (T55-1 to 6)

R-8 Evaluation Report – 1998-1999 school year

R-9 Deposition of Popovich, p. 41

R-10 Deposition of respondent, p. 73

R-11 Deposition of respondent, p. 91

R-12 Deposition of Trificante, p. 82

R-13 Accidental injury report

R-14 Evaluation Report – 1999-2000 school year

R-15 Letter to respondent

R-16 Deposition of Trificante, p. 82

R-17 February 7, 2001, memo

R-18 Prescription

R-19 Letter from principal

212-05

212-05
MARIA PARISE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

RESPONDENT,

AND

IRIS C. STOCK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, tenured school social workers, allege respondent Board reduced their full-time employment while retaining non-tenured and less senior employees in violation of their tenure and seniority rights.

The ALJ found: 1) that the Board's Reduction In Force (RIF) was invalid; 2) that the respondent Board did not act in bad faith regarding the RIF; and 3) that the reduction of the social worker position and contracting out of related services violated the tenure rights of the petitioners. The ALJ ordered: that petitioners be reinstated to their positions as social workers with back pay, appropriate salary adjustments and emoluments; that petitioners submit affidavits setting forth any income earned or unemployment compensation from other sources received subsequent to the RIF; and that petitioners are entitled to retroactive seniority credit from the date of termination or reduction to the date of reinstatement.

Upon a thorough and independent review of the record in this matter, including the parties' exception arguments, the Commissioner concurs with the ALJ that the Board's RIF was invalid as a matter of law; therefore it is unnecessary to reach to the issue of bad faith. The Commissioner concludes that petitioner Stock is to be reinstated to her position as social worker with back pay and emoluments as set forth in the Initial Decision; however, he is unable to determine relief in respect to petitioner Parise given the pending tenure charges against her and her apparent retirement on a disability pension. This matter is therefore remanded to OAL for supplementation of the record and a revised Order with respect to appropriate relief regarding petitioner Parise.

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 10, 2005

OAL DKT. NOS. EDU 5953-03 AND EDU 7633-03 (CONSOLIDATED)
AGENCY DKT. NOS. 181-6/03 AND 238-7/03

MARIA PARISE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IRIS C. STOCK,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions, as well as the replies of each petitioner, were timely filed in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.[1] To the extent these submissions essentially reiterate arguments raised before the ALJ, they are not recounted herein.

[1] In addition to her exceptions and her reply to the Board's exceptions, petitioner Parise submitted: 1) a copy of her letter to the Board's attorney, dated May 13, 2005; 2) a copy of her letter to the Board's attorney, dated May 16, 2005; 3) a copy of her letter to the school superintendent, dated May 25, 2005; and 4) a copy of "research done by Mr. Edward Dragan, Ed.D.," which she requests to be attached to his Case Review and Consultant Report already contained in the record. Counsel for the Board also provided a copy of its letter to petitioner, dated May 16, 2005. These additional documents submitted by petitioner Parise and the Board were not before the ALJ and not previously made a part of the record. In accordance with *N.J.A.C.* 1:1-18.4(c), these additional submissions were, therefore, not considered by the Commissioner in rendering his decision. Further, *N.J.A.C.* 1:1-18.4 does not provide for submissions other than exceptions and replies thereto. Accordingly, the Board's reply to petitioner Stock's reply, filed on May 18, 2005 was not considered.

In its exceptions, the Board claims, *inter alia*, that its situation is distinguishable from *Vicenzino, supra*, in that in *Vicenzino,* the Board eliminated the only social work position, although it did maintain the other Child Study Team (CST) positions in-house. (Board's Exceptions Regarding Parise at 2-3)[2] In this case, the Board points out, there was at least a .1 social work job in-house at all times and what the Board did was to use the Educational Services Commission on an emergent basis to deal with students whose first language was not English, and to finish up work left undone when tenure charges were filed against Ms. Parise. (*Id.* at 3) The Board argues that the intent of *Vicenzino* was to forbid school districts from dividing their CST obligation between district employees and outside arrangements on any routine basis. (*Id.* at 4) Even before the RIF, the Board contends, some social histories had been farmed out in emergency situations when the in-house staff could not keep up with required deadlines, asserting that such action merely supplemented, but did not replace, district employees. (*Ibid.*)

The Board also takes exception to the Order restoring Ms. Parise to her position, noting that Ms. Parise was offered and rejected a .1 position and argues that the Board cannot be ordered to recreate a full-time position it does not need. (*Ibid.*) Moreover, the Board notes that Ms. Parise was suspended, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, while tenure charges are pending against her. (*Id.* at 5) In this regard, the Board sets forth its argument that Ms. Parise cannot be restored to active employment with the Board while tenure charges are pending against her. (*Ibid.*) Additionally, the Board claims that Ms. Parise has received a disability retirement.[3] (*Ibid.*)

In its exceptions with respect to petitioner Stock, the Board claims that none of the services that were previously performed by Ms. Stock were assigned to outside agencies and

---

[2] The Commissioner notes that the Board is represented by two separate attorneys in these consolidated matters.

[3] The Commissioner observes that this is the first mention of petitioner's retirement. There is nothing in the record before the Administrative Law Judge (ALJ) regarding this issue.

it takes exception with the ALJ's conclusion that she be restored to her former position. (Board's Exceptions Regarding Stock at 2-3) The Board submits that it cannot be ordered to recreate a full-time position it does not need and asserts that there has been no determination that the amount of work for which the ESC was utilized amounted to a .6 position. (*Id.* at 3) The Board also points out that, when it determined that it needed a .4 position rather than a .1 position, the .4 position was provided to Ms. Stock. (*Ibid.*)

In reply to the two sets of Board exceptions, petitioner Parise points out that the consultant report from Management Consulting, LLC, concluded that a social worker could not fulfill her responsibilities in a four-hour-a-week job. (Parise's Exceptions, dated May 12, 2005 at 1-2) Additionally, petitioner emphasizes that she did not resign her position, but, in fact -- in a letter dated May 27, 2003 -- noted her intentions of resuming her position once a [full-time] position was recreated. (*Id.* at 2) Petitioner claims that "not offering her the part time position was in fact a violation of her rights." (*Ibid.*) Additionally, petitioner asserts that the Board is incorrect in that she "may resume active employment as per the Disability Pension regulations." (*Ibid.*) Moreover, petitioner claims that she is entitled to pay after the suspension, dated August 27, 2003, until January 2005 "when Disability Pension was mailed." (*Ibid.*)

Replying to the second set of exceptions filed by the Board, petitioner Parise argues, *inter alia*, that with respect to the social histories that the Board claims were left undone by her, that the social histories, were, in fact, completed and were being put on audio tape when the Board suspended the full time position on April 10, 2003 and then again from April 28, 2003 until August 27, 2003. (Parise's Exceptions, dated May 13, 2005 at 1-2) Petitioner also claims that the business administrator "misspoke" when she stated that social histories were sometimes done by outside contractors when district employees could not meet deadlines. (*Id.* at 2) Petitioner claims that it was the learning disabilities teacher consultants (LDTCs) and school

psychologists, not the social workers, who were allowed to use contracted help for the last 17 years. (*Ibid.*)

In her reply to the Board's exceptions, petitioner Stock points out that *N.J.S.A.* 18A:46-5.1 establishes the mechanism by which the Board may provide basic CST services, noting that the Board may either have its own CST or it may join with another board or agency to provide such services. (Petitioner Stock Reply at 2) What it cannot do, petitioner asserts, is to determine to use its own staff for CST services, while reducing part of the staff and using outside contractors to provide basic CST services. (*Id.* at 2) Petitioner Stock contends that her time commitment of only four hours on one day per week as a .1 staff member was not a sufficient time period for the provision of social worker services in light of the use of two full-time school psychologists and two full-time LDTCs. (*Id.* at 3) Moreover, petitioner points out that *N.J.A.C.* 6A:14-3.1(b) provides that CST members "shall be available during the hours when students are in attendance," with no exception for social workers. (*Ibid.*) Yet, in this case, the social worker member of the district's two CSTs was rarely available when students were in attendance, even when petitioner's schedule was modified to a .4 staff member. (*Id.* 3-4)

Moreover, petitioner asserts that there is nothing in the record to indicate that the need for social worker services was reduced during the 2003-2004 school year. (*Id.* at 4) Petitioner claims that the evidence, in fact, leads to a contrary conclusion in that the number of students requiring CST services only changed by one from the 2002-2003 school years and that, when focused on the number of children needing the services of a school social worker, the number significantly increased from 19 to 28. (*Ibid.*) The Board's action was, thus, not a RIF in the true sense of the term -- and contrary to the holdings in *Viemeister, supra*, and *Cochran, supra,* petitioner contends -- because additional work was either transferred to other individuals in the District or assigned to outside contractors as a means of circumventing tenure rights. (*Id.* at 5-6)

Upon a thorough and independent review of the record and the arguments of the parties in this matter, the Commissioner rejects the Board's argument that the within matter is distinguishable from the *Vicenzino* case and concurs, for the reasons expressed in the Initial Decision, that the Board's Reduction in Force (RIF) was invalid because it eliminated a district employee's CST position of social worker and contracted out for those services, while continuing to maintain its own CST. In that the RIF has been determined to be invalid as a matter of law, it is not necessary to reach to whether the Board acted in bad faith.

The Commissioner, therefore, concludes that petitioner Stock is to be reinstated to her position as social worker with all back pay and emoluments as set forth in the Initial Decision. With respect to petitioner Parise, the Commissioner is unable to determine the relief to which she is entitled on this record given the pending tenure charges against her and her apparent retirement on a disability pension. Accordingly, this matter is hereby remanded to the OAL for supplementation of the record and a revised Order with respect to the appropriate relief to be accorded to petitioner Parise.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6/9/05

Date of Mailing: 6/10/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MARIA PARISE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

OAL DKT. NO. EDU 5953-03

AGENCY DKT. NO. 181-6/03

IRIS C. STOCK,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

OAL DKT. NO. EDU 7633-03

AGENCY DKT. NO. 238-7/03

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

James F. Schwerin, Esq., for respondent Borough of Butler
(Parker, McCay & Criscuolo, P.A., attorneys)

Gregory T. Syrek, Esq., for petitioner, Iris C. Stock
(Bucceri and Pincus, attorneys)

Donald T. Okner, Esq. for respondent, Borough of Butler BOE
(Dwyer, Connell & Lisbona, attorneys)

Record Closed: January 14, 2004

Decided: April 28, 2005

BEFORE: **IRENE JONES**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioners, Maria Parise (Parise) and Iris Stock (Stock) contests the action of the respondent, Board of Education of the Borough of Butler, Morris County that eliminated their positions as tenured members of the District's Child Study Team (CST), due to reduction in force (RIF). Parise filed a petition of appeal with the Department of Education (DOE) on June 9, 2003. Stock filed a petition with the DOE on July 10, 2003. Answers were filed on behalf of the respondent on June 16th and July 17, 2003.

The matter was transmitted to the Office of Administrative Law on July 11, 2003 and August 15, 2003 for hearing as a contested case. Prehearing conferences were held on January 20, 2004 and June 30, 2004 wherein procedural schedules were established. An Order of Consolidation was entered on March 4, 2004. Thereafter, hearings were held on November 8 and 9, 2004. The parties filed written submissions on December 10, 2004 at which time the record closed. At the request of the undersigned, the time for filing of initial decision was extended by Order of the Commissioner of Education until April14, 2005.

STATEMENT OF FACTS

Petitioners were school social workers employed by the Butler Board of Education ("Respondent" or "District"). Petitioner, Maria Parise began employment with the respondent in September 1989, as a full-time (1.0) social worker. Petitioner, Iris Stock began employment for the respondent as a part-time social worker in 1991. Prior to the 2003-2004 school year, Stock had been employed on a .495 part-time basis, which amounted to a 19-1/2 hour workweek. Parise and Stock were members of the respondent's Child Study Team ("CST"). Further, both were tenured, but Parise had seniority. The two positions combined equaled 1.49 positions, which comprised the total amount of time allotted for social workers by the district.

The respondent's business administrator, Debra Naley-Minenna (Naley-Minenna), testified that the District's prepared budget for the 2003-2004 school year was too high. Consequently, she was directed by the respondent's Finance Committee to reduce the budget. Ms. Naley-Minenna testified that after all other possible budget cuts had been made there was still a $100,000 excess over the budget cap. Since staffing and benefits accounted for 65-75% of the budget, a reduction in force ("RIF") was necessary.

The Board determined that social work was an appropriate area where cuts could be made. In support of this decision, Witnesses Naley-Minenna and the Superintendent of Schools, James Smith, testified that the number of annual social evaluations being done in the district had decreased significantly. A few years prior to the RIF, the number of social evaluations had been around 40 per year. From 2001-2002, however, that number dropped to 19 per year. Petitioners disputed this assertion, contending that during the past five years, total student enrollment in the district increased, as well as the number of students with disabilities.

Further, respondent contends that the primary duty of a District social worker is the preparation of social evaluations. The other functions listed in the social worker job description were discretionary or done on as needed basis. In any event, the respondent determined the District was overstaffed with 1.49 social worker positions, and estimated that a .1 position would suffice. Accordingly, it conducted a RIF, eliminating both social worker positions, and creating a new .1 social worker position.

In an April 28, 2003 letter to Parise, the District notified her that it would eliminate all but .1 of the school social worker positions pursuant to a RIF, effective for the 2003-2004 school year. The District initially offered the remaining .1 position to Parise based on her seniority. She declined the position, however she did not waive her seniority rights or preferred reemployment rights and reserved her rights to any future full-time position. Thereafter, the District informed Parise that it would treat her rejection of the .1 position as a formal resignation from her position.

Subsequently, the District offered the .1 position to Stock, who accepted. Four months into the school year, the District discovered that the .1 position was not enough, and increased the position to a .4 position. This .4 position was offered directly to Stock, who currently holds that position.

After the RIF, the District then contracted with outside agencies for services previously performed by the school social workers. Indeed, even prior to the RIF, the respondent had sub-contracted some of the social evaluations out to the Educational Service Commission ("ESC") when special circumstances existed, such as non English-speaking students. Parise claims that while she was actively employed in the District, the social assessments or evaluations were not performed by outside contractors or agencies. Additionally, Stock testified that she would have performed these duties had the respondent asked.

The respondent asserts that the RIF saved the district approximately $70,000 in salary for Parise, and $30,000 in salary to Stock. The district saved a total of $100,000 in salary, plus another $10,000 in benefits for Parise.[1] Stock began the 2003-2004 school year as a .1 school social worker with a salary of $6,361 per year. She received $2,544.40 for the four months from September 2003 to December 2003. She received $14,789.32 for the remainder of the school year.

DISCUSSION, FINDINGS AND CONCLUSIONS

The first issue is whether the reduction in force is valid if it affects tenured positions. It is undisputed that a local board of education may conduct a RIF, even where tenured positions are affected, if done for reasons of economy. *Klinger v. Cranbury Bd. of Educ.,* 190 *N.J. Super.* 354, 357 (App. Div. 1982), certif. denied, 93 *N.J.* 277 (1983); *Trigani v. Monmouth Beach Bd. of Educ.,* 2002 *WL* 31628724 (N.J. Admin.). The controlling statute, *N.J.S.A.* 18A:28-9 provides:

[1] The net district savings would be $110,000 less the cost to contract out for the supplemental social worker position services. There is nothing in the record, however, indicating the district's expense for contracting with the ESC for those services.

> 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.
>
> [*N.J.S.A.* 18A:28-9.]

Thus, a local board of education has the authority to reduce its teaching staff so long as it "is genuinely for reasons of economy." *Impey v. Shrewsbury Bd. of Educ.,* 142 *N.J.* 388, 398 (1995). Accordingly, courts have consistently recognized that a RIF, "whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." *Maywood Bd. of Educ. v. Maywood Educ. Assoc.,* 168 *N.J. Super.* 45, 55 (App. Div. 1979); *Jamison v. Morris School Dist. Bd. of Educ.,* 198 *N.J. Super.* 411, 414-415 (App. Div. 1985); *Klinger, supra,* 190 *N.J. Super.* at 357.

Further, a RIF abolishing positions may still be valid even if the services related to those positions are not eliminated. *Impey, supra,* 142 *N.J.* at 399; *see also Klinger, supra,* 190 *N.J. Super.* at 357 (concluding that a local school board may alter the full-time status of a tenured employee in order to restructure a department to meet financial constraints while continuing to provide identical services). A RIF, however, is subject to review to determine whether any positions have been eliminated or merely transferred in violation of tenure statutes. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215 (App. Div. 1949). A petitioner has the burden of proving, by a preponderance of the credible evidence, that the RIF was undertaken in bad faith, or was arbitrary and capricious, or was in any other fashion contrary to the dictates of *N.J.S.A.* 18A:28-9. *Dearden v. Trenton Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 321, 323; *Wollman v. Trenton Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 20, 22, *aff'd, Comm'r, Id.* at 27.

Having established that the respondent could eliminate the position for reasons of economy, the next issue is whether the District violated its obligations under *N.J.S.A.* 18A:46-5.1 and *N.J.A.C.* 6A:14-3.1 (b).

N.J.S.A. 18A:46-5.1 provides that [e]ach board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. Further, the CST must consist of a school psychologist, a learning disability teacher consultant and a school social worker. *Ibid. N.J.A.C.* 6A:14-3.1(b).

Further, special education regulations require that "[a]ll child study teams members shall be employees of a district board of education have an identifiable, apportioned time commitment to the local school district and shall be available during the hours students are in attendance." *N.J.A.C.* 6A:14-3.1(b). Ordinarily, CST members are to be employees of the board of education pursuant to *N.J.A.C.* 6A:14-3.1, however, the legislature has authorized arrangements where a board of education can contract with an ESC to replace the lost services of a CST terminated during a RIF. *Trigani, supra,* 2002 *WL* 31628724.

In *Trigani*, the petitioners were tenured part-time CST members. The local board of education terminated their positions and contracted with an ESC to provide replacement services for those previously performed by the petitioners. On appeal, it was found that the board is authorized to engage in a RIF, even if the positions of tenured employees are eliminated. *Ibid.*

Further, it has been recognized that a local board of education has "considerable latitude in providing essential educational services." *Impey, supra* 142 *N.J.* at 392. Thus, board may discharge its responsibility to provide facilities and programs of special education in a myriad of different ways. *Ibid.* Specifically, the special education regulations governing the provision of educational and related services explicitly sanction agreements between a local board of education and a jointure commission for CST services:

> (a) Each district board of education, independently *or through joint agreements*, shall employ child study teams, speech correctionists or speech-language specialists and other

> school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.
>
> 1. *Joint agreements for child study team services may be entered into with local education agencies including* other local school districts, *educational services commissions*, jointure commissions and county special services school districts.

[*N.J.A.C.* 6A:14-5.1(a)1 (emphasis added).]

Petitioners rely upon *Cochran v. Watchung Hills Reg'l High Sch. Bd. of Educ.*, 1985 *S.L.D.* 1878, for support that the respondent cannot reduce the CST while using outside contractors to provide basic CST services. In *Cochran*, the local board reduced its full-time CST positions to half-time positions. The board then supplemented the CST by entering into outside contracts for services previously performed by the CST. It was found that the District had "simply reorganized and transferred functions to a less-expensive provider, which violated tenure rights and the requirements that core CST functions be carried out by school employees." Relying on the requirements then codified in *N.J.A.C.* 6:28-1.3(a)[2], it was noted that the basic CST was "expected to be employees of the local board of education." *Id.* at 1880. Further, *N.J.A.C.* 6:28-1.3(f) authorized outside contractors "in limited circumstances" with prior approval of the County Superintendent and "only for the purpose of supplementing existing team members." *Id.* at 1880-1881. Finding that the board's "intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider," the RIF was voided for violating tenure rights. *Id.* at 1881.

More recently, in *Vicenzino v. Bedminster Twp. Bd. of Educ.*, 312 *N.J. Super.* 243 (App. Div. 1998), the Appellate Division affirmed the Commissioner's order to reinstate a tenured social worker, holding that the district could not eliminate a social worker position and contract with an ESC to provide services undertaken by the former employee while maintaining a CST. Specifically, the court stated, "where a school district elects to maintain its own Child Study Team (CST), the school social worker must be an employee of the district." *Id.* at 244. The court went on to conclude that

[2] *N.J.A.C.* 6:28-1.3(a) is now recodified at *N.J.A.C.* 6A:14-3.1(b).

where a board establishes a CST with employees of the district, it may not eliminate one of those positions and contract out for those services. *Id.* at 250. "[I]f the Board were in good faith to eliminate the CST for reasons of economy and instead, 'join with one or more boards of education or State agencies [to] provide for basic [CST] services,' under *N.J.S.A.* 18A:46-5.1, ... the board of education would have complied with *N.J.S.A.* 18A:46-5.1 and *N.J.S.A.* 18A:28-9." *Ibid.* In sum, a board may either maintain its own CST or contract out for those services.

Subsequently, *Anders v. Lakewood Twp. Bd. of Educ. and Monmouth-Ocean Educ. Servs. Comm.,* 2001 *WL* 34609280 (N.J. Adm.), it was held that:

> Educational service commissions are established specifically for the purpose of providing to public school districts "such educational and administrative services as may be authorized pursuant to rules of the State Board of Education." *N.J.S.A.* 18A:6-51. If there had been any question concerning the authorization of boards of education to provide basic child study team services through an educational services commission, that question was definitively resolved with the adoption in 1998 of the State Board Rule *N.J.A.C.* 6A:14-5.1
>
> [*Ibid.*]

Thus, a board of education complies with *N.J.S.A.* 18A:46-5.1 if it, in good faith, eliminates its CST for reasons of economy and instead, joins with an ESC to provide for basic CST services.

Here, the petitioners assert that the need for the services of a school social worker did not decrease. Instead, the work was merely transferred to others employees of the respondent and outside contractors. In support of their contention that the respondent may not transfer such duties, petitioners rely on *Viemeister, supra.* In that case, the board of education abolished the position of principal, terminated the existing tenured principal and assigned the related duties to a teacher was appointed "teaching principal."

On appeal, the Appellate Division found "the formal resolutions adopted by the Board speak in terms of abolition of the position of principal and creation of a new position of 'teaching principal.'" *Viemeister, supra*, 5 *N.J. Super.* at 218. The court found insignificant the fact that such action finds no recognition in the tenure statutes, and instead, relied on "the substance rather than the form" of the RIF. *Ibid.* The court held that, in substance, the position of principal continued, and was merely transferred to a newly appointed "teaching principal" position. *Ibid.* Accordingly, it affirmed the decision of the State Board upholding the principal's reinstatement.

Petitioners further argue that *Viemeister* and *Cochran, supra,* suggest the respondent's RIF was arbitrary and capricious because the work and responsibilities of the school social workers were neither eliminated nor diminished. In *Impey,* however, the Appellate Division distinguished *Viemeister* on the grounds that *Viemeister* involved "the re-titling of a position in order to remove a tenured incumbent, while [*Impey]* involves a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of saving money." *Impey v. Shrewsbury Bd. of Educ.,* 273 *N.J. Super* 429, 435 (App. Div. 1994), *aff'd,* 142 *N.J.* 388 (1995). The court held that "a local board has the authority both to contract with an ESC to provide educational services for the handicapped and to abolish a teaching position 'for reasons of economy.'" *Ibid.* Notably, the position in *Impey* was that of a speech correction, not a member of the basic CST referred to in *N.J.A.C.* 6:28-3.1

In *Elson v. Hudson County Area Vocational-Technical Schs. Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 229 the Commissioner agreed with the ALJ that the local board violated the tenure rights of a school psychologist on the CST when it terminated his services as a result of a RIF, and contracted those services to an outside private CST. Predicated on the then provisions of *N.J.A.C.* 6:28-5.1(c), the ALJ observed that "[o]nly specified services may be contracted." *Elson, supra*, 96 *N.J.A.R.2d* (EDU) at 234. Further, it was held that "[a] local board cannot subcontract the services of its child study team to outside individuals" and, while "[a] board may supplement such services..., this situation presupposes an existing team with members who are employed by the district." *Ibid.* The contracted services were determined not to constitute supplemental independent CST evaluations and/or CST diagnostic services

contrary to *N.J.A.C.* 6:28-5.1(c)(1)(i). *Id.* at 236. The ALJ further reasoned that the facts were akin to those presented in *Cochran* and distinguishable from *Impey. Id.* at 235.

The Elson finding is supported by the *Vicenzino* holding that if the district chooses to maintain its own CST, a school social worker must be an employee of the district. *Id.* at 244. *Vicenzino* further declared that a board cannot eliminate a district employee's CST position and contract out for those services. *Vicenzino, supra*, 312 *N.J. Super.* at 250. In *Anders, supra,* the court dismissed the petitioner's claim that the board violated his tenure rights. It held that the board may act in good faith to eliminate its CST for reasons of economy and join an ESC to provide basic CST services. 2001 *WL* 34609280. The Commissioner found that all tenured CST positions were eliminated, and no employee of the board was performing the duties previously performed by the tenured CST members. *Ibid.* The court noted that, should the board again provide basic CST services with board employees, the tenured petitioners would be entitled to their tenured protections from the employment list. *Ibid.*

In *Becton Educ. Ass'n v. Carlstadt-East Rutherford Reg'l Sch. Dist.,* EDU 7061-01, Initial Decision, (November 3, 2004), <http://lawlibrary.rutgers.edu/oal/search.html>, the board elected to eliminate the entire CST and contract out the CST services. The ALJ found that "a district board of education may not eliminate the position of one CST member while maintaining its own CST." The board may, however, abolish its entire CST and contract out for those services. *Ibid.*

Here, the respondent did not eliminate its entire CST before contracting out for those services. Instead, the respondent reduced the CST social worker position and contracted out for those services, while continuing to maintain its own CST. Accordingly, I **FIND** that the RIF is invalid because the respondent eliminated a social worker's CST position and contracted out for those services, while continuing to maintain its own CST.

The next issue is whether the District acted in bad faith.

Petitioners assert that the respondent's decision to eliminate the school social worker positions and replace them with a .1 position constitutes bad faith. Petitioners contend that the RIF was related to the respondent's desire to remove a tenured employee, whom it deemed unsatisfactory. Specifically, during 1999-2000 school year, the respondent had concerns about Parise's performance. She was criticized and "written up every day" by her supervisors. On April 10, 2003, the respondent brought Parise up on tenure charges and suspended her with pay. On April 28, 2003, the respondent abolished both Parise's and Stock's positions pursuant to the RIF. Thus, the RIF was a guise to eliminate Parise. Stock's position was eliminated out of necessity because Parise had seniority and could not be eliminated before Stock. Petitioners claim the RIF was based on illegitimate motives, unrelated to any reduction in services or needs of the children.

The respondent asserts the RIF was conducted genuinely for reasons of economy, offering testimony that all other possible budget cuts were first attempted, but still there was a $100,000 excess over the budget cap. The district saved a total of $110,000 due to the reduction of social worker positions from 1.49 to a .1 position. Respondent further brings attention to the absence of evidence offered by petitioners that the budgetary concerns were not legitimate.

I **FIND** and **CONCLUDE** that the respondent recognized a savings of approximately $110,000 by reducing the social worker position to a .1 position. This offers strong support that the respondent acted in good faith for reasons of economy. Parise's position was full-time, while Stock's was a .495 position. After the respondent abolished both positions, it created a .1 position and offered the position to Parise which she declined. Four months later, Stock's .1 position was increased to a .4 position. Given the facts herein, I am not persuaded that the respondent acted in bad faith.

CONCLUSION

I **FIND** and **CONCLUDE** that the RIF is invalid because the respondent eliminated a district employee's CST position and contracted out for those services, while continuing to maintain its own CST. A board may only contract out for CST

services if it abolishes its entire CST. Here, the respondent eliminated the CST position of social worker, while leaving the rest of the CST intact, unaffected by the RIF. Thereafter, respondent then engaged outside services of the CST social workers, while continuing to maintain a district CST. Consequently, the RIF is invalid because the reduction of the social worker position and contracting out of those services violates the tenure rights of the petitioners.

ORDER

It is therefore **ORDERED** that the petitioners be reinstated to their positions as Social Workers.

It is further **ORDERED** that the petitioners be awarded back pay and any salary adjustment and any and all emoluments for period of time that the position was eliminated and or reduced.

It is further **ORDERED** that the Petitioners shall submit an affidavit to the respondent setting forth any income earned or unemployment compensation received during said period.

It is further **ORDERED** that petitioners be and are entitled to retroactive seniority credit from the date of termination reduction to the date of full reinstatement.

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

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

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

4/28/05
DATE

Irene Jones
IRENE JONES, ALJ

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

4/28/05
DATE

Mailed to Parties:

MAY 02 2005
DATE

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

sej

APPENDIX

Witnesses:

Maria Parise

Iris Stock

Debra Naley – Munenna

James Smith

Exhibits:

P-1 Case Review and Consultant Report

PS-1 DOE Certificate, I. Stock

PS-1 Resume - I. Stock

PS-3 Letter, April 28, 2003

PS-4 Letter, June 4, 2003

PS-5 Letter June 17, 2003

PS-7 Memo, November 19, 2003

PS-8 Memo, December 2, 2003

PS-9 Memo, December 3, 2003

PS-10 Memo, February 4, 2004

PS-11 Summary Evaluation, June 6, 2003

PS-12 Payroll Check Register

ID Only:

R-1 2003-04 Budget, Butler BOE

215-05

215-05

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, claims entitlement to reemployment by the Board of Education of the Manalapan-Englishtown Regional High School District pursuant to *N.J.S.A.* 18A:66-40, following a TPAF finding that she no longer suffers from alcoholism, the cause of her disability retirement in 1988. Cross motions for summary judgment were filed in this matter.

The Initial Decision enumerated 24 paragraphs of "undisputed facts" which were based on a statement of procedural and factual history prepared by the respondent Board; the ALJ found all 24 paragraphs to be pertinent facts in this matter. Based upon these pertinent facts, the ALJ concluded that the Board had the right to deny Klumb's request that she be rehired to her former position as teacher, and affirmed the Board's determination not to rehire Klumb. In so concluding, the ALJ emphasized that: the applicable statute, *N.J.S.A.* 18A:66-40a, provides for re-hiring by the former employer when a person recovers from a qualifying disability, but does not mandate that a former employer rehire the person; the Board offered petitioner an opportunity to show that she had the necessary qualifications to resume her teaching position; and the Board acted reasonably when it determined not to offer her a position after she failed to meet its qualifications for employment as a teacher.

Upon a thorough and independent review of the record and arguments in this matter, the Commissioner rejects the ALJ's findings and conclusions, and grants summary decision to petitioner. In accord with relevant court determinations in *DiMuzio, supra,* and *Allen, supra,* and the Commissioner's 1994 and 1996 determinations in *Bublin,* the Commissioner concludes that petitioner is entitled to be reinstated to her former tenured position of elementary teacher and orders the Board to reinstate her as of March 1, 1999 -- the date on which petitioner was interviewed for an existing elementary teacher vacancy -- with emoluments, back pay, and any support necessary to assure petitioner's seamless re-acclimation to her teaching duties.

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

MAILED JUNE 20, 2005

OAL DKT. NO. EDU 2892-03
AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4[1] and were duly considered by the Commissioner in reaching his determination.

In her exceptions, petitioner initially contends that the Administrative Law Judge (ALJ) decided this case contrary to *Sellers v. Schonfeld*, 270 *N.J. Super.* 424, 427-429 (App. Div. 1993), arguing that summary judgment cannot be granted where the attorney seeking summary judgment attaches exhibits to a certification by counsel which contain no indication that counsel had any firsthand knowledge concerning the exhibits and facts contained therein. (Petitioner's Exceptions at 1) This is particularly important in this matter, petitioner claims, because the ALJ "practically accepted exclusively as undisputed facts the attachments and facts contained in the brief of the respondent *** and itemized 24 paragraphs accepting items contained therein as 'undisputed.'" (*Ibid.*) Notwithstanding petitioner's cross-motion for summary judgment in this matter, therefore, the petitioner disputes all of the facts listed by the

[1] Petitioner's attorney requested and was granted two extensions for the filing of exceptions due to health problems.

ALJ as "Undisputed Facts," with the exception of facts numbered 14, 22, 23 and 24. (*Id.* at 1-10)

Moreover, petitioner argues, *inter alia*, that the ALJ disregarded the holding in *Allen, supra*, wherein the court construed *N.J.S.A.* 43:16A-8(2) as mandating that an employee who retires on a disability who regains the ability to perform his or her duties be returned to his or her former position. (*Id.* at 11-12) Petitioner submits that *N.J.S.A.* 43:16A-8(2) is not only similar to *N.J.S.A.* 18A:66-40a as noted by the ALJ, but that the two are the same. (*Id.* at 12) Petitioner also points out that both *Allen, supra,* and *DiMuzio, supra,* were cited and approved by the Commissioner in *Bublin, supra,* (*Bublin II*)[2] wherein he ruled that Bublin did not have to be rehired as a media specialist, but that she had to be rehired in the position she formerly held -- that of teacher. (*Id.* at 12-13) Additionally, petitioner claims the ALJ misapplied the holding in *Canavera, supra*, when he noted that the court stated therein that *N.J.S.A.* 43:16A-8(2) does not "expressly compel" the former employer to restore a previously disabled person. (*Id.* at 13) Petitioner points out that the facts in *Canavera* were entirely different from *Bublin II* or *Allen* because Canavera's police officer's certification had lapsed and he had to be completely retrained before returning to active service. (*Id.* at 14) Unlike Canavera, petitioner submits, she has both the proper teaching certification and 18 years tenure. (*Id.* at 15)

Petitioner also contends that the Board never properly appealed the Teacher's Pension and Annuity Fund (TPAF) determination of October 2, 1998[3] and, thus, the original TPAF determination should stand. (*Ibid.*) Moreover, petitioner asserts that the ALJ's reliance on *Laing, supra*, is misplaced because the *Laing* determination, made before *Bublin II*, *Allen*,

---

[2] This reference to *Bublin* is to the *Bublin* decision cited in the Initial Decision, *Bublin v. Board of Education of the Borough of Point Pleasant*, 96 *N.J.A.R.*2d (EDU) 768, *affirmed* State Board December 4, 1996, a Commissioner's Decision on Remand. In that the determination herein makes references to both this decision and the earlier Commissioner's Decision remanding the case to the Office of Administrative Law, this decision on remand will be referred to as *Bublin II.*

[3] The Commissioner notes that the TPAF determination to which petitioner refers ordered the Board to reinstate petitioner to her former position.

DiMuzio and *Canavera*, is no longer the rule of law. (*Id.* at 17) Additionally, petitioner contends that the Board's failure to rehire her conflicts with its New Jersey Education Association contract and is an unfair labor practice. (*Id.* at 19) Finally, petitioner avers that in the damages sought in the Superior Court Complaint she not only asked for her return to active service, but also asked for "comparative" and punitive damages, interest, attorney's fees and costs of suit and that these claims were overlooked by the ALJ. (*Id. at 18*)

Upon a thorough and independent review of the record in this matter and the arguments raised, the Commissioner has determined to reject the ALJ's findings and conclusions of law and grant summary decision to petitioner for the reasons that follow. Initially, pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding petitioner's assertions to the contrary, there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." The central issue in this matter is the question of a disabled employee's entitlement to reemployment under *N.J.S.A.* 18A:66-40, which is a question of law. Notwithstanding petitioner's dispute of the facts surrounding the Board's decision to initiate tenure charges against her and the events leading up to her disability retirement, therefore, these facts are not "material facts" to the question at hand.

"It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25

(1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Moreover, the submission of cross-motions for summary judgment suggests the parties' agreement that summary judgment is appropriate in this matter and, as set forth below, petitioner is entitled to prevail as a matter of law. Accordingly, the Commissioner concludes that summary judgment is appropriate in this instance.

With respect to the issue of whether a disabled retiree has a right to return to his or her former position upon a determination by TPAF that he or she is able to return to work, the Commissioner finds the Board's and the ALJ's reliance on *Laing, supra*, is misplaced. As set forth by the Commissioner in *Christine Bublin v. Board of Education of the Borough of Point Pleasant, Ocean County*, decided by the Commissioner January 26, 1994 (*Bublin I*):

> Initially, the Commissioner notes that *Laing* does indeed stand for the general proposition that retirement constitutes a resignation from the district of employment, and that action by TPAF to rescind such retirement does not necessarily obligate a district to reinstate a retired employee. Following this reasoning when turning to the specific question of a disabled employee's entitlement to reemployment under *N.J.S.A.* 18A:66-40, the Commissioner in *Kopel* interpreted that statute to make reinstatement by the former employer following a determination of fitness by the TPAF medical board optional rather than mandatory. However, in the wake of subsequent Court decisions (*DiMuzio, supra, and Allen, supra*), this interpretation can no longer be held valid. To the contrary, in interpreting language substantially

identical to that of *N.J.S.A.* 18A:66-40,[4] the Court explicitly stated that

> ***Although the statute does not expressly compel the appointing authority to restore the employee to his former position, the [Police and Fireman's Retirement System] Board's construction of *N.J.S.A.* 43:61A-8(2) is fully consonant with the legislative purpose. It is apparent that the grant of disability retirement is conditioned on the continuation of the incapacity. If the retired employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. Their separation from employment is unlike the voluntary separation of other civil servants whose seniority is not aggregated. In our view, *N.J.S.A.* 43:16A-8(2) contemplates that a restoration to employment return the formerly disabled individual as nearly as possible to the status held at the time he or she was pensioned. *** (*Allen, supra*, at 444)

Thus, the Commissioner can reach no other conclusion but that upon TPAF's determining that a disabled retiree is able to return to work, that retiree has a right to return to his or her former position. That right, however, is not unfettered as noted by the Court in *DiMuzio*:

> We recognize that *N.J.S.A.* 43:16A-8 does not require that an additional slot be created if there are no existing vacancies at the former duty level, nor does it require that incumbents be "bumped" to make room. The PFRS order does not so require, nor do we. If a vacancy at the former level, *i.e.*, the

---

[4] It is noted that the language at issue, "[i]f the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assigned to him, the beneficiary shall report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service," appears in both *N.J.S.A.* 18A:66-40 and *N.J.S.A.* 43:16A-8(2). In *Fairweather v. Employees' Ret. Sys.*, 373 *N.J. Super* 288, 291, Footnote 2, (App. Div. 2004) the court noted the precedential value for construing similar statutes:

> A similar requirement that the disability result from a traumatic event appears in connection with the statutes providing for accidental disability pension benefits under New Jersey's Police and Fireman's Retirement System, *N.J.S.A.* 43:16A-7, and the Teachers' Pension and Annuity Fund, *N.J.S.A.* 18A:66-39. Accordingly precedent construing each of the three statutes is relevant here.

> lieutenant, then existed the order (and the statute) requires that DiMuzio be there placed. If not, he should be returned to "any other available duty" to which the Department "is willing to assign him." *** (*DiMuzio, supra*, slip opinion at p. 9)

Bublin I, slip op. at 23-25

Turning to the ALJ's deference to the December 16, 1998 letter from the Secretary, Board of Trustees, TPAF, pursuant to *Texter, supra,* at 385, the Commissioner observes that this letter does not appear to be a legal determination in that it does not contain an analysis of the statute in light of the interpretative court decisions, but simply restates the language of the statute. The letter states, in pertinent part:

> The governing statute, *N.J.S A.* 18A:66-40, states that if a member becomes employed again in a position covered by the retirement system his or her retirement will be canceled until they retire again, The statute does not address reemployment nor does it require an employer to reemploy the member. However, it does guarantee the continued payment of benefits until the member is reemployed in a position covered by the Teachers' Pension and Annuity Fund.

Assuming, *arguendo*, that the above letter is a legal determination of the TPAF, however, the practice of traditional deference to an agency's interpretation is not binding when it conflicts with judicial interpretation. As the appellate division has explained:

> In the interest of justice we abandon our traditional deference to agency decisions when an agency's decision is manifestly mistaken. (citations omitted) Moreover, although we respect the agency's expertise, ultimately, interpretation of statutes is a judicial, not an administrative function and we are in no way bound by the agency's interpretation. (citations omitted) *Fairweather, supra,* at 295.

In the instant matter, therefore, the Commissioner concludes that, in accord with the court's determinations in *DiMuzio, supra, and Allen, supra,* and the Commissioner's determinations in *Bublin*, petitioner is entitled to be reinstated to her former position of elementary teacher. Accordingly, the Board erred when it did not appoint petitioner to its opening for the position of elementary teacher, for which petitioner was interviewed on March 1, 1999.

With respect to petitioner's claim that the Board's actions are a violation of the New Jersey Education Association contract and an unfair labor practice, the Commissioner notes that he does not have jurisdiction over these issues as they are under the purview of the Public Employee Relations Commission. Petitioner also complains that the damages sought in the Superior Court Complaint -- which not only asked for her return to active service, but also for "comparative" and punitive damages, interest, attorney's fees and costs of suit -- were overlooked by the ALJ. With respect to petitioner's claim for "comparative" and punitive damages, it is well-established that the Commissioner lacks authority to award money damages or monetary sanctions that constitute compensation for "damages" other than lost earnings or restoring an increment which has been improperly withheld. See *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 279, 281 (*Citing McLean v. Bd. of Ed. of Glen Ridge*, 177 *S.L.D.* 311, 3154; *Mith v. Bd. of Ed. of Hamilton,* OAL Dkt. No. EDU 5468-87 *adopted in part and rejected in part on other grounds*, decided by the Commissioner April 21, 1998) See also *Scott and Yarnall, et al., v. Bd of Educ. of the City of Trenton, et al.,* decided by the Commissioner September 30, 2002, and *Winter v. Bd of Educ. of the Twp. Of North Bergen,* 1975 *S.L.D.* 236. In the absence of express statutory authority to award damages or monetary "sanctions" to compensate for damages, therefore, I may not direct that petitioner be compensated for any alleged damages in this matter beyond her lost earnings.

Turning to petitioner's claim for "interest," the Commissioner does not find that the Board deliberately violated the statute, acted in bad faith or acted from other improper motive. Accordingly, the Commissioner concludes that petitioner is not entitled to prejudgment interest in this matter. The Commissioner also observes that a claim for post-judgment interest is not properly before him at this time, since the requisite time period has not passed pursuant to *N.J.A.C.* 6A:3-1.17(c)2. Accordingly, petitioner's claim for the award of "interest" is denied.

Finally, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct that the Board compensate the petitioner for legal fees in this matter. *See B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County,* 1987 *S.L.D.* 323, 336*; Balsley v. North Hunterdon Bd. Of Educ.,* 117 *N.J.* 434 (1990*); and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

Accordingly, for the reasons set forth above, summary decision is granted to petitioner. The Board is, therefore, ordered to reinstate petitioner to her former position as an elementary teacher as of March 1, 1999,[5] with all emoluments and back pay to which she is entitled, and to provide her with the support necessary to familiarize her with current methods and educational trends to assure petitioner's seamless re-acclimation to her teaching duties and the provision of quality educational services to her students.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/05

Date of Mailing: 6/20/05

[5] It is noted that the Board interviewed petitioner on March 1, 1999, for an existing elementary teacher vacancy. See Board's Statement of Facts, Number 24.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2892-03

AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,

Petitioner,

v.

BOARD OF EDUCATION OF THE MANALAPAN – ENGLISHTOWN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Richard C. Swarbrick, Esq., for the petitioner

Cynthia A. Satter, Esq., for the respondent (Law Offices of Stephen E. Gertler, attorney)

Record Closed: November 9, 2004 Decided: December 22, 2004

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the claim of the petitioner, Charlotte Klumb, that she is entitled to be rehired as a teacher by the respondent, the Board of Education of the Manalapan – Englishtown Regional High School District (Board), pursuant to *N.J.S.A.* 18A:66-40, since the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) found that she no longer

suffers from a disability. The petitioner requested a hearing, and the matter was transmitted to the Office of Administrative Law on May 21, 2003, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to –15 and *N.J.S.A.* 52:14B-1 to –13.

The matter was initially assigned to Administrative Law Judge John Futey. Thereafter, the matter was reassigned to the undersigned on November 25, 2003.

The petitioner filed a motion for summary decision and argued that she should be reinstated by the Board. The Board opposed the motion and filed a cross-motion for summary decision. I had an in-person conference with the parties on December 2, 2003. At that time, both parties agreed that this matter could be decided on the briefs. The Board agreed to file a statement of the procedural history and undisputed facts. I received the document on December 23, 2003. At the conference, I stated that the petitioner could file a response. On behalf of the petitioner, Richard S. Swarbrick, Esq., stated at the conference that it was likely that the petitioner would not file a response.

By letter dated December 22, 2003, I received a letter from Swarbrick's office stating that he had had open heart surgery and asked for an extension for any response due in the matter. On behalf of the Board, Cynthia A. Satter, Esq., agreed to an extension for his response to the Board's statement. Swarbrick was out-of-work for an extensive convalescent period. By letter received by my office on November 9, 2004, Swarbrick expressed his intention not to file a response. The record in the matter closed on November 9, 2004.

APPLICABLE STATUTE

N.J.S.A. 18A:66-40a provides:

> Once each year the retirement system may, and upon his application shall, require any disability beneficiary who is under the age of 60 years to undergo medical examination by a physician or physicians designated by the system for a period of 5 years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. If the disability beneficiary is engaged

> in an occupation, then the amount of his pension shall be reduced to an amount which, when added to the amount then earned by him, shall not exceed the amount of the salary now attributable to his former position.
>
> If his earnings have changed since the date of his last adjustment; then the amount of his pension may be further altered; but the new pension shall not exceed the amount of pension originally granted.
>
> If a disability beneficiary, while under the age of 60 years, refuses to submit to at least one medical examination in any year by a physician or physicians designated by the system, his pension shall be discontinued until withdrawal of his refusal. If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assign to him, the beneficiary shall report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service. If the beneficiary fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

UNDISPUTED FACTS

Based on Satter's statement of the procedural history and the undisputed facts, I **FIND** that the pertinent facts in this matter are:

1. By letter dated May 29, 1986, Klumb was contacted by her then Principal, Ruth Jacobson, with regard to problems the school was having with her attendance. Klumb had telephoned the morning of May 27, 1986 to advise that she was ill and would be going to a doctor, and had called for a substitute. The following day, she again called for a substitute. On May 29, 1986, Klumb did not attend school and did not call for a substitute teacher. The school had to find a temporary substitute for the morning, and another substitute for Klumb's afternoon sessions. The May 29, 1986 letter reminded Klumb of her responsibility to obtain coverage for her class in the event that she was ill (Exhibit C attached to Satter's November 25, 2003 brief).

2. By letter dated September 19, 1986, Klumb's Principal noted continuing problems with Klumb's performance as well as problems relating to Klumb having alcohol on her breath while teaching at school. The letter notes that Klumb had to take a

"leave of absence" the prior school year and that she was absent 74.5 days in the 1985-1986 school year. The principal states that when she first saw Klumb on September 18, 1986, she appeared distraught and "wobbly" on her feet. When they began to talk, Jacobson smelled alcohol on Klumb's breath. They discussed Klumb's "problem" and agreed that Klumb should go home. Thereafter, Jacobson drove Klumb home and another teacher drove Klumb's car back to her home. The following day, September 19, 1986, Klumb called in sick. In her September 19, 1986 letter, Jacobson suggested that Klumb obtain professional assistance for her "problem" (Exhibit D attached to Satter's November 25, 2003 brief). Klumb was thereafter absent 173 days in the 1986-1987 school year, including a "health leave" from October 15, 1986 through June 30, 1987.

3. Klumb had continuing problems in the beginning of the 1987-1988 school year. In a memorandum dated September 21, 1987, Joseph Scozzari, then Superintendent of Schools noted that he had been advised by Jacobsen that they were unable to find Klumb. Scozzari went to Klumb's home but she was not there. When he returned to the school, he saw Jacobson with Klumb following behind. Jacobson informed him that she had been talking to Klumb, and that she smelled alcohol on Klumb's breath. He escorted Klumb to Jacobson's office and asked Klumb if she had gone home to get a drink. He was aware that Klumb had already participated in a rehabilitation program at Riverview Medical Center. Scozzari contacted Klumb's counselor, Mrs. Fenny who agreed that Klumb should not go back in the classroom and asked that Klumb contact her to make an appointment for further treatment. At that time, Scozzari drove Klumb home and Mrs. Bernstein drove Klumb's car to her home (Exhibit E attached to Satter's November 25, 2003 brief).

4. Because of continuing problems with Klumb's performance and her apparent consumption of alcohol on the job or coming to work smelling of alcohol, the Board suspended Klumb effective October 7, 1987. The suspension was to be in effect until the completion of physical and psychiatric examinations by physicians selected by the Board as permitted by *N.J.S.A.* 18A:16-2 (Exhibit F attached to Satter's November 25, 2003 brief).

5. By letter dated October 14, 1987, the Board officially voted to continue Klumb's suspension with pay pending the outcome of an examination by Dr. Abraham Isrow of the Paul Kimball Hospital. Klumb was asked to schedule an appointment for that examination within two weeks. Klumb was provided with a copy of this resolution which stated that since 1985, Klumb had shown continued inability to perform her duties as a classroom teacher due to alcohol related problems and that her inability to perform had an adverse impact on the classroom and administrative functions of the school district. (Exhibit G attached to Satter's November 25, 2003 brief).

6. By letter dated October 30, 1987, the Board recognized that Klumb had not made the necessary arrangement with Kimball Hospital, as of that date. The Board had left messages with Klumb, her counselor and her New Jersey Uniserve

representative, and it had not received any response. The Board requested Klumb's cooperation (Exhibit H attached to Satter's November 25, 2003 brief).

7. By letter dated February 4, 1988, The Board proved Klumb with a copy of written tenure charges against her (Exhibit I attached to Satter's November 25, brief). These charges included "incapacity, excessive absenteeism, and insubordination (Exhibit J attached to Satter's November 25, brief).

8. The tenure charges against Klumb included the incident memorialized in the May 29, 1986 letter, the incident memorialized in the September 19, 1986 letter, the incident memorialized the September 19, 1986 letter, and the events memorialized in the September 21, 1987 memorandum. The charges included notations of "chronic absenteeism." Specifically, that in the school year 1985-86, Klumb was absent 74.5 days, including a health leave from December 9, 1985 through February 9, 1986. For school year 1986-87, Klumb was absent 173 days including a health leave from October 15, 1986 to June 30, 1987. The charges also included notations of poor teacher observation reports and poor annual performance reports which indicated poor teaching performance and incapacity to perform her duties. The insubordination charge was based on Klumb's failure to comply with the Board's resolution in a timely fashion.

9. Klumb saw Robert Berkowitz, M.D., a psychiatrist, on January 12, 1988. At that time, the doctor noted that she had been essentially out of work for two years (due to extended periods of "medical leave"), that her mental status was distracted and tangential, and that due to her long drinking history she showed very mild signs of organic brain syndrome. He noted that the organic brain syndrome could cause extremely poor functioning and that under these circumstances, he did not feel that Klumb could return to work as a teacher (Exhibit K attached to Satter's November 25, 2003 brief).

10. By letter dated February 18, 1988, Sanford D. Brown, Esq., on behalf of the Board wrote Thomas W. Cavanaugh, Jr. (then counsel for Klumb) stating that he had forwarded the report of Dr. Berkowitz to the Board, and that Klumb's status would be addressed at the Board's meeting on February 23, 1988. Brown confirmed that Cavanaugh had requested that the Board consider possible alternatives to the tenures charges and Brown suggested as a possible alternative that Klumb could resign and file for a disability pension (Exhibit L attached to Satter's November 25, 2003 brief).

11. By letter dated March 23, 1988, Cavanaugh noted that he had discussed the matter with Klumb and that she would be filing for an ordinary disability pension with the TPAF. Further, he noted that the Board had agreed to amend Klumb's status to "voluntary sick leave disability" which entitled Klumb to certain benefits but no additional salary, and that the Board agreed not to proceed to certify tenure charges pending the outcome of the pension matter. (Exhibit M attached to Satter's November 25, 2003 brief).

12. Klumb's application for an ordinary disability pension was approved. (Exhibit M attached to Satter's November 25, 2003 brief).

13. There was no evidence presented to show that Klumb was forced to take an ordinary disability pension in 1988.

14. At its October 1, 1998 meeting, the TPAF considered Klumb's request for instatement, and found that her disability had disappeared or had substantially diminished to the point that she could resume her former duties of teacher without restriction. The TPAF ordered the Board to reinstate Klumb to her former position (Exhibit N attached to Satter's November 25, 2003 brief).

15. By letters dated October 8, 1998 and October 21, 1998, the Board asked for a clarification of the TPAF's findings, and also requested medical documentation and the narrative report of an examination conducted by an independent physician. (Exhibit P attached to Satter's November 25, 2003 brief).

16. By letter dated November 13, 1998, the Board stated that it disagreed with the determination of the TPAF and requested a formal hearing (Exhibit Q attached to Satter's November 25, 2003 brief). The various requests for clarification and the November 13, 1998 request for a formal hearing were forwarded to the TPAF within the forty-five day time period.

17. By letter dated December 16, 1998, the TPAF responded to the Board's various requests and clarified its October 1, 1998 action. TPAF noted that it had considered an independent medical examiner's report which stated that Klumb was able to resume the position of teacher and that the TPAF concurred. Making reference to *N.J.S.A.* 18A:66-40, the TPAF noted that "if a member becomes employed again in a position covered by the retirement system his or her retirement will be cancelled until they retire again." The TPAF stated that "the statute does not address re-employment nor does it require an employer to re-employ the member." (Exhibit R attached to Satter's November 25, 2003 brief).

18. Thereafter, Klumb initiated an administrative hearing against the TPAF and asked that the TPAF order her reinstatement. By initial decision dated December 14, 1989, Administrative Law Judge John Futey dismissed Klumb's case with prejudice. (Exhibit S attached to Satter's November 25, 2003 brief).

19. In 1991, Bernstein, who is employed by the Board, wrote a letter of recommendation on behalf of Klumb (Exhibit J attached to Swarbrick's brief). Klumb taught courses for childcare givers and taught pre-kindergarten from 1991 to 1993. Between 1993 and 1994, she was a substitute teacher in the Keansburg Public School System and taught art in the Howell Public School System. What Paul Quirk, the Principal of the Keansburg Public Schools, requested that Klumb not be assigned as a substitute at the Frances Place School. In 1993, she was compensated $70.00 by the Keansburg Board of Education and 1994 she received $385.00. Keansburg did not rehire Klumb for the 1995-96 school year. (Exhibit

T attached to Satter's November 25, 2003 brief). With regard to Klumb's employment as an art teacher in the 1993-94 school year, Howell's records indicate that she worked a total of six days in that school year (Exhibit U attached to Satter's November 25, 2003 brief). Klumb worked as a teacher in Korea in 1995-96.

20. Klumb was interviewed on March 1, 1999 by representatives of the Board in order to determine whether she was qualified to fill a teacher position at the Pine Brook School, in the Manalapan-Englishtown District (Exhibits V and W attached to Satter's November 25, 2003 brief).

21. Assistant Principal Don Colbert and Principal Carmen Daccursa, both from the Pine Brook School, conducted the interview and prepared the following observations and rating:

(a) With regard to experiential and educational background, Klumb was given the lowest possible rankings with regard to her knowledge of instruction (cooperative learning, learning styles, flexible grouping) and also with regard to her knowledge of current trends (literature-based reading, math manipulatives and problem solving, technology and computers, integrated curriculum, portfolios).

(b) Her knowledge of classroom management and discipline was also ranked quite low on the applicable scale.

(c) Klumb's philosophy of education" was ranked relatively low on the applicable scale, noting that she did not have a clear or concise philosophy that was consistent with the District's philosophy. The "comments" section of the assessment form noted that Klumb is "not current at all. Needs considerable retraining."

(d) The interview rating overall was unsatisfactory.

(e) Klumb was not familiar with the "new" types of learning that were regularly being used in the Manalapan-Englishtown Regional School System.

(f) Daccurso felt that Klumb had not kept up on changes or trends in education during the ten years she had been out of education, and that her skills, knowledge of methods of instruction and then-current trends were not up to district standards.

22. Klumb filed a complaint against the Board and several individuals in the Law Division, New Jersey Superior Court on April 29, 2002 (Exhibit A attached to Satter's November 25, 2003 brief). She alleged that the Board had been ordered to restore her to her prior position as a teacher by TPAF's letter; she alleged that she made various demands for her return to her position with Board which were denied; and she demanded reinstatement as a tenured teacher.

23. An answer to Klumb's complaint was filed on behalf of the respondents. (Exhibit B attached to Satter's November 25, 2003 brief). In their answer, the respondents

denied the relevant allegations, listed various defenses, including lack of jurisdiction over the claims set forth in Klumb's complaint.

24. On January 6, 2003, the defendants filed a motion for summary judgment and the motion was heard by the Honorable William P. Gilroy, J.S.C., on February 28, 2003. Judge Gilroy requested additional submissions from the parties, and he again heard the Motion on April 29, 2003. He opined that the "Commissioner of Education has fundamental and indispensable jurisdiction over all disputes and controversies arising under the School Laws and that plaintiff should exhaust her administrative remedies from the denial of the request for reinstatement with the defendant Manalapan-Englishtown Regional Board of Education...." He entered an "Order Transferring Action to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9." (Exhibit B attached to Satter's November 25, 2003 brief).

It is also not disputed that Klumb worked for the Board as an elementary school teacher from September 1968 to June 1988. Prior to 1986, she received satisfactory or better evaluations (Exhibit G attached to Swarbrick's brief).

ARGUMENTS OF THE PARTIES

Both parties agreed that a decision based on the motions for summary decision is appropriate in this matter since as there are no disputes as to the pertinent facts. *N.J.A.C.* 1:1-12.54; *Judson v, People Bank and Trustees Co. of Westfield,* 17 *N.J.* 67, 73-5 (19540; *Brill v. Guardian Ins. Co. of America*, 142 *N.J.* 520 (1995). I concur.

On behalf of the petitioner , Swarbrick argued that the Board violated the law by failing to rehire Klum and to pay her back wages and benefits. Swarbrick relied on the appellate court's decision in *The Matter of Allen*, 262 *N.J. Super.*, 438 (App Div. 1993). In that case, the Court stated:

> Although the statute does not expressly compel the appointing authority to restore the employee to his former position, the Board's construction of *N.J.S.A.* 43:16A-8(2) is fully consonant with the legislative purpose. It is apparent that the grant of disability retirement is conditioned on the continuation of the incapacity. If the retired employee regains the ability to perform his or her duties, the Legislature mandate that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. Their separation from employment is unlike the voluntary separation of other civil servants whose seniority is not aggregated. In our view, *N.J.S.A.* 43:16A-8(2)

> contemplates that a restoration to employment return the formerly disabled individual as nearly as possible to the status held at the time he or she was pensioned. The aggregation of seniority complies with the legislative mandate that disable employees return to their former position upon cessation of their disability. . . .
> Id. at 444.

Although the *Matter of Allen* case dealt with a police officer who returned to his prior job after recovering from a disability, Swarbrick argued that the holding is applicable since the provisions in the Police and Firemen's Retirement System's statute, *N.J.S.A.* 43:16A-892), regarding reemployment is similar to the TPAF statute in issue on the matter, *N.J.S.A.* 18A:66-40a. See also, *Bd. of Police Comm., City of East Orange v. PFRS. DiMuzio* (App Div. Dkt. No. A-2629-87T8, unpubl. op. May 18, 1989). Swarbrick also relied on the decision of the Commissioner of Education in *Bubbin v. Bd. of Ed.of the Borough of Point Pleasant*, 96 *N.J.A.R.* 2d (EDU) 768. In this case, the Commissioner recognized a teacher's right to reemployment upon recovering from a disability.

On behalf of the Board, Satter argued that the Board did not act illegally or unreasonably when it refused to rehire Klumb. Satter argued that the petitioner's reliance on *Matter of Allen* is misplaced. In the *Matter of Allen* case, the police officer's former employer had rehired him and the issue in the case was limited to whether he was entitled to his former position and to the restoration of his former seniority. The court ordered him to be restored to his former position with seniority. Satter noted that in a latter decision, *Canavera v. Township of Edison,* 271 *N.J. Super.* 125 (App. Div. 1994), the Appellate Division held that an employer did not act inappropriately when it treated a restored police officer, after a disability, as a new employee without seniority.

Satter argued that in neither the *Matter of Allen* or the *Canavera* case did the Court order the former employer to hire the person who had recovered from a disability and in both cases the court recognized that the pension statute in issue, *N.J.S.A.* 43:16A-8(2), does not "expressly compel" the former employer to restore a previously disabled person, *Canavera* at 162; *Matter of Allen* at 444.

Satter noted that in this matter, the TPAF acknowledged in its December 16, 1998 letter that the pension statute in issue here, *N.J.S.A.* 18A:66-40, does not require the former employer to rehire a previously disabled person.

Satter argued that in the *Bublin* case, also cited by the petitioner the Commissioner affirmed the administrative law judge's initial decision, 96 *N.J.A.R.* 2d (EDU) 768, that the board did not act inappropriately when it refused to hire *Bublin* after a screening committee recommended that *Bublin* not be hired since she did not meet the requirements for the position. The Commissioner in the *Bublin* case recognized the right of the school administrators to make subjective judgment so long as it is done in good faith and cited the decision in *Ellen Bringhurst and Susan Kornacki v. Bd. of Ed. of the City of Cape May,* 1981 SLD 564.

Satter relied on the decision in *Laing v. Bd. of Ed. of the Township of Edison*, 1977 S.L.D. 422; aff'd by Comm. of Ed., 1977 S.L.D. 426; aff'd by State Bd. of Ed., 1977 S.L.D. 427; aff'd by the N.J. App. Division (September 22, 1978), 1978 S.L.D. 1025. In this case, a teacher received a disability pension and after the pension was rescinded, she requested her former position. The Board of Education of Edison refused and the administrative law judge decided that there was no statute which compelled Edison to reinstate her. The initial decision was upheld upon appeal.

Satter also relied on the decision in *Young v. Bd. of Ed. of City of West Orange*, 1987 S.L.D. 776; aff'd by Comm. of Ed., 1987 S.L.D. 782; aff'd by State Bd. of Ed., 1987 S.L.D. 784. In this case, it was held that the former employer was not required to rehire Young. I recognize that this case is distinguishable based on the facts since Young did not retire with a disability pension.

I agree with the Board's arguments. It is clear that the statutory policy reflected in *N.J.S.A.* 18A:66-40a is to have a person who recovers from a disability rehired by his or her former employer but that the statute does not mandate that the former employer rehire the person. This is TPAF's interpretation of the statute and the courts have traditionally given deference to an agency's interpretation of its statute, *Texter v. Dept. of Human Services*, 88 *N.J.* 376, 385 (1982).

In this matter, the Board considered rehiring Klumb as a teacher. Klumb was interviewed by two administrators who recommended that she not be hired as a teacher. The petitioner presented no facts showing any bias by these individuals against Klumb nor any reason to question their evaluation and conclusions.

It is the prime responsibility of all boards to provide a good education for the students entrusted to its schools. In order to provide such an education, a board must have qualified teachers. In this case, the Board offered petitioner an opportunity to show that she had the necessary qualifications to resume her teaching position and the Board acted reasonably when it determined not to offer her a position after she failed to meet its qualifications for employment as a teacher.

Therefore, I **CONCLUDE** that the Board had the right to deny Klumb's request that she be rehired to her former position as a teacher.

I **ORDER** that the determination of the Board not to rehire Klumb as a teacher be **AFFIRMED**.

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

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

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

December 22, 2004
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

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

12-22-04
DATE

Mailed to Parties:

DEC 29 2004
DATE

Laura Sanders
OFFICE OF ADMINISTRATIVE LAW

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

/cad

EXHBIITS

For Petitioner:

Exhibits attached to her brief of October 10, 2003

Exhibit A	Complaint in *Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education, et al.,* filed in the Law Division of the Superior Court, Docket No. L2190-02
Exhibit B	Order Transferring Action to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 entered by Judge William P. Gilroy
Exhibit C	Letter from Kathleen Coates to Richard C. Swarbrick, Esq., dated April 4, 2003
Exhibit D	Letter from Richard C. Swarbrick, Esq. to the Division of Pensions and Benefits, dated March 14, 1993, with attachment
Exhibit E	Notice of Filing of the matter identified as OAL Dkt. No. EDU 3242-03
Exhibit F	Notice of a Prehearing Conference in the matter identified as EDU 2892-03
Exhibit G	Affidavit of Charlotte Klumb (Exhibits referred to in the affidavit were not attached. Swarbrick stated in his brief that he was not resubmitting them and that they were attached to his motion before the Superior Court which had been sent by the Superior Court to the Commissioner of Education and then to the OAL).
Exhibit H	Letter from Regina M. Trauner, Secretary of the Board of Trustees of the Teacher's Pension and Annuity Fund to the Manalapan-Englishtown Regional Schools, dated October 2, 1998
Exhibit I	Letter from Richard S. Swarbrick, Esq. to Joseph Passiment, Jr. of the Manalapan-Englishtown Regional Schools, dated December 23, 1988
Exhibit J	Letter from Harriet Bernstein, dated 1991
Exhibit K	Letter from Harriett Bernstein to Board of Education Members, dated March 12, 1999
Exhibit L	Initial Decision in a matter identified as Klumb v. Teachers' Pension and Annuity Fund, TYP 6884-94, decided on December 14, 1999

For Respondent:

Exhibits attached to its brief, dated November 25, 2003

Exhibit A	Complaint in *Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education et. al.*, Docket No. L-2190-02
Exhibit B	Answer filed in Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education, et al., Docket No. L-2190-02
Exhibit C	Letter from Ruth Jacobson to Charlotte Klumb, dated May 29, 1986
Exhibit D	Letter from Ruth Jacobson to Charlotte Klumb, dated September 19, 1986
Exhibit E	Memo prepared by Joseph Scozzari, dated September 21, 1987 and the certification of John I. Dawes, Esq.
Exhibit F	Letter from Joseph Scozzari to Charlotte Klumb, dated October 7, 1987
Exhibit G	Letter from Joseph Scozzari to Charlotte Klumb, dated October 14, 1987, with attachment
Exhibit H	Letter from Joseph Scozzari to Charlotte Klumb, dated October 30, 1987
Exhibit I	Letter from Margaret Uhl to Charlotte Klumb, dated February 4, 1988
Exhibit J	Charges prepared by Joseph F. Scozzari against Charlotte Klumb, dated February 4, 1988
Exhibit K	Psychiatric consultation regarding Charlotte Klumb by Robert Berkowitz, M.D., dated January 12, 1988
Exhibit L	Letter from Stanford D. Brown, Esq. to Thomas W. Cavanaugh, Jr., Esq., dated February 18, 1988
Exhibit M	Letter from Thomas W. Cavanaugh, Jr. Esq. to Stanford D. Brown, Esq., dated March 23, 1988
Exhibit N	Letter from Regina M. Trauner, Secretary, Board of Trustees, Teachers' Pension and Annuity Fund to Richard C. Swarbrick, Esq., dated October 2, 1988
Exhibit O	Letter from Regina M. Trauner, Secretary, Board of Trustees, Teacher's Pension and Annuity Fund to Manalapan-Englishtown Regional Schools, dated October 2, 1998

Exhibit P Letter from John L. Dawes, Esq. to Regina M. Trauner, dated October 8, 1988, with attachment

Exhibit Q Letter from John L. Dawes to the Division of Pensions and Benefits, dated November 13, 1998

Exhibit R Letter from Regina M. Trauner to John L. Dawes, Esq., dated December 16, 1998

Exhibit S Letter from Regina M. Trauner to Richard C. Swarbrick, Esq., dated January 10, 2000 with attachment

Exhibit T Subpoena *duces tecum* filed in *Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education, et al.*, filed in the Law Division, Superior Court of New Jersey, Docket No. L-2190-02, with attachments

Exhibit U Subpoena *duces tecum* filed in *Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education, et al.*, filed in the Law Division, Superior Court of New Jersey, Docket No. L-2190-02, with attachments

Exhibit V Certified Staff Interview Assessment Form regarding Charlotte Klumb, dated March 1, 1999, with attachments

Exhibit W Affidavit of Carmen Daccurso

Exhibits attached to the respondent's brief, dated December 17, 2003

Exhibit A Letter from Cynthia A. Satter, Esq. to Honorable William P. Gilroy, J.S.C., March 12, 2003

Exhibit B Order Transferring Action to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 entered in Charlotte Klumb v. Manalapan-Englishtown Regional Board of Education, et al., Law Division, Superior Court of New Jersey, Docket No. L-2190-02

WITNESSES

For Petitioner:

None

For Respondent:

None

224-05

OAL DKT. NO. EDU 05379-05
AGENCY DKT. NO. 68-3/05

L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that the April 25, 2005 decision in the special education matter entitled *L.P. v. New Jersey Department of Human Services, Office of Education, Dumont Board of Education, and Teaneck Board of Education*, EDS 1959-05, renders petitioner's instant challenge to the Board of Education of the Borough of Dumont's residency determination moot.

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.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/05

Date of Mailing: 6/24/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05379-05

AGENCY DKT. NO. 68-3/05

L.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

Respondent.

Theodore A. Sussan, Esq., represented the petitioner (Sussan & Greenwald, attorneys)

James L. Plosia, Jr., Esq., represented the respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May 31, 2005 Decided: June 1, 2005

BEFORE **THOMAS E. CLANCY**, ALAJ:

In this matter, the petitioner challenged the respondent's residency determination. In view of the decision reached on April 25, 2005, in OAL matter bearing docket number EDS 1959-05,[1] the undersigned *sua sponte* deems the issue in this case to have been rendered moot.

Accordingly, I **ORDER** that the petitioner's challenge to the board's residency

[1] See attached.

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

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

6/1/05
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

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

6-2-05
DATE

Mailed to Parties:

JUN 03 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

da

To: TEC

Spec Ed

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 1959-05

AGENCY DKT. NO. 2005 9764

L.P.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION, DUMONT BOARD OF EDUCATION, AND TEANECK BOARD OF EDUCATION,

Respondents.

Theodore A. Sussan, Esq., for petitioner
(Sussan & Greenwald, attorneys)

Amy E. Duff, Deputy Attorney General, for respondent New Jersey Department of Human Services, Office of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

James L. Plosia, Esq., for respondent Dumont Board of Education
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Robert J. Pruchnik, Esq., for respondent Teaneck Board of Education
(Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Record Closed: April 13, 2005 Decided: April 25, 2005

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

STATEMENT OF THE CASE

L.P., (petitioner), is an 18-year-old female who seeks through a due process hearing filed with the New Jersey Department of Education on February 23, 2005, an Order obligating each named respondent, individually or collectively, to be responsible for all costs associated with her attendance at the New York Institute of Technology (NYIT) in a program she says is appropriate for her identified needs flowing from a diagnosis of being multiply disabled. Petitioner contends that until November 2004, her district of residence for school purposes was Teaneck, and then moved to the respondent school district of Dumont which became her district of residence. The respondent New Jersey Department of Human Services, Office of Education (OOE), is obligated under the State Education Facilities Act, L.1979, c.207, as amended, to provide those who are in need of special education and in its care at a state facility as defined in administrative regulations, with a free and appropriate education.

On February 7, 2005, petitioner requested the Department of Education to mediate the dispute with the named respondents. The OOE objected to mediation because the issue presented is the same issue resolved in a prior settlement agreement between the parties. After the objection was made regarding mediation, petitioner requested a due process hearing. OOE asserts the issue petitioner seeks to raise in her due process request is a matter of enforcement of the prior agreement; it should not be the subject of a *de novo* special education due process hearing and that, therefore, the Office of Administrative Law is without jurisdiction to hear the matter. It says the matter should be before the Director of the Division of Special Education in the Department of Education.

On March 3, 2005, the matter was transferred to the Office of Administrative Law for final determination by an Administrative Law Judge (ALJ) under the Individuals with Disabilities Education Act (IDEA), as amended, 20 *U.S.C.A.* 1401, *et seq.*, and *N.J.S.A.* 18A:46-1, *et seq.* The undersigned ALJ was assigned the case, after which the matter proceeded to hearing on March 15, 2005 at the Office of Administrative Law, Newark.

On the date scheduled for hearing, argument was heard on a motion for summary decision filed by the OOE, and on motions to dismiss filed by both the Dumont and Teaneck Boards of Education.

The OOE seeks summary decision on its argument that the issues presented were resolved by the existing agreement between the parties. OOE asserts petitioner's allegation that the agreement is not being honored is a matter of enforcement; not the basis for a new due process hearing. Therefore, the OOE concludes the Office of Administrative Law is without jurisdiction over the subject matter. The Dumont Board seeks to be dismissed as party respondent for the asserted failure of petitioner to state a claim against it. This Board says petitioner failed to establish residency in its district despite its best efforts to assist her in that regard. The Teaneck Board of Education filed a letter dated March 28, 2005, in which it asserts that its motion to dismiss should be considered as an alternative argument to the issue of whether the State Facilities Education Act of 1979, *N.J.S.A.* 18A:7B-1, *et seq.*, imposes a financial or educational obligation upon it for petitioner must first be determined. The Teaneck Board suggests that its motion to dismiss be considered here only if the Commissioner decides the foregoing issue in a manner adverse to its interests.

I have reviewed petitioner's request for a due process hearing and the various motions of the named respondents in response to that request. I **CONCLUDE** that the OOE's motion for summary decision must be granted and the motion to dismiss argued by the Dumont Board of Education need not be decided.

Petitioner's request for a due process hearing must be dismissed in its entirety. Petitioner's source of relief should the parties not be honoring the settlement agreement entered is to seek its enforcement before the Director of the Division of Special Education, Department of Education.

FACTS AND ARGUMENTS

Although there is not a stipulation of fact in the record, the record does disclose facts that are not in dispute between the parties as reported here. For purpose only of the motions, the following facts are found to exist and are as seen in a light most favorable to petitioner.

1. L.P. was born January 2, 1986.

2. There is evidence in the record that L.P. may have been abused during her infancy and early childhood.

3. Although it appears L.P. has been in foster care through Division of Youth and Family Services (DYFS) since she was about four years of age, there is no evidence in the record that the parental rights of L.P.'s biological parents were terminated, nor is there evidence to show L.P. was placed for adoption. The mother had lived in Keansburg, New Jersey; she presently lives in Pennsylvania. The whereabouts of the father are not mentioned in the record.

4. OOE acknowledges that its "responsibility for petitioner's education was triggered by her placement in a specialized treatment home by DYFS." (OOE's supplemental letter brief March 28, 2005 in support of it motion for summary decision).

5. At some point before high school, probably in or about 1991-1992, L.P. was declared eligible for special education and related services based upon a diagnosis of multiply disabled. At the conclusion of the 2003-04 academic year, L.P. acquired 160 high school credits from the Bergen County Community High School, under what was apparently considered to be an appropriate individual education program for her identified needs until 2003.

6. In the meantime and by letter dated August 21, 2003 petitioner, through counsel other than present counsel of record for petitioner, filed a Request for Mediation with the New Jersey Department of Education that reads:

> This office represents [G.C.], the natural mother of [L.P.], and [M.E.], the long – term care foster parent of [L.P.], who is a special education student currently attending the Community School in Teaneck, NJ. Ms. [C.] is the parent responsible for making education decisions for [L.]. The child, whose date of birth is 1/02/86, resides with Ms. [E.] at [Teaneck]. [It is noted petitioner had not yet reached the age of 18]. This residence has been designated a Specialized Treatment Home by the Department of Human Services (DHS) through an arrangement with the Youth Consultation Service (YCS). It is considered to be a 'State facility' and subject to *N.J.A.C.* 6A:17, *et seq.* As Teaneck is the child's temporary district of residence, the entity responsible for the child's education is the Teaneck Public School district, in conjunction with the DHS-Office Education. The child's DHS case manager is Susan Reed and the Supervisor is Dianne Cole. The child's case manager at the Teaneck Public School is Colleen Mullen.
>
> Ms. C., [the natural biological mother] resides at [Keansburg, NJ].
>
> * * *
>
> Both the natural mother and the foster care mother disagree with the proposed IEP which does not reflect the discussions and suggestions of the child's teachers and child study team representatives. At an 11/29/02 meeting, the team concluded that as part of a transition plan, [L.] requires an additional year of instruction, *i.e.,* a 'fifth year' of high school, and this was stated in the IEP developed at that meeting. [L.P.] is beginning the 12th grade this school year ('03-'04). At an IEP review meeting held on 6/2/03, there was no discussion of changing the transition plan previously agreed to at the 11/29/03 meeting. However, the proposed IEP that was sent with cover letter dated July 31, 2003, to both Ms. [C.] and Ms. [E.] eliminated that provision. This latest draft IEP represents an attempt by the DHS-Office of Education to terminate its educational obligations to [L.] upon her attaining the required number of credits for a high school diploma, rather than until her IEP goals are substantially met.

> Consequently, we believe that the new IEP violates both the IDEA's FAPE requirement as well as the child's statutory rights under State law to an education that maximizes her potential [citation omitted].
>
> A mediation conference is requested to ensure that the program reflects the unique transition needs of this child at this critical juncture. *The relief requested is the restoration of the language referring to a fifth year of education described in the IEP developed collaboratively by the appropriate individuals (teachers, providers) at the 11/29/02 meeting, and with which the child herself agrees, along with the additional related services agreed to in June. (Emphasis added).*

It is noted that contrary to the assertion made in the foregoing letter regarding Teaneck being the district of residence, a district of residence determination is governed by *N.J.S.A.* 18A: 7B-12, the State Facilities Education Act of 1979, L.1979, c.30, as amended. which provides:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> * * *
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

[*N.J.S.A.* 18A:7B-12b. (Emphasis added)].

The implementing regulations define "present district of residence" as follows: * * *

> 2. The present district of residence of a child placed by a State agency in a group home, skill development home, private school or out of state facility also referred to in the first paragraph of *N.J.S.A.* 18A: 7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) immediately prior to his or her initial admission to a State facility or placement by a State agency.

[*N.J.A.C.* 6A: 23-5.2 (1) and (2) (emphasis added)].

Without deciding the issue but while following the rule that if the language of a statute is plain, unambiguous, and uncontrolled by other parts of the regulation, the words of the statute are to be given their ordinary and well-understood meaning, *Fahey v. Jersey City*, 52 *N.J.* 103, 106-07 (1968); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467, 478 (1964); *Lane v. Holderman*, 23 *N.J.* 304, 313 (1957), it does appear Teaneck has a valid argument against it being assigned as the district of residence under the State Education Facilities Act. Petitioner's individual education plan adopted on February 19, 2004, acknowledges Keansburg Borough to be the district of residence for petitioner. A subsequent IEP developed for her February 10, 2005, lists the OOE as the district of residence. As far back as September 2000, there is evidence to show the OOE accepted full responsibility for L.P.'s education when, while acknowledging full responsibility for her IEP, invited a representative from the Teaneck schools to attend an IEP meeting for her as a matter of courtesy and referred to the district as the "LEA", meaning local educational agency under federal law. Despite the fact Teaneck provided some schooling for petitioner and some services for her over the years, reference by representatives of OOE to the district as the 'LEA', or local educational agency under federal law, 34 *C.F.R.* § 300.18, 20 *U.S.C.* 1401 (15), does not establish Teaneck as the "district of residence" under the State Education Facilities Act. (See, Exhibit C, attached to petitioner's reply letter, March 11, 2005).

Nevertheless, the record shows petitioner's request for a due process hearing was filed with the Office of Administrative Law on August 21, 2003, and docketed as OAL Docket No. EDS 11276-03, Agency Docket No. 2004 8108. Petitioner sought an additional year of education for her transition from high school to college, even though she would have acquired 160 credits by June 2004. Prior to the time the due process hearing was conducted by the Honorable Robert J. Giordano, the assigned ALJ, the OOE offered petitioner a fifth year of high school at the Bergen County Technical High School Springboard Program. Petitioner and her counsel accepted the offer. A settlement agreement was reached by the parties. Petitioner signed an

acknowledgement on February 24, 2004, that she understood the agreement and her then attorney of record also signed the document as being "a full and final disposition of all issues in this matter." In addition to the fifth year of high school that was to occur in 2004-2005, $2,000 was also accepted by petitioner, which includes counsel fees, as part of the agreement.

Springboard, it is noted, is a full-time intensive program for students with disabilities who have participated in a comprehensive high school program and who would benefit from intensive instruction related to their transition outcomes. Petitioner had a comprehensive high school program at the Community School. The IEP sets forth as fact that petitioner was exempt from local graduation requirements of the Teaneck Board of Education because of the nature of her disability.

The settlement agreement refers to an Individual Education Plan that was developed for petitioner on February 19, 2004. This IEP was prepared in consultation with petitioner and her attorney, the Youth Consultation Service treatment home parent to which petitioner had been assigned in Teaneck, and representatives of the OOE as well as the Teaneck Board of Education. The document states the IEP was developed to "continue the IEP development process and to discuss transitional programming. [L.] recently applied to and was verbally accepted at the Bergen County Technical High School Springboard Program in Paramus for September 2004." The IEP recognizes that by the end of the 2003-04 academic years, petitioner would have achieved 160 high school credits but that she would not be issued a diploma because of her scheduled fifth year of attendance at the Springboard program. Petitioner's issuance of a diploma was not conditioned upon the successful completion of the Springboard program; rather, the issuance of a high school diploma depended upon her meeting the criteria for the stated goals and objectives in the IEP, ostensibly after having completed the Springboard program to which she agreed.

Petitioner was scheduled to begin the fifth year, or transition year, of high school in September 2004 at the Bergen County Springboard Program as the settlement agreement provides. While it is unclear precisely how many days petitioner attended

the program, she now asserts the Springboard program is ill-suited to her needs, that it failed to hold an IEP meeting at the beginning of the 2004-2005 year and, that, she was provided a generic non-specific program wholly unrelated to her needs.

Petitioner says that after November 2004 when her foster mother died, she moved into a new foster home in Dumont where she tried to enroll in the public schools. The evidence more strongly suggests petitioner continues to reside in Teaneck at her deceased foster mother's home with the help of the foster mother's relatives. In any case, petitioner says that during January 2005 she was advised by Dumont officials to submit some evidence of actual residency in the Dumont district in order to complete the enrollment process in the Dumont schools. It appears that petitioner sought to reside with a Mr. and Mrs. P., who intended to operate a state approved 'YCS Treatment/Foster Home Program.' The Mr. and Mrs. P. were advised on January 31, 2005 by the "YCS" that certain violations in their Dumont home had to be abated before placement of any children may be made.

The Dumont schools notified petitioner by letter dated February 2, 2005, that she would be conditionally accepted as a student, but she must file within 30 days proof of domicility or residency at the address she claims to live, and that such proof may be by way of a deed, lease, affidavit of title, or current mortgage statement, plus a copy of a gas and electric bill. Should the gas/electric bill not be in her name, she would need to file two pieces of current legal mail in her name such as a credit card bill, medical bill, car insurance, registration, driver's license, employment verification, life insurance, home phone bill, or cable bill. In addition, petitioner was advised she also needed to file a court order or an equivalent document that she was placed in the Dumont address by DYFS, or other legal manner. While then counsel of record submitted a copy of the Mr. and Mrs. P.'s gas and electric bill, no other documents were forthcoming to the Dumont school. On February 24, 2005, Board counsel advised petitioner's counsel that the issue of violations abatement in the Mr. and Mrs. P.'s home is not resolved, nor is there any proof from anyone that petitioner was indeed residing at their residence. By letter dated March 2, 2005, the Dumont Board advised petitioner she is ineligible to

attend the district's school because she failed to submit specific proof of residence at Mr. and Mrs. P.'s house.

In the meantime and because petitioner did not feel the Springboard program was helpful to her, she unilaterally enrolled in the NYIT during November 2004. The OOE was notified by letter dated December 22, 2004, from counsel of record. Petitioner's present costs associated with the New York program are being absorbed by relatives of the deceased foster mother. The relief she seeks is payment of her room, board and tuition at the NYIT. By letter dated February 7, 2005, petitioner sought mediation before the Department of Education as against the named respondents of what she now says is an inappropriate program, the Springboard program, and she seeks costs for her room, board and tuition at the NYIT.

The OOE is neutral with respect to the motions to dismiss of the Dumont and Teaneck Boards of Education, but it does note that Dumont was never considered by it to be the so-called local educational agency, or district of residence. It also acknowledges its understanding that while the Teaneck Board was the named district of residence, Keansburg Borough should have been so named. The OOE notes petitioner's natural mother lived in Keansburg and it is she who was considered petitioner's legal guardian until petitioner reached the age of majority on January 2, 2004. The OOE contends that DYFS did not at any time assume legal guardianship of petitioner, nor did petitioner's parents at any time have their parental rights terminated.

Indeed, attached to OOE's supplemental letter brief of March 14, 2005, is a letter sent to petitioner by the Director of Family Based Services. This letter advises petitioner she is discharged from the Youth Counseling Service Treatment Home Program as of February 1, 2005, because there is no DYFS Office of Licensing Treatment Home family of record for her to be placed and there is no DYFS Office of Licensing approved alternative care provider. On the basis of this letter, OOE concludes it is no longer responsible for the education of petitioner other than what was contained in the settlement agreement. It does acknowledge in a theoretical manner it could be responsible for compensatory education should that issue arise.

Finally, it is noted petitioner filed a separate Petition of Appeal before the Commissioner of Education challenging the determination of the Dumont Board of Education she is not entitled to attend its school under *N.J.S.A.* 18A:38-1.

CONCLUSIONS

School funding is at the heart of the State Education Facilities Act. Under that law, specifically at *N.J.S.A.* 18A:7B-12, determinations as to the district of residence of children in foster homes or who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, are to be made by the Commissioner of Education. Under law, a state facility is a residential or day program operated or contracted with the Department of Human Services, Department of Corrections or Juvenile Justice Commission. *N.J.A.C.* 6A:17-3.1. At paragraph (a) of the cited statute, the district of residence for children in foster homes shall be the district in which the foster parents reside unless the child is subsequently placed in a State facility or by a State agency in which case the district of residence shall be determined as if no such foster placement had occurred. At paragraph (b) of the cited statute, the district of residence for these children shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency

Under the law, the OOE has the responsibility of insuring each child in their care receive either a thorough and efficient program of education or a free and appropriate education. As explained by the OOE, the local district responsibility under law is satisfied when 'an amount equal to the approved per pupil expenditure established [by law]' is diverted from the district of residence to the Department of Human Services by the Commissioner of Education. (Supplemental letter brief, OOE, March 14, 2005, p.2).

Although petitioner's present due process request appears on its face to be valid under the IDEA and under *N.J.A.C.* 6A:14-2.7, close examination of the allegations

disclose the issue presented has already been settled. Petitioner attended the Bergen County Community High School for at least four years under an individual education plan. Her mother had lived in Keansburg at the time, and her foster mother lived in Teaneck. These supervising adults in her life were in the immediate area, they knew or should have known what was happening with respect to L.P.'s education program. Indeed, it was during 2003 that the biological mother and foster mother made known their discontent with the absence of a fifth year of transitioning high school. In fact, it was petitioner herself who applied to and was accepted at the Bergen County Springboard program.

In the face of the then pending litigation, the Department of Human Services, as the supervising agent of petitioner's education under the State Education Facilities Act because DYFS had arranged for petitioner to be placed in a treatment home through the Youth Consultation Service, agreed to provide a fifth year transition period at the Springboard program. This is the program petitioner wanted, her biological and foster mother wanted, and for which her then-attorney argued. Indeed, the very letter that initiated the earlier litigation resulting in the settlement demanded a fifth year of high school intended for the successful completion of L.P.'s transition to college; not the mere accumulation of credits. Not only did petitioner receive the opportunity for a fifth year of transition high school which she herself selected, the Springboard program, petitioner also received $2,000 cash in return for her waiver of "all claims against the State of New Jersey with regard to the subject matter of this dispute." Petitioner had reached the age of majority by the time she signed the document on February 24, 2004, and her attorney also signed the document as a full and final disposition of all issues in this matter. When Administrative Law Judge Giordano accepted the settlement, he wrote:

> 1. The parties have voluntarily agreed to the settlement as evidenced [by] 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. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

There is no suggestion petitioner did not know what she was signing when she signed the agreement, there is no suggestion she was deceived, there is no suggestion petitioner was coerced into signing the agreement, and the evidence is clear petitioner not only had the advice of her natural mother and foster mother, she also had the advice of counsel. Once petitioner had secured agreement to attend the program she and her advisors ostensibly chose, the Springboard program and the $2,000 in cash, petitioner determined she did not like that program and wanted to go to the NYIT as a resident student. She seeks now to have a due process hearing to secure an Order requiring any or all respondents to be obligated for all costs at the NYIT.

The rule for summary decision pursuant to the Uniform Administrative Procedure Rules, specifically *N.J.A.C.* 1:1-12.5 is essentially the same as the summary judgment rule pursuant to the New Jersey Rules of Court. It provides as follows:

> [A] party may move for summary decision 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. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5(B)].

A contested case 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 the Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App. Div. 1988) (citing *N.J.S.A.* 52:14B-2(b); *N.J.A.C.* 1:1-12.5 (a)). Summary decision must be based on an examination of the totality of the circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. *Ibid.*

Summary decision is appropriate in this case because the fact of the settlement and its terms are not in dispute. Settlement of litigation "ranks high in our public policy," *Nolan v. Lee Ho, 120 N.J. 465*, 472 (1990). That does not mean, however, that things not legitimately encompassed in the agreement document will be read to exist. The settlement of lawsuits is favored because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced. *Dep't. of Pub. Advocate v. N.J. Bd. of Pub. Util.*, 206 *N.J. Super.* 523, 528 (App. Div. 1985).

In this case, petitioner, her mother, her foster mother, and her then attorney of record, agreed to settle the prior litigation under terms they felt, at the time, were acceptable. In return for the Springboard program and the $2,000 cash settlement, petitioner waived any and all claims she may have had regarding her free and appropriate education.

N.J.A.C. 6A:14-2.7 provides at paragraph (n) as follows:

> If the public agency responsible for implementing the IEP fails to implement a hearing decision of the Office of Administrative Law, a request for enforcement may be made by the parent. The request shall be made in writing to the State Director of the Office of Special Education Programs, Department of Education. Upon receipt of this request, the Office of Special Education Programs shall determine the implementation of the decision. If it is determined that the district has failed to implement the decision or part of the

> decision, the Office of Special Education Programs shall order the district to implement the decision or part of the decision, as appropriate.

A settlement agreement, an otherwise enforceable contract, cannot be lightly set aside on the basis one of the parties found something better. Therefore, I **FIND** and **CONCLUDE** petitioner is bound by the settlement agreement she entered as evidenced by her signature affixed thereto on or about February 24, 2004; I further **FIND** the subject matter in that enforceable agreement addresses the same issue sought to be litigated in this request for a due process hearing. Under the terms of the settlement agreement, petitioner received the opportunity of a fifth year of high school as her transition year and which she selected, despite the fact that at the end of the fourth year she would have acquired 160 high school credits, enough to have earned a high school diploma from Teaneck. Petitioner, in midstream and after the agreement was signed and sealed, changed her view of the program she wanted, and determined on her own to attend the NYIT.

If the agreement were not being honored by OOE, petitioner's relief is to bring the matter to the attention of the Director of the Division of Special Education at the New Jersey Department of Education. Repose of disputed issues is a desirable outcome of voluntary settlement agreements such as entered here. At some point, litigation over the same issue must cease – even in matters of special education – so long as the rights of the parties have been honored. Here, petitioner's rights were honored which she and her counsel recognized in the agreement they signed to settle the former litigation.

For the foregoing reasons, summary decision is granted to the New Jersey Department of Human Services, Office of Education, in that the settlement agreement accepted by Administrative Law Judge Giordano on April 22, 2004, is the law of this case. Therefore, petitioner's request for a due process hearing on the very same issue cannot be countenanced. Should the OOE not be abiding by the terms of the settlement, relief would be available through the Department of Education.

While there is a dearth of evidence to show a valid enforceable claim against the Teaneck Board of Education or the Dumont Board of Education, there is no need to rule on their motions to dismiss because the due process request itself is **DISMISSED** for lack of jurisdiction.

ORDER

Having found and concluded the issue presented in this due process request has already been amicably settled by the parties, a *de novo* hearing on the very same issue is neither required nor warranted. If petitioner claims the OOE refuses to honor the settlement agreement, that matter must be taken to another forum. Consequently, summary decision is **GRANTED** to the Department of Human Services, Office of Education. The due process request is **DISMISSED.**

IT IS SO ORDERED.

This decision is final pursuant to the provisions of 20 U.S.C.A. §1415(i)(1)(A) and 34 C.F.R. § 300.510 and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a federal District Court of the United States. 20 *U.S.C.A.* § 1415(i)(2), 34 *C.F.R.* §300.511. If either party feels this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

25, 2001

DATE

DANIEL B. MCKEOWN, ALJ (t/a)

jb

APPENDIX

THE RECORD OF THE CASE

Date	Document
February 7, 2005	Petitioner's Request for Mediation
February 18, 2005	OOE's Response to the Request for Mediation, with attachments
February 22, 2005	Petitioner's Request for Due Process, with attachments
February 28, 2005	Petitioner's Comments to the Settlement, with attachments
March 7, 2005	Response of Dumont Board of Education and Motion to Dismiss, with attachments
March 9, 2005	Response of Teaneck Board of Education and Motion to Dismiss, with attachments
March 9, 2005	Petitioner's Response to Dumont's Motion to Dismiss, with attachments
March 11, 2005	Petitioner's Response to Teaneck's Motion to Dismiss, with attachments
March 11, 2005	Motion for Summary Decision by OOE, with attachments
March 14, 2005	Supplemental Letter Brief in support of its Motion for Summary Decision, with Attachments
March 15, 2005	Oral Argument on the Motions
March 24, 2005	Dumont's Response to OOE's Motion for Summary Decision and as a Supplement to its Own Motion to Dismiss, no attachments
March 28, 2005	Petitioner's Response to the OOE's Supplemental Letter Brief, with attachments
March 28, 2005	Supplement of Teaneck Board to its Motion to Dismiss
March 29, 2005	Petitioner's Response to Dumont's Letter of March 24, 2005, with attachments
April 6, 2005	OOE's Reply to the Replies to its Motion for Summary Decision; Record Closed Upon Receipt of Last Listed Document on April 13, 2005

225-05

225-05

OAL DKT. NO. EDU 3806-04
AGENCY DKT. NO. 132-4/01

CANDICE LUCHEJKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/05

Date of Mailing: 6/24/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3806-04
AGENCY DKT. NO. 132-4/01

CANDICE LUCHEJKO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

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

Ronald C. Hunt, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: June 2, 2005 Decided: June 3, 2005

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

On April 26, 2001, petitioner filed a petition alleging that the action of the Board of Education of the City of East Orange (the Board), which charged her sick days for work-related injury/illness, violates *N.J.S.A.* 18A:30-2.1. The Board filed an Answer to the Petition on or about June 4, 2001. In a letter by counsel for petitioner, dated April 25, 2001, it was requested that the matter be held in abeyance pending a decision by the Division of Workers' Compensation. Subsequently, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on April 27, 2004, it was filed for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Following prior adjournments of the hearing on October 12, 2004 and March 22, 2005, the matter was rescheduled for hearing on April 22, 2005.

Counsel for the parties, as well as petitioner, appeared at the OAL on April 22, 2005 and engaged in discussions toward an amicable resolution of the matter. On April 22, 2005, the parties submitted the attached Settlement Agreement indicating the terms of agreement. Thereafter, counsel for respondent forwarded the attached letter dated June 2, 2005 memorializing that the Board and Superintendent of School consented to the aforesaid settlement.

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

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

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

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

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

June 3, 2005
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

6-8-05
DATE

M. Kathleen Dunn Cox/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 10 2005
DATE

Laura Rendeiro
OFFICE OF ADMINISTRATIVE LAW

pb

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
Attorneys for Petitioner
(973) 642-0161

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL. DKT. NO. EDUOR 03806-2004N
AGENCY DKT. NO. 73-3/02

CANDICE LUCHEJKO,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
EAST ORANGE BOARD OF EDUCATION,	:	
Respondent.	:	

Candice Luchejko, Petitioner in this matter, and the Board of Education of the City of East Orange, Respondent in this matter, hereby agree to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's ~~38~~ 23 sick days during the school year 2000-2001 shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-2.1;

2. The Respondent shall return to the Petitioner's accumulated sick days the ~~38~~ 23 sick days for which she was charged for her absences during the 2000-2001 school year, which will be available to Petitioner for use in the future;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding. Neither party is admitting any liability with regard to the allegations set forth in these proceedings.

5. This agreement is subject to approval by the Board of Education.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 4/22/05

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent
By:

RONALD C. HUNT, ESQ.

Dated: 4/22/05

226-05

OAL DKT. NO. EDU 01132-05
AGENCY DKT. NO. 401-11/04

M.B., on behalf of minor child, G.N.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Stipulation of Dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement by the Administrative Law Judge in her Initial Decision. Inasmuch as no settlement terms were brought to the record so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and hereby dismisses this matter with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/05

Date of Mailing: 6/24/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01132-05
AGENCY DKT. NO. 401-11/04

M.B. O/B/O MINOR CHILD, G.N.G.,

Petitioner,

v.

BOARD OF EDUCATION
OF BOROUGH OF BERGENFIELD,

Respondent.

M.B., petitioner, *pro se*

Nicole G. Centanni, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: May 20, 2005 Decided: June 6, 2005

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This education residency matter was transferred to the Office of Administrative by the Department of Education, Bureau of Controversies and Disputes on January 11, 2005 for determination as a contested case. Subsequently, it was scheduled for

hearing before the undersigned Administrative Law Judge on November 2 and November 3, 2005.

Settlement discussions took place between the parties prior to the hearing and a resolution was reached. A fully executed Stipulation of Dismissal was submitted by the parties to the undersigned.

Having reviewed the Stipulation of Dismissal, which is attached hereto and made part hereof, I am satisfied that it is appropriate in all essential respects and should be approved and I **FIND** as follows:

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

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

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

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

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

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

June 6, 2005
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6-8-05
DATE

M. Kathleen Duncan/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 10 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
ELLEN MARIE WALSH

JANE GALLINA MECCA
JANET L. PARMELEE
VITTORIO S. LAPIRA
SCOTT W. CARBONE
NICOLE G. CENTANNI
JOCELYN M. FRANK

16-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

March 18, 2005

William Speziale
Deputy Clerk
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: M.B. o/b/o of minor child G.N.G. v. Borough of Bergenfield Board of Education
OAL Docket No.: EDUOS 01132-2005N
Agency Ref. No.: 401-11/04
Our File No.: 3/98

Dear Mr. Speziale:

Please be advised that this office represents the Bergenfield Board of Education (hereinafter referred to as the "Board") in the above-captioned matter. Enclosed please find a fully executed Stipulation of Dismissal of both parties' respective claims. To date, this matter has not been assigned to an administrative law judge. However, being that the parties have reached a resolution of this matter, we ask that it be removed from the court's active calendar.

If you have any questions, of course, do not hesitate to contact us.

With kind regards, we are

Very truly yours,

FOGARTY & HARA

By: NICOLE G. CENTANNI

NGC:sds
Enc.
cc: Mr. Thomas P. Egan (w/enc.)
Business Administrator/Board Secretary
Ms. Maria Berrios (w/enc.)

MAY 20 '05 10:20 FR FOGARTY & HARA TO 9736486124 P.02/03

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Respondent
Borough of Bergenfield Board
of Education

M.B. o/b/o minor children, G.N.G.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner, v.	OAL Dkt. No. EDUOS 01132-2005N Agency Ref. No. 401-11/04
BOROUGH OF BERGENFIELD BOARD OF EDUCATION,	**STIPULATION OF DISMISSAL**
Respondent.	

The matter in difference in the above-entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party.

Dated: February 24, 2005

FOGARTY & HARA, ESQS.

By: _____
NICOLE G. CENTANNI

MARIA BERRIOS o/b/o G.N.G.

By: _____
MARIA BERRIOS

227-05

OAL DKT. NO. EDU 5172-04
AGENCY DKT. NO. 2-1/03

RICHARD NUNN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/05

Date of Mailing: 6/24/05

* Correspondence in the file indicates that the Board approved restoration of the 56 sick days and authorized the Board attorney to execute the settlement agreement on its behalf.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5172-04

AGENCY REF. NO. 2-1/03

RICHARD NUNN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Vito Gaglairdi, Jr., Esq., for respondent (Porzio, Bromberg and Newman, attorneys)

Record closed: May 26, 2005 Decided: June 6, 2005

BEFORE **ROBERT J. GIORDANO**, ALJ:

On May 6, 2004, this matter was transmitted to the Office of Administrative Law (OAL) by way of an appeal filed by petitioner Richard Nunn. Petitioner challenges the action of respondent Board of Education of the Borough of Mount Arlington, Morris Township, charging him sick days for work-related injury and/or illness.

After several adjournments, a hearing was scheduled on April 7, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing date, the parties advised the undersigned that they had resolved the matter. The parties submitted the attached Settlement Agreement, indicating the terms of settlement, which are incorporated herein by reference. The Mount Arlington Board of Education approved the settlement agreement as referenced by letter dated April 28, 2005. Counsel for the respondent confirmed that no formal resolution was required to approve the resolution of the within matter, by letter dated May 24, 2005.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the acknowledgement of such on the record, by their representatives.

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

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

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

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

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

6/6/05
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

June 10 2005
DATE

K Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

lrs

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOR 05172-2004N
Agency Dkt. No. 2-1/03

RICHARD NUNN,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
MT. ARLINGTON BOARD OF EDUCATION,	:	
Respondent.	:	

RICHARD NUNN, Petitioner, and the Board of Education of the Borough of Mt. Arlington, Respondent, hereby agree to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's seven days of absence in July 2002, 22 days of absence in August 2002, 20 days of absence in September 2002 and 7 sick days in October 2002 will be changed on his records to indicate that he was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-2.1 on those dates, rather than for personal illness pursuant to N.J.S.A. 18A:30-2;

2. The Respondent shall return to the Petitioner's accumulated sick days the 56 sick days for which he was charged for his absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future;

3. The Petitioner agrees to withdraw with prejudice his petition in this matter, and hereby waives any further claims which he could have pursued in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD

Dated: 5/11/05

PORZIO, BROMBERG & NEWMAN, PC
Attorneys for Respondent
By:

JAMIE D. ZOGBY

Dated:

232-05

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL OF THE COUNTY OF PASSAIC,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning Board of the Passaic County Technical Institute (PCTI) seeks tuition payment from the respondent Board of the Manchester Regional High School District (Manchester), alleging that Manchester's refusal to remit tuition for its resident students attending the PCTI for the 2004-2005 school year is in violation of *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6A:19-3.1. Both parties filed motions for summary decision, submitting a joint stipulation of facts which was adopted by the ALJ as her factual findings.

The ALJ found, as a matter of law, that the language of both the statute and the implementing regulation at issue here is clear and unambiguous, and therefore not subject to judicial interpretation. Furthermore, the respondent's reliance on a regulatory summary to support the position that Manchester is not obligated to pay sending tuition to the PCTI because it offers certain programs which are similar to programs offered by the vocational school, is misplaced and inappropriate. The plain language of the statute is mandatory: a district or regional board of education must send and pay tuition for any student who has applied for and has been granted admission to a vocational school operated by a county vocational school district. The ALJ granted summary decision in favor of the PCTI and ordered Manchester to pay tuition for its students who attend the vocational school.

The Commissioner concurs with the conclusions of the ALJ as set forth in the initial decision, that the respondent's contention that it is not required to pay tuition for academic instruction received by students enrolled at the vocational school because such courses are available in the Manchester district, is unsupported in statute and regulation. The Commissioner adds that respondent's argument was raised and rejected in prior cases, and respondent's assertion that withholding tuition from petitioner advances the cost-cutting goals of Public Law 2004, Chapter 73 is spurious. Furthermore, Manchester's suggestion that students are better off socially and culturally attending school in their district of residence is unsupported by facts, and the benefit to Manchester's vocational students of a strategy that requires shuttling them back and forth each day between two districts is unclear, even assuming such scheduling were logistically possible. Accordingly, the initial decision of the OAL is adopted as the final decision in this matter, and the ALJ's recommended orders for relief shall be implemented forthwith.

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 27, 2005

OAL DKT. NO. EDU 5964-04
AGENCY DKT. NO. 157-4/04

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL OF THE COUNTY OF PASSAIC,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT,	:	
RESPONDENT.	:	
	:	

The record in this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed. Upon review, the Commissioner concurs with the conclusions of the Administrative Law Judge (ALJ) as set forth in the initial decision.

The following pertinent facts have been stipulated by and between the parties.

The Passaic County Technical Institute (PCTI), located in the Township of Wayne, Passaic County, is a duly authorized county vocational school operated by the petitioner. Admission is open to all Passaic County high school students, and both full-time and part-time or shared-time vocational and technical educational programs are offered. Pursuant to *N.J.S.A.* 18A:54-20.1, petitioner charges tuition on a per student basis to the sending districts. Petitioner charges $9,564 for regular full-time students,

$14,529 for full-time special needs students, and $3,500 for half-share or shared-time students.

Respondent operates Manchester Regional High School, a comprehensive high school that serves the boroughs of Haledon, North Haledon and Prospect Park, providing a full range of academic classes. Respondent Board does not maintain a vocational school, pursuant to Article 2 of Chapter 54 of Title 18A of the New Jersey Statutes, but does offer four Classification of Instructional Program (CIP) approved occupational programs. Three of these programs are also offered by PCTI: business education / accounting technician; business education / general office; and technology and communications / CISCO Networking Academy.

On January 29, 2004, the Manchester Regional High School District Board of Education (respondent) passed a resolution directing that "starting with the 2004-2005 Freshman class, payment of full-time tuition payments not be paid to Passaic County Technology Institute (PCTI)" and "the Board of Education will not pay tuition to PCTI for students taking the same vocations courses that are offered at Manchester Regional High School for which MRHS has a CIP number."

In a February 4, 2004, letter to PCTI, Superintendent Kwak of the Manchester Regional High School District (Manchester District) advised that for the 2004-2005 school year the Manchester District would only pay the PCTI District for "'Shared Time' (the instructional time allocated only for vocational instruction – not academic instruction) services." The Superintendent also informed PCTI that it was "the Board's intent not to be financially responsible for any vocational instruction given to

students who could otherwise attend Manchester in comparable CIP approved course [sic]."

On February 12, 2004 the PCTI District responded to the Manchester District, directing its attention to *N.J.S.A.* 18A:54-20.1(a), *Board of Ed. of the Union County Vocational-Technical School v. Board of Ed. of the City of Linden,* Dkt. No. EDU 11819-99, decided October 18, 2002, and *N.J.A.C.* 6A:19-3.1, contending that those authorities preclude the action contemplated by respondent. While the Manchester Superintendent wrote to PCTI on March 26, 2004, advising that he had brought the statutory and case law to the attention of respondent, there was ultimately no reversal in respondent's position. However, respondent did defer taking any action on its resolution until the 2005-2006 school year.

On April 29, 2004, the PCTI Board (petitioner) submitted to the Department of Education a petition seeking an order directing respondent to pay tuition for PCTI students from the Manchester Regional High School (Manchester RHS), sending district pursuant to *N.J.S.A.* 18A:54-20.1. In Charge No. 1, petitioner alleged that respondent's intended withholding of tuition would violate *N.J.S.A.* 18A:53-20.1. In Charge No. 2, petitioner claimed that respondent's intended withholding of tuition would also violate *N.J.A.C.* 6A:19-3.1.

Respondent answered on June 1, 2004, denying the charges.

At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein. *N.J.A.C.* 1:1-12.5(a). A summary decision may be rendered if the submissions show that there is no genuine issue of material fact, and the moving party is entitled to prevail as a

matter of law. Both parties here have moved for summary decision and, by virtue of their submission of a joint stipulation of facts, there is no genuine issue of fact to be resolved. Thus, a summary determination on the law is appropriate.

As to the protocol for student attendance at county vocational schools, *N.J.S.A.* 18A:54-20.1(a) provides:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and who has been accepted for attendance at any of the schools of the county vocational district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes. (Emphasis added.)

N.J.S.A. 18A:54-20.1(c) provides, in pertinent part:

> The board of education of a county vocational school district *** shall be entitled to collect and receive from the sending districts in which each pupil attending the vocational school resides, for the tuition of that pupil *** a sum not to exceed the actual cost per pupil as determined for each vocational program classification, according to rules prescribed by the commissioner and approved by the State board ***. (Emphasis added.)

Respondent concedes that it does not maintain a vocational school. Thus, by virtue of the mandatory language in *N.J.S.A.* 18A:54-20.1(a), it must pay the tuition of the students in its district that attend PCTI.

Further, one of the regulations implementing *N.J.S.A.* 18A:54-20.1, namely, *N.J.A.C.* 6A:19-3.1(a), also directs sending districts to pay the tuition of its students who attend county vocational schools:

> All students shall be guaranteed the right to apply to and, if accepted, to attend a county vocational school. The sending district shall be responsible for the tuition and transportation costs for students admitted to a county vocational school. (Emphasis added.)

As the ALJ noted, the mandate in the statute and regulation is not qualified in any way (p.8). There is no exemption allowing sending districts to decline to pay tuition for county vocational school students taking occupational courses that are also offered by the sending district. There is similarly no provision allowing tuition reductions for the academic portions of the vocational students' programs.

Respondent urged the ALJ to ignore the plain language of the statute, *N.J.S.A.* 18A:54-20.1, and the above referenced implementing regulation, *N.J.A.C.* 6A:19-3.1(a), and rely instead on language in two regulatory summaries. One summary, specifically of *N.J.A.C.* 6A:19-3.1, appeared in the New Jersey Register before the regulation was enacted. The other one is a broad brush summary, published by the Department of Education, of all the provisions in *N.J.A.C.* 6A:19. The language which is the focus of respondent's arguments states:

> The section includes new language which guarantees qualified students the right to attend a county vocational school, and further requires that the sending district board of education pay the associated tuition and transportation costs, as long as the resident district does not offer an approved, identical type of program. (Emphasis added.)

The Commissioner agrees with the ALJ that this argument has no merit. First, the language in the summary is inconsistent with the language of the regulation. The discrepancy can be understood when the language of *N.J.A.C.* 6A:19-3.1(a) is compared with *N.J.A.C.* 6A:19-3.1(b). In *N.J.A.C.* 6A:19-3.1(a), quoted above, sending districts are unconditionally required to pay tuition for qualified resident students who

attend county vocational schools. *N.J.A.C.* 6A:19-3.1(b), addresses a different set of students, i.e., those who wish to go to a vocational program in another local district. It provides:

> Students shall be permitted to enroll in programs of vocational instruction offered by local district boards of education other than their resident district so long as the resident local district board of education agrees to pay the tuition and transportation costs and does not offer an identical type of program, which is approved and meets or exceeds current program performance standards, with the same Classification of Instructional Programs (CIP) code, and as long as space is available for additional enrollees in the programs offered by the receiving district board of education.

Clearly, it is the latter set of students -- i.e., students who wish to take occupational courses in another local school district -- that may not receive tuition from the sending district if the sending district offers the same vocational programs as the student's intended receiving district.

It is unfortunate that the summary is misleading, since it is intended to facilitate understanding of the regulation. There is no question, however, that explanatory materials may not be relied upon where they contradict the plain language of a regulation. *See, e.g., Aetna Insurance Company v. Trans American Trucking Service*, 261 *N.J. Super.* 316, 328 (App. Div. 1993), where the court held that the content of the *New Jersey Workers' Compensation and Employers' Liability Insurance Manual,* compiled by the Compensation Rating and Inspection Bureau, which bureau is presided over by a special deputy commissioner of banking and insurance, did not have the force of law, because it had not been adopted as a regulation under the Administrative Procedure Act, *N.J.S.A.* 52:14b-1 *et seq.* Thus, the content of the manual could not be elevated above the legal definition of independent contractor. *Ibid.*

Second, even if respondent's interpretation of the regulation were correct, the regulation could not trump the plain meaning of the statute. *I.M.O. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f),* 240 *N.J. Super.* 224, 230 (App. Div. 1989) ("If the regulation is plainly at odds with the statute, it is *ultra vires.*"). And where the language of a statute is clear and unambiguous, there is no room for judicial interpretation. *Macysyn v. Hensler*, 329 *N.J. Super.* 476, 485 (App. Div. 2000).

Third, petitioner's argument was raised and squarely rejected in prior cases. In *Board of Education of the Bergen County Vocational and Technical School District, Bergen County v. Board of Education of the Ramapo-Indian Hills Regional School District, Bergen County,* OAL Dkt. No. EDU 7891-03, Agency Dkt. No. 201-6/03 (August 25, 2004), *adopted* (Comm. Ed. October 13, 2004), the Board of Education of the Bergen County Vocational and Technical School District (Bergen County VTS District) sought tuition and transportation costs from the Ramapo-Indian Hills Regional School District (Ramapo-Indian Hills District). The Ramapo-Indian Hills District offered some vocational programs that were allegedly identical to programs at Bergen County VTS, but did not operate a vocational school *per se.* Some of its resident students chose to attend Bergen County VTS.

The Commissioner in that case determined that, where a sending district does not operate its own vocational school, the sending district must pay tuition and transportation costs for its resident students who attend the county vocational school, even if vocational programs offered by the sending school district are CIP approved and

identical to those offered by the county vocational school. (Commissioner's Decision at 5.) Thus, the Ramapo-Indian Hills District was ordered to pay tuition and transportation costs. *Ibid.*[1]

Separate and apart from the issue of statutory intent, respondent argues that withholding tuition from petitioner would help respondent's district advance the cost-cutting goals of Public Law 2004, Chapter 73, "An Act concerning school district budget caps and amending and supplementing parts of the statutory law." But, as the ALJ determined, the legislature, via *N.J.S.A.* 18A:54-20.1, has mandated that local districts must pay county vocational districts for the costs associated with educating students from the local districts. Obviously, respondent may not advance the purposes of one law by violating another. Moreover, there is no basis to believe that in passing Public Law 2004, Chapter 73, the legislature contemplated that local districts could cut costs by defaulting on their obligations to county vocational school districts. It is unlikely that the legislature anticipated that a rob-Peter-to-pay-Paul approach could achieve state-wide stability in education funding.

Finally, respondent contends that even where its resident students attend PCTI and take courses not offered in the Manchester District, respondent should not be required to pay tuition for academic instruction received by those students. Respondent argues that such courses are offered in the Manchester District, and students are better off

---

[1] Respondent interprets footnote 2 in the Bergen County VTS – Ramapo-Indian Hills decision as an acknowledgment of the relevance of a district's offering of CIP approved vocational programs. The footnote states: "It is assumed for purposes of this analysis that Ramapo's programs do, in fact, operate under valid CIP codes, since, in the absence of such approval, there could be no arguable basis whatsoever for a claim of the type Ramapo attempts to make herein."

As a threshold matter, the footnote is dictum and has no precedential value. Additionally, the Commissioner was referring to a factual basis for a claim. Obviously, if the facts had not supported the allegation that the Ramapo-Indian Hills' vocational courses were approved in the designated CIP categories, there would have been no need to reach the legal issues.

socially and culturally attending school in their district of residence. As the ALJ recognized, there is no support in the statute or regulation for this position. (Initial opinion at 8.) Further, respondent offers no facts to support its assertions, and it is not at all clear how students can benefit from having to shuttle back and forth each day between two districts, assuming such scheduling to be logistically possible.

Accordingly, for the reasons expressed by the ALJ and herein, petitioner is entitled to a summary decision in its favor, granting it tuition and transportation costs as a matter of law. Respondent's cross motion for summary decision is dismissed with prejudice. The initial decision of the OAL is adopted as the final decision in this matter, and the ALJ's recommended orders for relief are to be implemented forthwith.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of decision: 6/27/05

Date of mailing: 6/27/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 5964-04

AGENCY DKT. NO. 157-4/04

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL OF THE COUNTY OF PASSAIC,

Petitioner,

v.

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

Mary Pat Gallagher, Esq., appearing for Petitioner
(Gerber & Samson, attorneys)

Rodney T. Hara, Esq., appearing for Respondent
(Fogarty & Hara, attorneys)

Record Closed: April 5, 2005 Decided: May 17, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Passaic County Vocational School Board of Education, seeks payment of tuition from the responding regional high school district and claims that

Respondent's, Manchester Regional High School District, refusal to remit tuition for its students who are attending the vocational school for the 2004-2005 school year is in violation of *N.J.S.A.* 18A:54-20.1(a) and (c) and *N.J.A.C.* 6A:19-3.[1]

The parties agreed the matter could be disposed of by submitting a joint stipulation of facts, a copy of which is annexed hereto as Exhibit A. A briefing schedule was established; the record closed upon review of the submissions and document by the undersigned on April 5, 2005.

FINDINGS OF FACT

The parties submitted a joint stipulation of facts which are set forth in full and are adopted as the factual determinations in this matter.

1) PCTI Board operates the Passaic County Technical (PCTI), which is located in the Township of Wayne, Passaic County, New Jersey.

2) PCTI is duly authorized county vocational school.

3) PCTI provides vocational and technical educational programs to students on both a full-time and part-time or shared-time basis.

4) Admission to PCTI is open to all high school students in Passaic County.

5) PCTI charges tuition on a per student basis to the districts in which those students reside, pursuant to *N.J.S.A.* 18A:54-20.1.

6) The current tuition is $9,564 for a regular full-time student, $14,529 for a full-time special needs student and $3,500 for a half-share or shared-time students.

[1] Respondent advised implementation of the resolution dated January 29, 2004, had been delayed until the 2005-2006 school year.

7) Manchester Board operates the Manchester Regional High School District (Manchester RHS).

8) Manchester RHS services the Boroughs of Haledon, North Haledon and Prospect Park.

9) Manchester RHS is a comprehensive regional high school with a full-range of academic classes and four approved vocational programs.

10) As set forth in the State Board of Education's Directory of Verified Occupational Programs, there are four CIP approved occupational programs offered by Manchester RHS: (1) Business Education, Accounting Technician, CIP Code No. 520302; (2) Business Education, General Office, CIP Code No. 520408; (3) Marketing Education, General Marketing Operations, CIP Code No. 080708; and (4) Technology and Communications, CISCO Networking Academy, CIP Code No. 521204. Three of the foregoing CIP approved occupational programs are also offered by PCTI (CIP Code Nos. 520302, 520408, and 521204).

11) Manchester RHS does not maintain a vocational school pursuant to Article 2 of Chapter 54 of Title 18A of the New Jersey Statues.

12) On January 29, 2004, the Manchester Board passed a resolution directing that "starting with the 2004-05 Freshman class, payment of full-time tuition payments not be paid to PCTI" and "the Board of Education will not pay tuition to PCTI for students taking the same vocations courses that are offered at Manchester RHS for which HRHS has a CIP number."

13) Under cover of letter dated February 4, 2004, PCTI was advised of the Manchester Board's position regarding its payment of tuition to PCTI for Manchester RHS district students accepted into PCTI.

14) In the February 4, 2004 letter, the Manchester Board stated that on January 29, 2004, the Manchester Board resolved to refuse to remit

tuition for vocational instruction given to any PCTI student for "any vocational instruction given to students who could otherwise attend Manchester RHS in "comparable CIP approved" courses.

15) In the February 4, 2004 letter, PCTI was also advised that on January 29, 2004, Manchester Board passed a resolution in which it resolved to "only pay for 'Shared Time" (the instructional time allocated only for vocational instruction - not academic instruction) services" starting with the 2004-05 freshman class.

16) In a letter dated February 12, 2004, PCTI advised the Superintendent of the Manchester RHS district that the Manchester Board's action was in direct violation of state law and requested the Manchester Board reconsider its decision.

17) Manchester RHS district is a sending district within the meaning of *N.J.S.A.* 18A:54-20.1.

18) Originally, beginning with the 2004-04 school year, the Manchester Board was refusing to remit tuition to PCTI for students residing in the Manchester RHS district that are accepted to attend PCTI on a full-time basis if those students enroll in CIP-approved courses comparable to CIP-approved courses offered by Manchester RHS. However, the Manchester Board has deferred implementation of the foregoing action until the 2005-2006 school year.

19) Originally, beginning with the 2004-05 school year, the Manchester Board was refusing to remit tuition to PCTI for students residing in the Manchester RHS district that are accepted to attend PCTI for any vocational instruction given to students who could otherwise attend Manchester RHS in "comparable CIP approved" courses. However, the Manchester Board has deferred implementation of the foregoing action until the 2005-06 school year.

20) For the 2001-02 academic year, 51 students from the Manchester RHS district applied for admission to PCTI and 20 were accepted.

21) For the 2002-03 academic year, 63 students from the Manchester RHS district applied for admission of PCTI and 24 were accepted.

22) For the 2003-04 academic year, 50 students from the Manchester RHS district applied for admission to PCTI and 27 were accepted.

23) For the 2004-05 academic year, 55 students from the Manchester RHS district applied for admission to PCTI and 24 were accepted.

24) As of June 2002, 90 students from the Manchester RHS district were enrolled at PCTI for the 2001-02 school year, of which 62 were regular students and 28 were special education students. All 90 students attended on a full-time basis.

25) As of June 2003, 83 students from the Manchester RHS district were enrolled at PCTI for the 2002-03 school year, of which 61 were regular students and 22 were special education students. All 83 students attended on a full-time basis.

26) As of June 2004, 99 students from the Manchester RHS district were enrolled at PCTI for the 2003-04 school year, of which 73 were regular students and 26 were special education students. Of the 99 students attending, 98 students attended on a full-time basis and one special education student attended on a half-share basis.

27) As of October 2004, 84 students from the Manchester RHS district were enrolled at PCTI for the 2004-05 school year, of which 63 students were regular students and 21 were special education students. All 84 students attended on a full-time basis.

28) PCTI's tuition rates have remained unchanged since the 2001-02 school year. The tuition rates charged beginning with 2001-02 and continuing through the 2004-05 school year are as follows: Full-time, regular $9,564; Full-time, special education $14,529; Half-share, regular $3,500; Half-share, special education $3,500.

DISCUSSION AND CONCLUSIONS

The rules of this forum provide a party may move for summary decision at any time after a case is determined to be contested. A motion for summary decision shall be rendered if the submissions, including discovery and affidavits, if any, show there is no genuine issue as to a 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(a).

In this case, the parties have each moved for summary disposition, indicating there is no genuine issue as to a material fact; accordingly, one party is entitled to prevail as a matter of law.

The petitioning vocational school district seeks payment of tuition from the responding regional high school district and claims that Respondent, Manchester Regional High School District's refusal to remit tuition for its students who are attending the vocational school for the 2004-2005 school year is in violation of *N.J.S.A.* 18A:54-20.1(a) and (c) and *N.J.A.C.* 6A:19-3.

The statute provides:

> [t]he board of education of each school district or regional school district in any county in which there is a county vocational school district ***shall*** send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education ***shall*** pay tuition for each of these pupils to the county vocational school district

> pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district for regional school district maintaining a vocational school or schools pursuant to Article 2 of Chapter 54 of Title 18A of the New Jersey Statutes.

N.J.S.A. 18A: 54-20.1 (Emphasis added).

In its response to Petitioner's application for summary decision, Respondent asserts, because Respondent offers certain comparable CIP-approved course, Respondent is relieved of its obligation to pay tuition for a student applying for admission to those comparable, approved courses who is granted admission to PCTI. Respondent, however, ignores the plain language of the statute cited above. Instead, Respondent relies on the Regulatory Summary to the regulation implementing the statute.

It is a fundamental principal of statutory interpretation that a court must first examine the language of the statute or regulation; where the language is clear and unambiguous, there is no room for judicial interpretation. *Macysyn v. Hensler*, 329 *N.J. Super.* 476, 485 (App. Div. 2000). In this case, the language of both the statute and the implementing regulation is clear. As denoted by the supplied emphasis in the citation of the statute above, a school district or regional school district in a county which maintains a county vocational school district ***shall*** send any student who applies for admission to and has been accepted by a county vocational school to that county vocational school; moreover, the board of education ***shall*** pay tuition to the county vocational school district. It is well-established that the use of the word "shall" denotes a mandatory provision, *i.e.,* in this case, a district or regional board of education must send and pay tuition for any student who has applied for and has been granted admission to a vocational school operated by a vocational county school district.

Respondent asserts because it has certain programs which are similar to or the same as programs which are offered by the vocational school district, Respondent is relieved of the obligation to pay tuition to the county vocational school district for

students who enroll in the program offered by Petitioner rather than the one offered by Respondent. To support this conclusion, Respondent ignores not only the clear language of the statute, but the clear language of the implementing regulation as well and, instead, relies on interpretive language from the New Jersey Register.

Not only is the language of the statute is clear on its face, the language of the implementing statute is equally clear. That language guarantees to all students the right to apply to and, if accepted, to attend a county vocational school. *N.J.A.C. 6A:*19-3.1(a). The action of the Manchester Regional High School District flies in the face of the legislative and regulatory mandate guaranteeing all qualified students who apply for and are accepted the right to attend a county vocational school.

Reliance on the Regulatory Summary is misplaced and inappropriate where, as here, the statute and regulations are clear and unambiguous. Moreover, although Respondent articulates public policy issues which, in Respondent's view, *may* support the position that, because it has similar CIP-approved programs, it is relieved of the obligation to pay tuition, because the statute and regulation are clear on the face, the public policy issues raised by Respondent are appropriately addressed to the legislature.

Finally, I can find nothing in the statute or regulation which permits a sending district, such as Respondent to determine to pay only for shared time tuition. The guarantee contained in the statute and regulation is not qualified in any way. Accordingly, I **CONCLUDE** summary decision in favor of Petitioner is appropriate.

ORDER

I hereby **ORDER** summary decision be and hereby is **GRANTED** in favor of Petitioner; I further **ORDER** Respondent to pay the tuition for its students who have applied for and been granted the right to attend the PCTI pursuant to the requirements

of the statute and regulations; I further **ORDER** the cross application of Respondent seeking summary disposition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

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

May 17, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

May 18, 2005
DATE

Mailed to Parties:

MAY 18 2005
DATE

Laura Andrews
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 DEC -2 A 10:52

GERBER & SAMSON, L.L.C.
155 Willowbrook Boulevard
Wayne, New Jersey 07470
(973) 256-9000
Attorneys for Petitioner,
Passaic County Technical Institute
Our File No.: 610-002

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDUOT 05964-2004N

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL OF THE COUNTY OF PASSAIC,

Petitioner,

v.

BOARD OF EDUCATION OF MANCHESTER REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

STIPULATION OF FACTS

Petitioner, Board of Education of the Vocational School of the County of Passaic (hereinafter referred to as "PCTI Board" or "petitioner") and respondent, Board of Education of Manchester Regional High School District ("Manchester Board" or "respondent"), stipulate to the following facts:

1. PCTI Board operates the Passaic County Technical Institute ("PCTI"), which is located in the Township of Wayne, Passaic County, New Jersey.

2. PCTI is a duly authorized county vocational school.

3. PCTI provides vocational and technical educational programs to students on both a full-time and part-time or "shared-time" basis.

4. Admission to PCTI is open to all high school students in Passaic County.

5. PCTI charges tuition on a per student basis to the districts in which those students reside, pursuant to *N.J.S.A.* 18A:54-20.1.

6. The current tuition is $9,564.00 for a regular full-time student, $14,529.00 for a full-time special needs student and $3,500.00 for "half-share" or "shared-time" students. 7. Manchester Board operates the Manchester Regional High School District ("Manchester R.H.S.").

8. Manchester R.H.S. services the Boroughs of Haledon, North Haledon and Prospect Park.

9. Manchester R.H.S. is a comprehensive regional high school with a full-range of academic classes and four approved vocational programs.

10. As set forth in the State Board of Education's Directory of Verified Occupational Programs, there are four CIP approved occupational programs offered by Manchester R.H.S.: (1) Business Education, Accounting Technician, CIP Code No. 520302; (2) Business Education, General Office, CIP Code No. 520408; (3) Marketing Education, General Marketing Operations, CIP Code No. 080708; and (4) Technology and Communications, CISCO Networking Academy, CIP Code No. 521204. Three of the foregoing CIP approved occupational programs are also offered by PCTI (CIP Code Nos. 520302, 520408, and 521204).

11. Manchester R.H.S. does not maintain a vocational school pursuant to Article 2 of Chapter 54 of Title 18A of the New Jersey Statutes.

12. On January 29, 2004, the Manchester Board passed a resolution directing that "starting with the 2004-05 Freshman class, payment of full time tuition payments not be paid to Passaic County Technology Institute (PCTI)" and "the Board of Education will not pay tuition to PCTI for students taking the same vocations courses that are offered at Manchester Regional High School for which HRHS has a CIP number." A true and exact copy of an extract from the minutes of the January 29, 2004 meeting of the Manchester Board is attached hereto as Exhibit "A".

13. Under cover of letter dated February 4, 2004, PCTI was advised of the Manchester Board's position regarding its payment of tuition to PCTI for Manchester R.H.S. district students accepted into PCTI. A true and exact copy of the February 4, 2004 letter is attached hereto as Exhibit "B".

14. In the February 4, 2004 letter, the Manchester Board stated that on January 29, 2004, the Manchester Board resolved to refuse to remit tuition for vocational instruction given to any PCTI student for "any vocational instruction given to students who could otherwise attend Manchester H.S. in "comparable CIP approved" courses. See Exhibit B.

15. In the February 4, 2004 letter, PCTI was also advised that on January 29, 2004, Manchester Board passed a resolution in which it resolved to "only pay for 'Shared Time' (the instructional time allocated only for vocational instruction - not academic instruction) services" starting with the 2004-2005 freshman class. See Exhibit "B".

16. In a letter dated February 12, 2004, PCTI advised the Superintendent of the Manchester R.H.S. district that the Manchester Board's action was in direct violation of state

law and requested the Manchester Board reconsider its decision. A true and exact copy of the February 12, 2004 letter is attached hereto as Exhibit "C".

17. Manchester R.H.S. district is a sending district within the meaning of *N.J.S.A.* 18A:54-20.1

18. Originally, beginning with the 2004-2005 school year, the Manchester Board was refusing to remit tuition to PCTI for students residing in the Manchester R.H.S. district that are accepted to attend PCTI on a full-time basis if those students enroll in CIP-approved courses comparable to CIP-approved courses offered by Manchester R.H.S. However, the Manchester Board has deferred implementation of the foregoing action until the 2005-2006 school year.

19. Originally, beginning with the 2004-2005 school year, the Manchester Board was refusing to remit tuition to PCTI for students residing in the Manchester R.H.S. district that are accepted to attend PCTI for any vocational instruction given to students who could otherwise attend Manchester R.H.S. in "comparable CIP approved" courses. However, the Manchester Board has deferred implementation of the foregoing action until the 2005-2006 school year.

20. For the 2001-2002 academic year, 51 students from the Manchester R.H.S. district applied for admission to PCTI and 20 were accepted.

21. For the 2002-2003 academic year, 63 students from the Manchester R.H.S. district applied for admission to PCTI and 24 were accepted.

22. For the 2003-2004 academic year, 50 students from the Manchester R.H.S.

district applied for admission to PCTI and 27 were accepted.

23. For the 2004-2005 academic year, 55 students from the Manchester R.H.S. district applied for admission to PCTI and 24 were accepted.

24. As of June 2002, 90 students from the Manchester R.H.S. district were enrolled at PCTI for the 2001-02 school year, of which 62 were regular students and 28 were special education students. All 90 students attended on a full-time basis.

25. As of June 2003, 83 students from the Manchester R. H.S. district were enrolled at PCTI for the 2002-03 school year, of which 61 were regular students and 22 were special education students. All 83 students attended on a full-time basis.

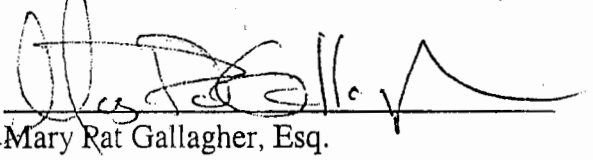
26. As of June 2004, 99 students from the Manchester R. H.S. district were enrolled at PCTI for the 2003-04 school year, of which 73 were regular students and 26 were special education students. Of the 99 students attending, 98 students attended on a full-time basis and 1 special education student attended on a half-share basis.

27. As of October 2004, 84 students from the Manchester R.H.S. district were enrolled at PCTI for the 2004-05 school year, of which 63 students were regular students and 21 were special education students. All 84 students attended on a full-time basis.

28. PCTI's tuition rates have remained unchanged since the 2001-2002 school year. The tuition rates charged beginning with 2001-2002 and continuing through the 2004-2005 school year are as follows:

Full time, regular	$9,564.00
Full time, special education	$14,529.00
Half share, regular	$3,500.00
Half share, special education	$3,500.00

GERBER & SAMSON, L.L.C.
Attorneys for Petitioner, Board of Education
of the Vocational School of the County of Passaic

By: 
Mary Rat Gallagher, Esq.

FOGARTY & HARA, ESQS.
Attorneys for Respondent, Board of Education
of Manchester Regional High School District

By: _____
Rodney T. Hara, Esq.

233-05

OAL DKT. NO. EDU 8583-04
AGENCY DKT. NO. 248-7/04

A.M.P. on behalf of minor child, H.E.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/27/05

Date of Mailing: 6/27/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8583-04

AGENCY DKT. NO. 248-7/04

A.M.P. o/b/o H.E.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

A.M.P., petitioner, *pro se*

Martin R. Pachman, Esq., for respondent

Record Closed: May 31, 2005 Decided: June 2, 2005

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

This matter was transmitted to the Office of Administrative Law on November 18, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

June 2, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

6-6-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN - 7 2005

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

MARTIN R. PACHMAN, P.C.
60 East Main Street
Freehold, New Jersey 07728
732 780-5590
Attorneys for Respondent

RECEIVED
2005 MAY 31 A 11:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

A.M.P. o/b/o H.E.P., Petitioner	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
vs.	OAL DOCKET #EDUOS 08583-2004S AGENCY DOCKET #248-7/04
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, Respondent	STIPULATION OF SETTLEMENT

WHEREAS, the instant Petition was filed with the Commissioner of Education on July 21, 2004; and

WHEREAS, the matter was transmitted to the Office of Administrative Law on September 30, 2004; and

WHEREAS, the parties are desirous of amicably resolving the instant matter;

NOW, THEREFORE, it is stipulated as follows:

1. It is agreed that H.E.P. shall be permitted to remain at Irwin Elementary School within the East Brunswick Public School District for the fourth and fifth grades during the 2005-06 and 2006-07 school years, respectively.

2. Parent A.M.P. hereby agrees to provide transportation at her own cost in connection with said placement.

3. The above two paragraphs constitute the parties' complete agreement with regard to this matter and, upon approval of this agreement by the Board of Education and execution by Petitioner, shall be incorporated into a decision by the Administrative Law Judge assigned to this matter.

Ann Marie Patti DATE: 5-6-05
ANN MARIE PATTI

This Settlement Agreement has been approved by the Township of East Brunswick Board of Education at its meeting of MAY 19, 2005, 2005.

BERNARDO J. GIULIANA
Board Secretary/
Business Administrator

MICHAEL BAKER, Board President

235-05

#235-05

BOARD OF EDUCATION OF THE CITY OF SEA ISLE,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
WILLIAM J. KENNEDY,	:	
RESPONDENT.	:	

SYNOPSIS

The Board of Education filed a petition claiming that respondent Board member, who is pursuing claims against the district alleging violation of his son's educational rights, has an incompatible interest mandating his disqualification from Board service pursuant to *N.J.S.A.* 18A:12-2.

The ALJ found that respondent did not have a disqualifying conflict of interest, relying on an October 2004 Advisory Opinion of the School Ethics Commission that interpreted *N.J.S.A.* 18A:12-24(j) as carving out an exception whereby board members may, under circumstances such as respondent's, pursue their own interests in matters involving the board without violating the School Ethics Act.

The Commissioner rejected the Initial Decision, holding that the School Ethics Commission's interpretation of its own Act, and its determination that certain conduct would not violate the Act, could not be determinative of a board member's fundamental qualification to hold office under the school laws. Applying the standards of *N.J.S.A.* 18A:12-2 and prior case law, the Commissioner found respondent to have a direct and substantial interest in a claim against the petitioning Board, thus disqualifying him from Board membership. The Commissioner ordered respondent removed as a member of the Sea Isle City Board of Education as of the filing date of this decision, and directed the County Superintendent to fill the resulting vacancy for a term to expire at the reorganization meeting following the April 2006 annual school election, with the remaining one-year portion of respondent's term (expiring in April 2007) to be placed on the ballot at that same election.

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 30, 2005

OAL DKT. NO. EDU 2028-05
AGENCY DKT. NO. 62-3/05

BOARD OF EDUCATION OF THE CITY OF SEA ISLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
WILLIAM J. KENNEDY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions filed by the Board of Education (Board) were not considered by the Commissioner, having been submitted outside the applicable regulatory time frame absent a request for extension in accordance with *N.J.A.C.* 1:1-18.8.[1]

Upon careful review and consideration, the Commissioner determines to reject the Initial Decision, since he cannot concur with the Administrative Law Judge (ALJ) that the School Ethics Commission's October 2004 interpretation of *N.J.S.A.* 18A:12-24(j) supersedes prior case law arising under *N.J.S.A.* 18A:12-2 or supports a conclusion that respondent does not have a conflict of interest precluding his membership on the Board pursuant to that statute.

As ALJ Law himself well stated in a prior matter where *N.J.S.A.* 18A:12-24(j) was invoked as an exception to *N.J.S.A.* 18A:12-2:

> Although subsection (j) of *N.J.S.A.* 18A:12-24 provides that any school official, or members of his/her immediately family, may represent themselves in negotiations

[1] Unless an extension is requested and granted, exceptions are due within 13 days of the mailing date of the Initial Decision. *N.J.A.C.* 1:1-18.4. In this instance, the Initial Decision was mailed on May 20, 2005, but exceptions bearing a face date of June 3, 2005—already one day beyond the regulatory due date of June 2, 2005—were not filed until June 6, 2005.

or proceedings concerning his/her own interests, this subsection of the statute does not amend nor supersede *N.J.S.A.* 18A:12-2. Rather, the School Ethics Act supplements Chapter 12 of Title 18A by "providing standards of ethical conduct for local school officials." (Historical and Statutory Notes, *N.J.S.A.* 18A:12-21). The conflict of interest statute, *N.J.S.A.* 18A:12-2, is clear and unambiguous where it states, "No member of any board of education shall be interested directly or indirectly in any ... claim against the board, ..." As the Commissioner observed in *Alfonsetti, et al. v. Lakewood Twp. Board of Ed.*, 1975 *S.L.D.* 297 at 299:

> In every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, *Carley v. Liberty Hat Mfg. Co.*, 81 *N.J.L.* 505, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a stature [*sic*] is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. *Watt v. Mayor and Council of Borough of Franklin*, 21 *N.J.* 274 (1956) (at p. 277).
>
> Where the wording of a statue [*sic*] is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth... *Duke Power Co. v. Patten*, 20 *N.J.* 42 (1955) (at p. 49).

The wording of *N.J.S.A.* 18A:12-2 is clear, explicit and unambiguous with respect to the prohibition of a board of education member having a claim against the board of education with which he/she serves. The Commissioner has, in fact, upheld the statute to remove board members who have been found to be in violation of *N.J.S.A.* 18A:12-2. *Taliaferro, supra; Holmdel, supra.*

Accordingly, I CONCLUDE that respondent's reliance upon *N.J.S.A.* 18A:12-24(j) as an exception to *N.J.S.A.* 18A:12-2 is misplaced and is hereby DISMISSED as a defense in this matter. (*Board of Education of the Township of Brick, Ocean County v. Edward Mercer,* 96 *N.J.A.R.*2d (EDU) 5, 9)

This analysis and conclusion are no less cogent, and no less valid, as a result of the School Ethics Commission's subsequent opinion that *N.J.S.A.* 18A:12-24(j) allows for an exception to the ethical standards set forth in *N.J.S.A.* 18A:12-24(a) and *N.J.S.A.* 18A:12-24(g).

In enacting the School Ethics Act, the Legislature declared that, in the interest of confidence in school government, it was necessary to ensure that board of education members avoid conduct that violates—or creates a justifiable impression of violating—the public trust; it further

stated its intent to provide, through the Act, standards to guide such conduct. *N.J.S.A.* 18A:12-22. It established the School Ethics Commission for the express purpose of carrying out the Act, and set forth a process whereby a board member found to have violated the Act's standards of conduct would be sanctioned through a penalty ranging from reprimand to removal. *N.J.S.A.* 18A:12-24, *N.J.S.A.* 18A:12-28, *N.J.S.A.* 18A:12-29. Significantly, it did *not* act to repeal any part of *N.J.S.A.* 18A:12-2, as it clearly could have if it had intended to have all questions of conflict addressed through the School Ethics Act, or to remove the possibility of a board member's disqualification based on inherently incompatible interests as opposed to removal based on the commission of unethical acts while in office.

On its face and in light of its legislative history, the School Ethics Act is clearly intended to guide, and where necessary sanction, the conduct of duly qualified board members; it was not intended, and cannot now be construed, as the means or standard for determining the qualification of a board member pursuant to Article 1 of *N.J.S.A.* 18A:12 (18A:12-1 through 18A:12-3). Moreover, although the School Ethics Commission clearly has the authority to interpret the Act through its decisions and issuance of advisory opinions, *N.J.S.A.* 18A:12-31, the Commissioner, to whom adjudication of board member qualification is reserved in the event of a dispute, *N.J.S.A.* 18A:6-9, is not bound by the Commission's interpretation in applying a school law within his own jurisdiction, particularly where, as here, such interpretation would effectively act to vitiate such law. In other words, the School Ethics Commission's opinion that a board member's pursuit of a claim of the type at issue herein would not constitute a violation of the School Ethics Act does not mean that the existence of such a claim could not disqualify the board member under *N.J.S.A.* 18A:12-2; the Commission cannot determine the legal qualification of a board member, only whether a particular course of conduct violates the Act, and the Commission's opinion in that regard is not dispositive of an inquiry before the Commissioner pursuant to *N.J.S.A.* 18A:12-2.

Thus, notwithstanding the Commission's conclusion that *N.J.S.A.* 18A:12-24(j) carves out an exception to the Ethics Act whereby, under circumstances such as here present, board members may pursue their own interests in matters involving the board, that opinion does not—indeed, cannot—create a concomitant exception to the prohibitions of *N.J.S.A.* 18A:12-2, so that the Commissioner must still ascertain whether respondent has a direct or indirect interest in a claim against the board of education so as to disqualify him as a board member while the claim is pending.

Upon review of the record, the Commissioner finds that respondent does, indeed, have such a claim. In two separate proceedings as referenced in the Initial Decision's factual recitation, respondent has claimed that the Board is denying his son's educational entitlements, alleging that:

> [M.] has been abused and continues to be abused in his current placement and***this abuse is the direct result of a lack of support that [M.] and his teacher's aide should be receiving from district personnel and behavioral consultants. The district has violated both the letter and spirit of the Agreement [that settled respondent's prior due process complaint] through the complete disintegration of the provision of services, communication with the parents, and the proper support of the district's own personnel. In short, the district has created an environment that is hostile to [M.], and this environment is causing behavioral reversals. (Initial Decision at 3, Exhibits A and B)

It is well established that the "interest which disqualifies is not necessarily a direct pecuniary interest***; it is based on the moral rule that no man can serve two masters whose interests conflict." *Lee, supra*, at 9, citing *Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502 (App. Div. 1956). It is likewise well established that the determination of whether such a conflict exists is necessarily a factual one and depends on the circumstances of the particular case. *Aldom, supra*, at 503. Having undisputedly elected to pursue two legal claims against the district alleging violation of the educational rights of his child, there can be no question that respondent has an interest of the most direct and personal nature in a claim against the Board, and that his dual

interests as a Board member and a father preclude his continued Board membership under *N.J.S.A.* 18A:12-2 unless he abandons his claims.[2]

Nor is respondent's abstention from voting in matters involving his son's case sufficient to remedy the situation, as respondent and the ALJ suggest based upon the School Ethics Commission opinion. Rather, as noted above, *N.J.S.A.* 18A:12-2 is a disqualifying statute, identifying situations that are inherently incompatible with membership on a board of education; it does not provide for board members in such situations to serve while abstaining from vote and discussion on selected issues. Indeed, as the statute recognizes, simply by virtue of his membership on the Board and regardless of any efforts on his part to avoid impropriety, respondent could not function as a Board member without regularly being placed in "a situation of temptation to serve his own purpose to the prejudice of those for whom the law authorized him to act as a public official." *Holmdel, supra*, at 676, quoting *S&L Associates, Inc. v. Washington Township,* 61 *N.J. Super.* 312, 329 (App. Div. 1960) At a minimum, respondent would routinely be—or equally important, have the opportunity to be—privy to matters involving staffing, programming, and personnel issues that directly or indirectly relate to issues implicated in his claim against the Board, raising both the temptation to act in his own interest and the appearance that he may have done so. This is not a question of respondent's conduct, but of the existence of an inherently untenable situation, precisely the evil *N.J.S.A.* 18A:12-2 seeks to avoid. *Board of Education of the Borough of Palmyra v. Robert Marinnie,* decided by the Commissioner June 8, 2005 (#208-05), slip opinion at 11.

[2] This holding is in no way intended to suggest that respondent's son waives or abandons his educational rights because his parent is a Board member, nor does it mean that parents who are also board members lose the ability to pursue claims that their children are being denied lawful educational entitlements. What it does mean, however, is that such parents must decide which of their two conflicting interests they will honor at any given time, since a parent—like anyone else whose board service requires them to relinquish a claim or contract they would otherwise have the right to pursue—may not simultaneously sit as a member of a board while maintaining an action against it.

Accordingly, for the reasons expressed herein, the Commissioner rejects the Initial Decision of the OAL, finding instead that respondent William J. Kennedy has a disqualifying conflict of interest in violation of *N.J.S.A.* 18A:12-2 and is, therefore, removed as a member of the Sea Isle City Board of Education as of the filing date of this decision. Pursuant to *N.J.S.A.* 18A:12-15a, the Cape May County Superintendent of Schools is directed to fill the resulting vacancy for a term to expire upon the Board's reorganization following the next (April 2006) annual school election, and the Board is directed to place the remaining one-year portion of respondent's term, which was due to expire in April 2007, on the ballot for the April 2006 annual school election.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/05

Date of Mailing: 6/30/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2028-05

AGENCY DKT. NO. 62-3/05

BOARD OF EDUCATION OF THE CITY OF SEA ISLE CITY, CAPE MAY COUNTY,

Petitioner,

v.

WILLIAM J. KENNEDY,

Respondent.

James B. Arsenault, Jr., Esquire for petitioner (Cooper Levenson, attorneys)

Stacey D. C. Brock, Esquire, appearing for respondent, *pro hac vice* (Mayerson and Associates, attorneys)

Record Closed: April 25, 2005 Decided: May 16, 2005

BEFORE **LILLARD E. LAW**, ALJ, T/A:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the City of Sea Isle City (Board), asserts that respondent, William J. Kennedy, has an incompatible interest as a member of petitioner's Board as proscribed by *N.J.S.A.* 18A:12-2, which mandates his disqualification from serving on the Board. Petitioner seeks a Declaratory Ruling issued by the Commissioner of Education (Commissioner) to remove respondent from serving on the Board.

Respondent contends that he does not take part in any matters or discussions relating to his son, [M.K.], a pupil eligible for special education and related services pursuant to Individuals with Disabilities Education Act (IDEA) 20 *U.S.C.A.* §1400, *et seq.* and the Rehabilitation Act of 1973, §504, 29 *U.S.C.A.* §794. Respondent further contends that the Commissioner lacks jurisdiction to determine the instant matter and that it most appropriately should be determined by the School Ethics Commission and seeks to have the Petition of Appeal dismissed.

On March 14, 2005, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The instant matter was transmitted to the OAL with a companion case, *W.K. & P.K. o/b/o M.K. v. Sea Isle City Board of Education*, OAL Docket No. EDS 2027-05. The record opened on March 16, 2005, at the Atlantic City OAL. Thereafter, the parties engaged in settlement discussions with respect to the special education matter, with no resolution of the issues on that date. Subsequent conference calls were held on April 4 and April 8, 2005. The matter was scheduled for hearing on May 16, 2005, at the Atlantic City OAL.

As a consequence of the discussions concerning the special education matter, the instant matter was held in abeyance. By letter from counsel for the Board, dated April 25, 2005, requesting that a determination in the instant matter be issued, the undersigned complied and determined the matter as follows.

RESPONDENT'S BACKGROUND FACTS

On March 2, 2005, respondent's attorney addressed a letter to Barbara Gantwerk, Director of the Office of Special Education Programs, Department of Education, wherein he stated, in part, as follows:

> [M.K.] is an eight year old boy who has been diagnosed with an autism spectrum disorder and presents with a variety of "interfering behaviors requiring intensive and competent behavioral supports and interventions. [M.] is highly distractible, and has significant difficulty with transitions and with the process of generalization. On the other hand, [M.] tests within the range of *normal* intelligence and he has been benefiting being educated with non-disabled peers, with significant additional supports, services

> and accommodations. In light of the Third Circuit's decision in the seminal *Ridgewood* case, what is "meaningful" and appropriate for a child like [M.] may be entirely different from the program that would be meaningful and appropriate for another child diagnosed with an autism spectrum disorder. In order to maintain [M.'s] meaningful success in a mainstream, least restrictive environment a "full court press" is necessary.
>
> In pursuit of a program for [M.] that would confer a meaningful educational benefit, [M.'s] parents exercised their due process rights and filed for an impartial hearing during the 2003-2004 school year. In an effort to resolve the complaint, the parties agreed to enter into a stipulation that applied to the 2004-2005 school year (hereafter the "Agreement"). See Attachment A. Among other things, the Sea Isle City Board of Education agreed to cooperate with the Kennedy family and implement the terms of the settlement in good faith, which included the proper and appropriate implementation of [M.'s] IEP.
>
> We submit that [M.] has been abused and continues to be abused in his current placement and that this abuse is the direct result of a lack of support that [M.] and his teacher's aide should be receiving from district personnel and behavioral consultants. The district has violated both the letter and spirit of the Agreement through the complete disintegration of the provision of services, communication with the parents, and the proper support of the district's own personnel. In short, the district has created an environment that is hostile to [M.], and this environment is causing behavioral reversals.

Respondent's attorney continues to state in his letter to Ms. Gantwerk, among other things, that the Board immediately perform in accordance with the Agreement with Compensatory Education in the form of increased consultation and support, together with the full backing and support of [M.'s] one-to-one aide. He requests an extended day service at home in order that [M.] may generalize his skills and achieve the meaningful educational benefit to which he is entitled and to maintain in his least restrictive environment. He also asserts, among other things, that [M.] is entitled to the "stay put" provision as per the law of IDEA.

FACTS AND CASE LAW ACCORDING TO THE BOARD'S PETITION

The following represents edited facts as set forth, in part, by the Board in its Petition of Appeal, and its legal arguments with respect to the instant matter:

1. The Board is a body corporate and politic, duly organized to operate the public schools for the City Isle City.

2. Respondent, William J. Kennedy, is a member of the Board

3. Mr. Kennedy was elected to a three-year term at the April 20, 2004, annual school election, was seated as a member of the Board at it reorganization meeting held on April 27, 2004, and was elected as the Board President.

4. This was Mr. Kennedy's second term as a Board member. Mr. Kennedy was initially elected to the Board in the 2001 school election, and was thereafter selected as its President. Mr. Kennedy resigned from the Board on or about June 29, 2003.

5. [M.K.], Mr. Kennedy's son, is presently in the Board's second grade and is a classified pupil and receives special education and related services pursuant to an individualized education plan (IEP).

6. Following his resignation from the Board on June 29, 2003, Mr. Kennedy and his wife filed a due process complaint against the Board on behalf of their child, [M.K.] The matter was captioned *W.K. & P.K. o/b/o M.K. v. Sea Isle City Board of Education,* Docket Number (EDS) 06465-2003S, Agency Ref. 2004-807 ("M.K. I").

7. Ultimately, a stipulation of settlement was reached in that litigation. The stipulation of settlement was dated April 27, 2004.

8. While the stipulation of settlement was being finalized, Mr. Kennedy ran for and was elected to his second term on the Board, which commenced on April 28, 2004 – the day after the stipulation of settlement was executed.

9. At the time of his election, Mr. Kennedy was qualified for office in accordance with the provisions of *N.J.S.A.* 18A:12-1. Given the execution of the stipulation of

settlement, there was also no inconsistent interest as defined by *N.J.S.A.* 18A:12-2 which would disqualify Mr. Kennedy from taking office on April 28, 2004. Thus, Mr. Kennedy was seated as a Board member.

10. By letter dated March 1, 2005, Mr. Kennedy's attorney, Gary S. Mayerson, Esquire, filed an Application for Emergent Relief in a matter encaptioned (*sic*), *W.K & P.K. o/b/o M.K. v. Sea Isle City Board of Education* ("M.K. II"). A copy of Mr. Mayerson's March 1, 2005, letter is attached as **Exhibit A.** The Board's attorney received Mr. Mayerson's letter via facsimile on March 1, 2005, at 6:29 p.m.

11. On March 2, 2005, the Board's attorney received a second letter from Mr. Mayerson outlining the same allegations and the same requested relief, attached as **Exhibit B.**

12. Both the March 1 and March 2 letters include footnote 1 at page 1, which provides in relevant part that "William Kennedy is the Chief of the Sea Isle City Police Department and a member of the Sea Isle City School Board. Mr. Kennedy will recuse himself from all matters relating to the school district and those relating to his son."

13. In a continuing series of decisions, the Commissioner and the State Board of Education have reviewed the types of claims against local school boards of education by operation of *N.J.S.A.* 18A:12-2.

14. Beginning with *Woodstown-Pilegrove Reg. Bd. of Educ. v. Ketas*, 1979 *S.L.D.* 353, rev'd St. Bd. 1980 *S.L.D.* 1563, aff'd *per curiam* App. Div. 1980 *S.L.D.* 1507, and continuing in a line of cases which includes *Holmdel Tp. Bd. of Educ. v. O'Connel*, 1990 *S.L.D.* 674, *Taliaferro v. Hawthorne Bd. of Ed.*, 94 *N.J.A.R.* 2d. (EDU) 197, *Williams v. Ciliberto*, 96 *N.J.A.R.* 2d. (EDU) 990, *I/M/O Tullo*, 1999 *S.L.D.* April 26, and *Berlin Borough Bd. of Educ. v. Lee*, 2000 *S.L.D.* June 14, the Commissioner and/or the State Board of Education have concluded that substantial and material interests adverse to a board of education disqualify a board member from continued board service.

15. Such substantial and material adverse interests have included worker's compensation claims (*See I/M/O Tullo, supra.*), tuition claims for a board member's grandchild (*See Williams, supra.*) and claims of damages for assault brought on behalf of a board member's minor child. (*See Holmdel Tp. supra.*)

16. An actual claim is not necessary to present an incompatible interest; even the filing of a notice of tort claim prior to the commencement of any formal legal action is sufficient to warrant the disqualification of a board member (*See Berlin Borough Bd. of Educ., supra.* and *Taliaferro, supra.*)

17. Mr. Kennedy tendered his resignation from the Board prior to commencing the M.K. litigation. In doing so, Mr. Kennedy must have realized the incompatible interest that such a claim represents.

18. On or about February 15, 2005, Mr. Kennedy did resign as Board President, yet he specifically retained his seat as a member of the Board.

19. Based on the foregoing, the Petitioner submits that Mr. Kennedy has a incompatible interest as proscribed by *N.J.S.A.* 18A:12-1 that mandates his disqualification as a member of the Board.

WHEREFORE, Petitioner request a declaratory ruling from the Commissioner with regard to Mr. Kennedy's continued membership on the Sea Isle City Board of Education. If the Commissioner agrees that an incompatible interest pursuant to *N.J.S.A.* 18A:12-2 exists that disqualifies Mr. Kennedy from serving as a Board member, the Petitioner asks for the Commissioner's guidance as to the status of that seat and any vacancy therein, and for any such other relief as may be necessary or warranted as a result of such determination.

FACTS ACCORING TO RESPONDENT'S ANSWER TO THE PETITION

The following represents the facts as contained in respondent's Answer to Petitioner's Appeal:

1. Respondent acknowledges the allegations set forth at paragraphs 1-10 and 12, 13, 14, and 20 of the Petition, except insofar as they would suggest that Petitioner is properly discharging it statutory and contractual obligations to Respondent's son, [M.K.]

2. In response to paragraphs 11 (9 herein) and 19 (17 herein) of the Petition, Respondent avers that even as to the 2003 due process litigation, although Respondent did temporarily resign from the Sea Isle City Board of Education, there is *no legal requirement* for Respondent to resign from the Sea Isle City Board so long as Respondent abstained from any discussions or deliberations concerning [M.K.], or the claims that had been asserted on his behalf.

3. In response to the allegations contained in certain paragraphs of the Petition citing decisional law, Respondent avers that the authorities cited by Petitioner's counsel are largely older or inappropriate decisions that have been superseded by the recent October 12, 2004 Advisory Opinion A30-04 of the School Ethics Commission (Exhibit A), an important and highly instructive authority that is simply *missing* in action from Petitioner's papers.

4. Respondent denies the allegations set for at paragraph 21 of the Petition, and avers that there are no facts that would mandate Respondent's automatic disqualification as a member of the Board provided the Respondent undertakes to abstain from all discussions and deliberations regarding [M.] and the claims and issues that have been asserted on his behalf.

5. The School Ethics Commission's Opinion A30-04 (Exhibit A) addresses *N.J.S.A.*18A:12-24 (Exhibit B) of the New Jersey Department of Education School Ethics Act which pertains to conflicts of interest.

6. Specifically, the School Ethics Commission's Opinion A30-04 (Exhibit A) explains why there is a recognized exception for precisely this kind of situation by reason of *N.J.S.A.* 18A;12-24(j), which provides that "nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." It is axiomatic that [M.K.], William Kennedy's son (with autism) is a member of Mr. Kennedy's "immediate family."

7. School Ethics Commission's Opinion A30-04 (Exhibit A) grants a board member an *exception* from disqualification so long as the board member takes the precaution to abstain from any deliberations or discussions regarding the claim asserted on behalf of he immediate family member. Here, the Petition admits the Respondent's March 1, 2005 claims were asserted with an express undertaking on Respondent's part to abstain and recuse himself from any and all such discussions. Under such circumstances, we urge that there is a clear exception to the general rule that permits Mr. Kennedy to stay on the Board, so long as he continues to follow the rule established by the School Ethics Commission.

8. There can be no substantial or material conflict if (as Mr. Kennedy voluntarily and previously undertook to do) the board member abstains and recuses himself from the pertinent discussions and deliberations. On this issue, Mr. Kennedy did the right thing here before anyone even asked him to do so.

9. The fact that Mr. Kennedy resigned from the Board in a *prior* 2003 due process proceeding involving his son [M.] is of no import. Mr. Kennedy did so voluntarily, of his own accord, strictly in an overabundance of sensitivity to this issue. It is irrelevant to the extent that Mr. Kennedy (to his honor and credit) did more in 2003 than he was required to do. Had Mr. Kennedy been aware of the statutory exception, or if the School Ethics Commission had rules on this issue at that time, Mr. Kennedy would not have resigned, but rather would have done the same thing that he is doing

now (i.e. expressly undertaking to abstain from all ["M."] related discussions or deliberations).

10. Significantly, pursuant to *N.J.S.A.* 18A:12-29 (Exhibit C) complaints of this type are required to first be filed with the School Ethics Commission. Subsection (d) of that Article states that "Any *appeal* of the commission's determination regarding a violation of this act. . . .shall be the State Board of Education in accordance with Title 18A of the New Jersey Statutes." For reasons known only to Petitioner, Petitioner impermissibly leapfrogged over the exclusive jurisdiction of the School Ethics Commission and thus, we submit, it is not now properly before the State Board of Education. It is axiomatic that there must first be a decision from the School Ethics Commission before there can be and "appeal" to the State Board of Education. We mean no disrespect by urging that the State Board of Education does not yet have jurisdiction over this matter.

11. Accordingly, the Petition should be dismissed with leave to refile before the School Ethics Commission. However, we are compelled to put Respondent (*sic*) on notice that if Respondent (*sic*), with full knowledge of the October, 2004 Opinion of the School Ethics Commission, would elect to refile its Petition before that tribunal, we would consider it entirely frivolous and seek whatever financial or other remedies that would be available. Mr. Kennedy is trying to secure his son's educational entitlements-he should not be in the position of spending time and money defending his board position from a frivolous attack.

ADVISORY OPINION A30-04 OF THE SCHOOL ETHICS COMMISSION

On October 12, 2004, the School Ethics Commission (Commission) rendered an advisory opinion, upon respondent's request, as to whether or not respondent might appeal a § 504 of the Rehabilitation Act of 1973, as amended , 29 *U.S.C.* §794 (§504) determination that was decided after respondent became a member of the Board. The request was filed with the Commission prior to respondent's election to the Board. Respondent also requested, among other things, for

an opinion as to whether or not he could be reimbursed for tuition and/or attorney's fees if respondent's child prevails with the opinion.

The Commission found and determined, among other things, that pursuant to the authority in *N.J.S.A.* 18A:12-28, respondent had the same rights as any similarly situated parent. Specifically, the Commission determined that respondent did not have a substantial conflict of interest in violation of *N.J.S.A.* 18A:12-24(a) or (g) by serving as a member of the Board and pursuing an appeal of a §504 determination or seeking tuition or attorney's fees. The Commission did advise, however, that respondent abstain from all Board discussions and decisions involving the §504 determination pursuant to *N.J.S.A.* 18A:12-24(c). The Commission advised respondent further, that he should not be present in the Board's executive sessions when it discusses matters concerning his son. The Commission cites the appropriate portions of the statutes upon which it relied in making its determination. The Commission

LEGAL ANALYSIS

In the matter of the *Board of Education of the Township of Jackson, Ocean County v. Gustav Acevedo, II*, 92 *N.J.A.R.* 2d (EDU) 163, a comprehensive discussion is set forth of the issue of a conflict of interest of a board of education member who has a claim against the board with which the board member serves. This discussion does not, however, include the issue of the rights of the board member's son to a free and appropriate public education (FAPE) under the law of IDEA.

In its analysis of the issue, the Commission has rightly determined that it believes *N.J.S.A.* 18A:12-24(j) provides an exception to respondent's situation. The statute provides that, "Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceeding concerning his, or their, own interests." Respondent herein is exercising the rights of his son, [M.K.] to a FAPE. Respondent's son does not waive or abandon his rights to a FAPE simply because his father is a member of the board of education responsible for providing such a FAPE. The statute, *N.J.S.A.* 18A:12-24(j) clearly allows respondent to opportunity to pursue his Petition of Appeal against the Board.

CONCLUSION

I **CONCLUDE**, therefore, grounded upon the discussion hereinbefore, that the Board's Petition of Appeal before the Commissioner to have respondent removed from its membership in violation of *N.J.S.A.* 18A:12-2, is without merit and must be dismissed. I **CONCLUDE** that the Board has failed to demonstrate an incompatible interest on the part of respondent. Rather, respondent is pursuing the rights of a minor, his son, [M.K.] to a free and appropriate public education, which the Board is required to provide under the IDEA.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal is hereby **DISMISSED,** with prejudice.

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

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

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

16 May 2005
DATE

Lillard E. Law
LILLARD E. LAW, ALJ, T/A

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

5-16-05
DATE

Mailed to Parties:

MAY 20 2005
DATE

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

/sd

WITNESSES

For Petitioner

None

For Respondent

None

DOCUMENTS IN EVIDENCE

For Petitioner

Exhibit A – Letter, March 1, 2005 Mayerson & Associates

Exhibit B – Letter, March 2, 2005 Mayerson & Associates, with attachments

For Respondent

Exhibit A – Advisory Opinion A30-04

Exhibit B – *N.J.S.A.* 18A:12-29

Exhibit C – *N.J.S.A.* 18A:12-24

236-05

OAL DKT. NO. EDU 7115-05
AGENCY DKT. NO. 145-6/05

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, AND PRITCHARD INDUSTRIES, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The audiocassette tapes of the emergent hearing conducted on petitioner's motion for emergent relief at the Office of Administrative Law and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Deputy Commissioner to whom this matter has been delegated for decision, pursuant to *N.J.S.A.* 18A:4-33.

Upon review, the Deputy Commissioner initially clarifies the facts set forth by the Administrative Law Judge (ALJ) with respect to the history of the 2003 litigation between these parties set forth at page 3 of the Initial Decision. As noted in the Initial Decision, the ALJ issued a recommended Order on August 22, 2003 granting petitioner's motion for emergent relief to restrain the award of the contract at issue pending a decision on the merits of petitioner's claim. Subsequently, the ALJ's recommended Order was adopted by the Deputy Commissioner on September 8, 2003. However, on July 8, 2004, the ALJ issued an Initial Decision wherein he recommended granting the Paterson School District's (District) motion to dismiss petitioner's complaint. On September 3, 2004, the Deputy Commissioner, in his capacity as Acting Commissioner, adopted the ALJ's recommendation and dismissed the petition. On October 14, 2004, the Deputy Commissioner denied petitioner's application for a stay of his decision and on October 22, 2004, the State Board stayed the Deputy Commissioner's decision,

pending its decision on the merits of petitioner's claim. On December 15, 2004, the State Board affirmed the Deputy Commissioner's September 3, 2004 decision.[1]

Turning to the motion for emergent relief which is at issue in this matter, the Deputy Commissioner points out that the standard for obtaining emergent relief is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6. A grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner'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. *Crowe, supra,* at 132-34.

With respect to irreparable harm, the Deputy Commissioner concurs that petitioner has not demonstrated that it will be irreparably harmed absent a stay of the award of the 2005-2007 contract to Pritchard Industries, Inc. (Pritchard). Harm is generally considered irreparable only if it cannot be redressed by monetary damages. *Crowe, supra,* at 132-133. Notwithstanding petitioner's assertion that it will have no monetary remedy because it is barred by *N.J.S.A.* 18A:18A-46 from filing a claim for monetary damages against the District arising from a violation of the Public Schools Contract Law, the Commissioner points out that petitioner has presented nothing to suggest improper actions by the District in awarding this 2005 contract to Pritchard, and *N.J.S.A.* 18A:18A-46 does not preclude petitioner from seeking damages from Pritchard in the event it prevails on the merits of its appeal. Thus, the Deputy Commissioner is not persuaded that petitioner cannot be made whole should it ultimately prevail in its claim.

Moreover, petitioner has not demonstrated that the legal right underlying its claim is settled or that there is a likelihood of its success on the merits. Petitioner claims that Pritchard's bid must be rejected because the bid is non-conforming and materially deficient because it: 1) fails to

[1] Petitioner's appeal of this determination to the Appellate Division was withdrawn on June 8, 2005.

itemize the number of daily hours of Black Seal custodians on Line 2 of the Bid Disclosure Sheet #1; and 2) fails to list a dollar amount for "vehicles" and "vehicle insurance" on Bid Disclosure Sheet #1. (Petitioner's Brief in Support of Motion at 21-24) With respect to Pritchard's failure to list the daily number of hours the Black Seal custodians will be working, the Deputy Commissioner notes that this line was not left blank and, as both the District and Pritchard point out, the information is available to the District by performing a simple mathematical calculation of dividing the total of the dollars paid to each category of custodian by the category's hourly wage. The information provided by Pritchard on lines #1 and #2 of the Bid Disclosure Sheet is as follows:

	Hours			
1. Custodian/Wages	1738	x	$ 9.23 per hr.	$3,578,421.76
2. Custodian w/ black seal wages	incl above	x	$10.08 per hr.	$ 578,027.52

(Petitioner's Exhibit B, Bid Disclosure Sheet #1)

With respect to petitioner's assertion that Pritchard's bid is materially deficient because it fails to list a dollar amount for "vehicles" and "vehicle insurance," the District avers that:

> This argument is mistaken because the information on vehicles that Petitioner declares is lacking, was not required to be submitted by bidders in the first place. In fact, the District explicitly excluded any requirement in Bid Disclosure Sheet #1 that the dollar amount for vehicles and vehicle insurance be included in the form by adding the language "not in total" in the spaces where the dollar amount for these expenditures would be included. (District's Brief at 6)

In light of the District's representation that vehicle information was not required, the Deputy Commissioner rejects petitioner's argument that it will prevail on its claim that Pritchard's bid is materially deficient for failing to list a dollar amount for "vehicle" and "vehicle insurance."

Additionally, as noted by the parties, the controlling authority for determination of the materiality of a bid specification for purposes of disqualification is *Meadowbrook Carting Co, Inc. v. Borough of Island Heights*, 138 *N.J.* 307 (1994), in which the Supreme Court developed a two-prong test for determining whether an instance of noncompliance with a bid specification constitutes a substantial, non-waivable irregularity, as follows:

> ***first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. (citations omitted) *Meadowbrook* at 315.

Under the *Meadowbrook* standard, the Deputy Commissioner cannot conclude petitioner has demonstrated a likelihood that it will prevail on its claim that Pritchard's bid is non-conforming and materially deficient for failing to list the number of daily hours attributable to Black Seal custodians. As noted above, this information is available through a simple mathematical calculation, and the Deputy Commissioner is not persuaded that the absence of a specific listing deprives the District of an assurance that the contract will be performed according to its specifications or that this *de minimus* deficiency adversely affected the competitive bidding process or gave Pritchard an advantage over other bidders.

Turning to petitioner's claim that it has a likelihood of success on the merits because Pritchard is not the "lowest responsible bidder" by reason of its lack of moral integrity as demonstrated in the 2003 bidding process, the Deputy Commissioner points out that, notwithstanding the review of petitioner's identical claims of fraud and collusion in the 2003 bidding matter by two superior court judges, the Deputy Commissioner and the State Board, there were no *findings of fact* with respect to petitioner's claims to substantiate petitioner's accusations. Instead, the Deputy Commissioner and the State Board determined that the District Superintendent's unilateral award to Pritchard was *ultra vires* in that the contract was never presented to the Board for a vote as required by *N.J.S.A.* 18A:18A:-48(b). As a result, the Deputy Commissioner and the State Board concluded that, given the circumstances, including the fact that the original specifications were erroneous, re-bidding was the appropriate remedy. There has been no allegation of misdeeds with respect to the re-bidding process at issue herein. Accordingly, for

the reasons stated above, the Deputy Commissioner finds that petitioner has not demonstrated that the legal right underlying its claim is settled in its favor or that there is a likelihood of its success on the merits.

Finally, in weighing the equities, the Deputy Commissioner finds that the equities favor Pritchard and the District. Petitioner's arguments against awarding the contract at issue to Pritchard are essentially the same as it argued with respect to the 2003 contract award, which were fully considered by the Deputy Commissioner and State Board and resulted in a re-bidding of the contract. Moreover, the Deputy Commissioner points out that petitioner was held harmless during consideration of the 2003 matter and has continued as the contractor for custodial services for the District through the re-bidding process. Pritchard, the lowest bidder, and the District represent that they have been preparing for the transition to the new provider for the last six weeks and petitioner has presented no compelling argument why it should be permitted to remain as the contractor after failing to submit the lowest responsible bid for the 2005-2007 contract.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein and for those reasons set forth above. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claims as may be deemed necessary.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 6/30/05

Date of Mailing: 6/30/05

FAXED TO THE PARTIES 6/30/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 7115-05

AGENCY DKT. NO. 145-6/05

CONTROL BUILDING SERVICES, INCORPORATED,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND PRITCHARD INDUSTRICES, INCORPORATED,

Respondents.

Joseph B. Fiorenzo, Esq., appearing for petitioner Control Building Services, Incorporated (Sokol, Behot & Fiorenzo, attorneys)

Sydney A. Sayovitz, Esq., appearing for respondent State-Operated School District of the City of Paterson (Schenck, Price, Smith & King, attorneys)

Patrick T. Collins, Esq., appearing for respondent Pritchard Industries, Incorporated, (Franzblau Dratch, attorneys)

Record Closed: June 21, 2005 Decided: June 28, 2005

BEFORE **DANIEL B. MCKEOWN,** ALJ (t/a):

STATEMENT OF THE CASE

Control Building Services, Inc., (petitioner), seeks emergency relief from the Commissioner of Education in the form of an Order by which Pritchard Industries, Incorporated (Pritchard), which submitted the low bid to supply custodial services to the

Petitioner was successful at that time to secure a temporary restraining order on July 9, 2003 from New Jersey Superior Court, Law Division, The Honorable Joseph F. Scancarella, Presiding, against the contract being awarded Pritchard for 2003-05 pending a hearing into the merits of Control's claim regarding the post bid announcement of low bidder between Pritchard and the School District. On July 18, 2003, The Honorable Ralph L. DeLuccia, Jr., J.S.C., ordered the continuation of the restraints already issued in the matter, but transferred the case to the Office of Administrative Law for hearing on the merits. On August 22, 2003, Richard McGill, Administrative Law Judge, issued an initial decision on a motion by which he continued the restraint against the awarding of an actual contract to Pritchard for 2003-05 be continued pending a full hearing on whether the entire contract should not be rebid. The initial decision was affirmed by the Commissioner of Education on September 8, 2003. An appeal was taken to the State Board of Education which affirmed the Commissioner of Education in his determination to agree with Administrative Law Judge McGill in continuing the restraints pending a hearing. It is interesting to note several observations made by the State Board in its decision. It said

> Initially, we recognize that the allegations made by Control are serious. However, as found by the ALJ and the Deputy Commissioner, they related to the original March 2003 invitation to bid and to actions that preceded the re-bidding process, and Control has made no allegations of wrong doing with respect to the re-bidding process as it has proceeded thus far.

And,

> Moreover, given the circumstances, including the fact that the original specifications were erroneous, re-bidding is the appropriate course to follow.

Petitioner Control Services contends that on these facts it is entitled to a temporary restraining order against the commencement of the 2005-07 contract by Pritchard because Pritchard, although the nominal low bidder, is not the 'lowest responsible bidder' within the meaning of the Public Schools Contract Law, *N.J.S.A.* 18A:18A -1, *et seq.,* because it lacks the moral integrity to be so designated based on its conduct during the 2003 bidding process. Control says that these facts require Pritchard to be disqualified as the lowest responsible bidder and allow it, Control

Services, to continue providing the custodial services it has been providing the School District since 1996 and until it has a hearing to prove the truth of its allegations.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief request is govern by the provisions of *N.J.A.C.* 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

i. Petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal rights 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 are an interest of the parties or balance the petitioner will suffer greater harm than the respondent will suffer if their requested relief is not granted. [*N.J.A.C.* 6A:14-12.7(m)1].

It is well settled that petitioner must meet these four criteria to prevail on this application. See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Regarding the first prong of irreparable harm, I **CONCLUDE** that petitioner has not shown irreparable harm. Control has not shown its right to continue in providing custodial services to the School District for 2005-07 in light of the fact it was not the low bidder on the contract for that period of time. I realize Control seeks to reach back to 2003 and use the efforts, misguided they may have been, of the School District and Pritchard to conclude such conduct is 'fraudulent' and 'collusive.' However, and despite the fact two superior court judges reviewed the facts on a preliminary basis, and an administrative law judge reviewed the 2003 bid facts on a preliminary basis, as did the Commissioner and State Board of Education, no such finding was entered in this record at any time. Control presented no evidence that it will suffer irreparable harm if

Pritchard is restrained from performing under the contract because it presented no evidence regarding its rights that will be harmed.

Petitioner Control must show that the legal right underlying the claim is settled. I **CONCLUDE** the record in this case, although voluminous at this point, does not settle Control's underlying claim.

Additionally, I **CONCLUDE** that petitioner has not demonstrated the likelihood of success on the merits. Despite the fact Control has been providing the School District custodial services since 1996, its reliance on events in 2003 that both the Commissioner of Education and State Board of Education held, could be cured by rebidding, provides no basis for the conclusion that Pritchard and the School District engaged in fraud or collusive conduct.

In sum, I **CONCLUDE** for the above reasons that petitioner has not prevailed on his application for emergent relief and this application must be **DENIED**. Should petitioner Control wish to press claims made against the School District and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed.

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 (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 28, 2005

DATE

DANIEL B. McKEOWN, ALJ

jb

243-05

OAL DKT. NO. EDU 02596-05
AGENCY DKT. NO. 64-3/05

BERNARD SMITH and GEORGE W. BRADFORD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PENNSGROVE-CARNEYS POINT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/1/05

Date of Mailing: 7/1/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2596-05
AGENCY DKT. NO. 64-3/05

BERNARD SMITH AND GEORGE BRADFORD,
Petitioners,
v.
BOARD OF EDUCATION OF PENNSGROVE-CARNEYS POINT, SALEM COUNTY,
Respondent.

Michael C. Damm, Esq., for petitioners (Selikoff & Cohen, PA, attorneys)

Jonathan J. Garbini, Esq., for respondent

Record Closed: June 9, 2005 Decided: June 9, 2005

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 21, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

6/9/05
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

6-15-05
DATE

DEPARTMENT OF EDUCATION

JUN 15 2005

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055 Fax (856) 778-6056
Counsel for Petitioners Bernard Smith and George W. Bradford

BERNARD SMITH and GEORGE W. BRADFORD, individuals, Petitioners, v. BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT, COUNTY OF SALEM, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DKT. NO.: 64-3/05 OAL DOCKET NO. 02596-2005S **SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT is entered into by Bernard Smith and George W. Bradford, individuals, (Petitioners) and the Respondent, Penns Grove-Carneys Point Board of Education (Board).

WHEREAS, on or about March 3, 2005, the Petitioners filed a Petition of Appeal captioned Bernard Smith and George W. Bradford v. Board of Education of Penns Grove-Carneys Point, Agency Dkt. No. 64-3/05, OAL Docket No. 02596-2005S seeking the payment of attorneys' fees and costs pursuant to N.J.S.A. 18A:16-6-1 in connection with not guilty findings entered in their favor by the Deptford Township Municipal Court and for the attorneys' fees and costs of an expungement; and,

WHEREAS, the Board filed an Answer to the Petition of Appeal dated April 11, 2005; and,

WHEREAS, the parties have conducted a full and complete investigation, and having had an opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and,

WHEREAS, this Agreement is the end-product of the investigation conducted between the

parties and intended to dispose of the issues in controversy based upon the mutual understanding set forth below;

NOW, THEREFORE, it is agreed as follows:

1. The Petitioners agree to accept in full settlement of attorneys' fees and costs for legal representation of them in the Deptford Township Municipal Court the sum of $3,700.00 paid by the Respondent Board to Petitioners' attorneys Selikoff and Cohen, P.A. Petitioners acknowledge through their attorneys receipt/payment of this amount by the Board;

2. The Board shall also pay to Petitioners' attorneys Selikoff and Cohen, P.A. the attorneys' fees and costs incurred in connection with obtaining an expungement of the dismissed municipal court charges. Said payment shall be at the flat rate of $500.00 for each Petitioner, for a total of $1,000.00, plus any out-of-pocket costs expended, provided no court appearance is required. If an appearance is required by Petitioners' counsel, counsel will bill the Board at the hourly rate of $135.00 per hour for time expended. The Board will make payment to the Petitioners' counsel within fifteen (15) days of delivery to the Board of the signed Orders for Expungement in each case and billing invoice;

4. This Agreement shall dispose of the within matter before the Commissioner of Education, provided, however, that if payment is not made as agreed, the Petitioners may seek to enforce payment through any appropriate judicial forum having jurisdiction;

5. The parties have read the terms of this Agreement and have had the opportunity to discuss it with counsel, and acknowledge that they are executing this Agreement of their own volition, with the full understanding of its terms, and without coercion. By signing this Agreement, each signatory represents that she or he is a party to or has been duly authorized by a party to sign on the party's behalf. 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;

6. The parties recognize the right to a trial before the Office of Administrative Law and independent consideration of the case by the Commissioner of Education. The parties are waiving their right to a trial and agree to the settlement as set forth above. The parties have made the decision to resolve this case knowingly and voluntarily in recognition that this proposed settlement is subject to the approval of the Commissioner of Education.

Intending to be legally bound, the Petitioners and the Board, through its authorized representative, execute the foregoing Agreement on the dates indicated below.

George W. Bradford

GEORGE W. BRADFORD
DATED: 5/13/05

Bernard Smith

BERNARD SMITH
DATED: 5/13/05

SELIKOFF AND COHEN, P.A.

MICHAEL C. DAMM, ESQ.
ATTORNEY FOR GEORGE W. BRADFORD
AND BERNARD SMITH
DATED: 6/3/05

PENNS GROVE-CARNEYS POINT REGIONAL
SCHOOL DISTRICT BOARD OF EDUCATION:

DATED: 5/31/05

JONATHAN GARBINI, ESQ.
ATTORNEY FOR PENNS GROVE-CARNEYS
POINT REGIONAL SCHOOL DISTRICT BOARD OF
EDUCATION
DATED: 6-1-05

245-05

OAL DKT. NO. EDU 319-04
AGENCY DKT. NO. 446-11/03

EAST BRUNSWICK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/6/05

Date of Mailing: 7/6/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 319-04
AGENCY DKT. NO. 446-11/03

EAST BRUNSWICK
EDUCATION ASSOCIATION
Petitioner,

v.

BOARD OF EDUCATION OF
EAST BRUNSWICK MIDDLESEX COUNTY,
Respondent.

Richard A. Friedman, Esq., appearing for petitioner, (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Martin R. Pachman, Esq., appearing for respondent

Record Closed: May 26, 2005 Decided: May 27, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on January 26, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for hearing at the OAL, Mercerville, N.J. on April 19, 2004, at which time the parties entered into meaningful negotiations. The parties have now 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 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, as well as the testimony under oath.

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

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

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

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

May 27, 2005
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

6-1-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN - 2 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

RECEIVED

2005 MAY 26 A 11: 17

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

EAST BRUNSWICK EDUCATION ASSOCIATION ,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	Docket No. EDUOR 00319-2004S
v.	:	Agency Ref. No. 446-11/03
BOARD OF EDUCATION OF EAST BRUNSWICK, MIDDLESEX COUNTY	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

The above-captioned matter having been brought before the Commissioner of Education upon the Petition of Appeal filed by the East Brunswick Education Association (hereinafter "Association") against the Board of Education of East Brunswick (hereinafter "Board") alleging that the Board violated N.J.A.C. 6:3-3.2 by assigning several teaching staff members at the Hammarskjold Middle School to a lunch period which was not consistent with the lunch schedules of school district students (i.e. Period 7), and the parties desiring to amicably resolve the dispute between them now pending before the Court, subject to the terms and conditions set forth herein:

1. The parties acknowledge that the Hammarskjold Middle School is currently undergoing an expansion project necessitated by overcrowding in the school and that the construction project is scheduled to be completed by the end of the 2007-08 school year.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

2. The Board alleges that the scheduling during the 2003-04 school year of a few teaching staff members at the Hammarskjold Middle School to a lunch period during Period 7, rather than Periods 4B through 6B, was driven by scheduling needs resulting from serious overcrowding at the school.

3. The parties recognize that until the construction is completed, scheduling difficulties resulting from the overcrowding may again result in the situation where a limited number of teaching staff members at the Hammarskjold Middle School may be assigned to a lunch period during Period 7, which is not consistent with the lunch schedules of school district students.

4. In light of the extraordinary circumstances occasioned by the current overcrowding at the Hammarskjold Middle School, and only until such time as the expansion project to alleviate that overcrowding is completed during the 2007-08 school year, the Association has agreed to allow the Board, if necessitated by scheduling needs, to assign a limited number of teaching staff members at the Hammarskjold Middle School to a lunch period during Period 7, rather than Periods 4B through 6B. This accommodation by the Association should not be interpreted as a willingness on the part of the Association to refrain from insisting upon compliance with the regulation (N.J.A.C. 6:3-3.2) in all other circumstances.

5. In the event it becomes necessary to schedule a limited number of teaching staff members to a lunch period during a period which is inconsistent with the lunch schedules of school district students, these teaching staff members shall not be assigned to a lunch period earlier than Period 4B nor later than Period 7, and the lunch period to which these teaching staff members are assigned must be no less than that

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

provided to other teaching staff members. In addition, these teaching staff members must be provided with access to the cafeteria where any and all food selections offered to teaching staff members assigned to lunch during periods 4B through 6B must continue to be served.

6. The Board shall ensure that on days when school is scheduled for only a "half-day", with dismissal at 12:40 p.m., those teaching staff members who are assigned to lunch during Period 7 shall be assigned to a lunch during some other period in which other teaching staff members are assigned to take their lunch, but in no event earlier than Period 4B.

7. In the event that the scheduling needs of the district during the expansion project necessitates the assignment of teaching staff members to a lunch period during Period 7 of an upcoming school year, then the Board shall notify the Association and the individual teaching staff members of the proposed assignments no later than August 1 of that year. This will provide the Association and the affected teaching staff members with time to review the assignments and notify the Board if any of the assigned teaching staff members have medical or special needs which will not permit them to take lunch at such a late period of time.

8. In the event that the Association believes that the Board has assigned an excessive number of teaching staff members to a lunch period during Period 7, and/or that an assignment violates the work load language set forth in the parties' collective bargaining agreement at Article 10D1, then the Association shall have the right to file a grievance.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

9. In consideration of the above terms, the Association agrees to withdraw the within Petition of Appeal.

EAST BRUNSWICK EDUCATION ASSOCIATION

By: Cathy Schwartz, President Dated: 4/27/05

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: Kathleen Naprstek Cerisano, Esq. Dated: 5/2/05

EAST BRUNSWICK BOARD OF EDUCATION

By: MICHAEL K. BAKER, President Dated: 5/19/2005

MARIN R. PACHMAN, P.C.
Attorneys for Respondent

By: Martin R. Pachman, Esq. Dated: 5/20/2005

246-05 R

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FACILITIES AND TRANSPORTATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning *Abbott* district Board of Education appealed the Department's determination to deny retroactive funding, pursuant to the Educational Facilities Construction and Financing Act (ECFCA), for land acquired by the district in 1999 and used for the construction of an early childhood education center approved and funded pursuant to ECFCA in 2001.

In proceedings on remand, the ALJ found that the Board's land purchase was not an eligible school facilities project approved prior to the July 18, 2000 effective date of ECFCA, as required by *N.J.S.A.* 18A:7G-9c in order to be eligible for retroactive funding. The ALJ upheld the Department's determination as consistent with law and dismissed the petition.

Elaborating on the reasoning of the Initial Decision, the Commissioner adopted the ALJ's decision as the final decision in this matter.

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

July 6, 2005

OAL DKT. NO. EDU 608-05
(EDU 920-04 ON REMAND)
AGENCY DKT. NO. 19-1/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FACILITIES AND TRANSPORTATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the Board of Education (Board) filed timely exceptions, to which the Department of Education (Department) duly replied.

In its exceptions, the Board reiterates the position it has consistently taken throughout this matter, incorporating by reference its OAL briefs and previously submitted exceptions. The Board argues that it has met the conditions of the controlling statute with respect to both project eligibility and applicable time frame. With respect to project eligibility, the Board contends that both the Department and the Administrative Law Judge (ALJ) erred in concluding that land acquisition does not constitute a school facilities project within the meaning of the Educational Facilities Construction and Financing Act (ECFCA). According to the Board, this interpretation ignores both the

plain language of the statute, which provides for any of the enumerated activities to constitute an eligible project, and its remedial intent with respect to special needs districts. (Board's Exceptions at 5-7)

With respect to time frame, the Board argues that it did, in fact, have the Department's approval for acquisition of the property in question prior to the July 18, 2000 effective date of ECFCA, in that: 1) the "programmatic elements" of its 1999-2000 Early Childhood Education Plan were approved on March 24, 1999; 2) the "financial elements" of the plan—which, the Board contends, included funding for the proposed land acquisition—were addressed through its 1999-2000 general budget as approved by the Department five days later; 3) and the proposed site for the center was approved on April 28, 1999. These actions, the Board urges, occurred well before the existence of the approval and planning processes set forth in ECFCA and its implementing regulations, so that the Board secured approvals consistent with the laws in place at the time and cannot reasonably be expected to have foreseen the requirements it is now being told it must have met in order to receive retroactive funding. (*Id.* at 8-10) Moreover, the Board continues, its actions must at the very least be viewed as substantially compliant with the requirements of ECFCA, since the Department acknowledges that the property acquisition at issue would have been funded if it had been coupled with construction of the early childhood center; a perceived technical defect, according to the Board, should not prevent it from receiving the funding to which it is entitled—particularly when any such defect can be readily explained by the Board having acted as it did, i.e., acquiring the property promptly despite not receiving the anticipated aid, "in order to comply with the mandates of *Abbott* and the Department to have an early childhood education

program up and running by September 1999." (*Id.* at 10-13, quotation at 12, referencing *Abbott v. Burke*, 149 *N.J.* 145, 183 (1997 and 153 *N.J.* 480, 524 (1998))

The Board reiterates its contention that the Department is estopped from denying its eligibility for retroactive funding on the basis of failure to meet the July 18, 2000 deadline, arguing that the August 22, 2001 settlement agreement that ended the parties' 1999-2000 Early Childhood Education Plan dispute specifically provided that such settlement was "without prejudice to the Board's retroactive funding application for acquisition of the property." The Board proffers that it understood the settlement to mean that "the Department would process the Board's application without consideration of any time constraint set forth in ECFCA, including the July 18, 2000 deadline for approval of a school facilities project," and the Board's agreement to withdraw the appeal was based on that understanding. (*Id.* at 13-15, quotations at 14) Finally, the Board argues that the Initial Decision is contrary to the Court's directives in *Abbott*, since the Board, through the State-mandated needs assessment process, demonstrated a particularized need for an early childhood education facility and is, therefore, entitled under the Court's decision to have the purchase of land associated with the building of such facility funded by the State. (*Id.* at 15-16)[1]

In reply, the Department urges adoption of the Initial Decision on Remand, likewise referencing prior arguments and submissions. With respect to project eligibility under the terms of the statute, the Department contends that the plain language

[1] The Board also objects to the ALJ's failure to consider the Proposed Supplemental Findings of Fact submitted by the Board, contending that, while the Board did enter into a joint Stipulation of Facts for purposes of proceedings on remand, the Board did not concede that the facts within the stipulation were the only relevant facts, so that the ALJ should have addressed the Board's proposed supplemental findings. (*Id.* at 5)

of *N.J.S.A.* 18A:7G-9c, in conjunction with the definition of "school facilities project" at *N.J.S.A.* 18A:7G-3, makes it clear that a planned structure or building must be part of the referenced approval, and that land acquisition alone, even with the intent of eventually using it for a school building, does not meet the statutory requirement; therefore, the Board did not receive "project approval" in April 1999,[2] and, indeed, did not even incorporate the early childhood learning center into its Long Range Facilities Plan until July 18, 2001, a full year after the statutory deadline. (Department's Reply Exceptions at 5-7) The Department offers the rules adopted to implement EFCFA as further clarification of the distinction between 1) a school facilities project including land acquisition and 2) a request for approval of land acquisition independent of a school facilities project, the former being subject to then-effective *N.J.A.C.* 6A:23A—which included site approval pursuant to then-effective *N.J.A.C.* 6:22 as a precondition of project approval—and the latter to *N.J.A.C.* 6:22 alone. (*Id.* at 7-10)

With respect to the Board's other arguments, the Department states that the *Abbott* decisions do not relieve a district from compliance with the requirements of ECFCA, and that the doctrine of substantial compliance is not applicable to this matter because: 1) the Department lacks authority to waive or alter statutory time limits; 2) the Board did not meet the intent of the statute with a facilities project that had progressed to the point specified; 3) permitting land acquisition undertaken apart from a concurrent facilities project to qualify for retroactive funding would open a floodgate of similar claims; and 4) the Board's explanation for its noncompliance is not reasonable.

[2] The Department notes that the Board's land acquisition approval was not actually finalized until June 14, 1999, the Department's April 28 approval covering only one part of the process set out by applicable rules at that time.

Moreover, the Department asserts that the settlement agreement referenced by the Board did nothing more than affirm that the Board's right to apply for retroactive funding under *N.J.S.A.* 18A:7G-9 and its implementing rules was not affected by withdrawal of its early childhood plan appeal. (*Id.* At 10-13)

Upon full and careful review of the record in this matter, the Commissioner must concur with the ALJ that the Board did not receive approval for a school facilities project prior to July 18, 2000 so as to be entitled to retroactive funding under *N.J.S.A.*18A:7G-9c.

In enacting ECFCA in July 2000, the Legislature plainly stated its intent to establish a comprehensive system for addressing New Jersey's school facilities needs, particularly those in the *Abbott* districts. (*N.J.S.A.* 18A:7G-2) Viewed within the context of the full legislative enactment, the remedial relief provided by section 9c of ECFCA (*N.J.S.A.* 18A:7G-9c) is clearly intended to ensure that districts having recently begun the construction of a school facility, or having completed every step of the then-applicable process leading to such construction short of issuing debt, would still be able to avail themselves of the fiscal benefits of the newly enacted law notwithstanding that their project had not been approved under the terms and conditions now prescribed by *N.J.S.A.* 18A:7G-5. It distorts the reach of a carefully circumscribed statute to suggest, as the Board does here, that eligibility for retroactive funding was meant to extend to any lawfully effectuated prior purchase that may subsequently contribute—as evidenced by its inclusion in the list of possible components within the definition of "school facilities project" at *N.J.S.A.* 18A:7G-3—to a project undertaken and approved pursuant to ECFCA; the definition on which the Board relies for the proposition that land acquisition

alone constitutes a school facilities project is applicable to the entire Act, and in context affirms nothing more than that a project submitted for approval pursuant to *N.J.S.A.* 18A:7G-5 may include—among other elements necessary for or ancillary to a school facility—acquisition of the land on which a proposed facility is to be constructed.

Notwithstanding that the Board in this instance was, as evidenced by its application for site approval and inclusion of a proposed early childhood education center in the Early Childhood Education Plan submitted by the district for the 1999-2000 school year, clearly taking steps prior to July 2000 in anticipation of building a school facility, the fact remains that the Board did not receive the type of approval contemplated by *N.J.S.A.* 18A:7G-9c until well beyond the statutory deadline.

Although the Board did receive a site approval from the Department in June 1999 (Exhibit M-1[3]), it is clear from the full regulatory scheme in place at that time (*N.J.A.C.* 6:22, 30 *N.J.R.* 3619(a))[4] that approval pursuant to *N.J.A.C.* 6:22-2.1 constituted nothing more than a determination that a proffered site was suitable for its anticipated eventual use; while site approval was unquestionably a necessary step in the construction approval process, there is no evidence on record that the Board proceeded to obtain the other reviews and approvals required by Chapter 22 before building could have begun. Moreover, the Department's February 11, 1999 review (Exhibit C) of the Board's proposed 1999-2000 Early Childhood Education Plan (Exhibit B) clearly states that requests for facilities (other than temporary) were to be addressed not through Early Childhood Education Plans pursuant to then-applicable *N.J.A.C.* 6:19A-2.3

[3] These and all subsequent similar references are to the Exhibits appended to the Petition of Appeal, which are identical to those appended to the Certification of John M. Rodecker.

[4] At all times pertinent to this matter, regulatory processes were in place by which boards of education were required to obtain Department review and approval before proceeding with planned school facilities.

(30 *N.J.R.* 3019(a)), but through the facilities management plan required elsewhere in the *Abbott* rules, *N.J.A.C.* 6:19A-5.1 *et seq.* (*Ibid.*),[5] and that, in the Board's case, before such a request would be considered, fuller collaboration with community early childhood education providers would have to demonstrated. Consistent with this position and with the regulatory schemes in place at the time, nothing in the Department's approval letter of March 24, 1999 (Exhibit E) suggests that construction of a new center was being approved—let alone required—by the Commissioner, either as part of the "program portion" of the district's plan or as part of the "fiscal elements" to be reviewed within the context of the district's general budget; indeed, such approval did not come until August 21, 2001 (Stipulation of Facts, ¶4), over a year after the effective date of ECFCA.

Under these circumstances,[6] the Commissioner cannot accept, as the Board urges, that the Board "substantially complied" with the standards of *N.J.S.A.*18A:7G-9c so as to have its 1999 land purchase eligible for retroactive funding, or that, in denying funding, the Department unreasonably expected the Board to have foreseen, and acted in accord with, the requirements of not-yet-existing ECFCA regulations. Neither can he accept the Board's explanation that it was "forced" to purchase land in order to comply with *Abbott* directives from the Court and Department to have an early childhood education program "up and running" by September 1999, or

---

[5] In accord with then-effective *N.J.A.C.* 6:19A-3.4 and 6:19A-8.1 (31 *N.J.R.* 2924(a)), this contention was reiterated by the Department in its review of the district's 2000-01 operational plan. (Exhibits M-3, M-4)

[6] The Commissioner here notes his concurrence with the ALJ (Initial Decision at 2, Findings of Fact) that no fact-finding beyond the parties' joint stipulation (see note 1 above) is necessary to decide this matter. The Commissioner further notes that several of the Board's proposed supplemental findings (¶ 2, 11, 12, 13, 14, 16) incorporate in whole or part allegations from the Petition of Appeal which the Department, in its Answer, either denied or was unable to either admit or deny because of insufficient knowledge, contrary to the parties' cross motions for summary decision.

that a "particularized need" was demonstrated through the regulatory processes established in order to effectuate the Court's mandate.

Finally, the Commissioner rejects the Board's contention that the Department is estopped from denying the requested funding based on the August 22, 2001 settlement agreement reached between the parties in the Board's 1999-2000 Early Childhood Education Plan appeal. To the contrary, whatever the Board now claims it understood that settlement to mean, the parties' agreement as memorialized by the Board attorney (Exhibit I) plainly does nothing more than provide that withdrawal of the early childhood plan appeal, which the Board states that it maintained even after the plan's other elements were approved (Rodecker Certification at 6, ¶16) in order to obtain funding for the land acquisition at issue herein, would not affect the Board's "right to seek" such funding by way of its then-pending application (submitted on July 18, 2001) for retroactive funding pursuant to *N.J.A.C.* 6:23A-3.1 (33 *N.J.R.* 720(a)), the then-effective rule implementing *N.J.S.A.*18A:7G-9c. Even assuming, *arguendo*, that the Department might have, under the circumstances, ignored the lateness of the Board's application vis-à-vis the June 30, 2001 regulatory time frame for its submission, no prejudice resulted from this procedural deficiency because the Department went on to consider the merits of the application and ultimately denied it for substantive reasons (Exhibit N). Certainly, the settlement agreement cannot be construed to have authorized the Department to ignore a statutory deadline for project eligibility, or, indeed, as any kind of promise that the Board's application would be successful; such an interpretation would be contrary to law as well as common sense.

Accordingly, for the reasons expressed therein and above, the Commissioner adopts the Initial Decision of the OAL, dismissing the Petition of Appeal, as the final decision in this matter.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7/6/05

Date of Mailing: 7/6/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 608-05

(ON REMAND EDU 920-04)

AGENCY DKT. NO. 19-1/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

Petitioner,

v.

THE NEW JERSEY DEPARTMENT F EDUCATION, DIVISION OF FACILITIES AND TRANSPORTATION,

Respondent.

Francis X. Journick, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: April 22, 2005 Decided: April 27, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the City of Perth Amboy Board of Education, challenges the State Department of Education's decision denying retroactive funding for an early childhood education facility,

pursuant to *N.J.S.A.* 18A:7G-1. Respondent contends that the funding was appropriate and consistent with State law and implementing regulations. The matter was transmitted to the Office of Administrative Law, where it was filed on March 8, 2004.

Petitioner and Respondent filed motions for summary decision on September 29, 2004. Responses were simultaneously filed on November 18, 2004. On December 20, 2004, an Initial Decision was rendered denying Petitioner's summary decision motion and granting Respondent's summary decision motion. On February 2, 2005, the Commissioner of Education entered a Decision remanding the Initial Decision to the Office of Administrative Law.

ANALYSIS

The Commissioner provides the following three reasons for the remand:

(1) Findings of Fact: The Commissioner's Decision states that the Initial Decision failed to set forth findings of fact. This matter is appropriate for summary decision because there are no material facts in dispute. In order to address the Commissioner's concerns, the parties prepared a stipulation of facts. The stipulation of facts is hereby incorporated into this Initial Decision (*See* Exhibit "A"). No additional findings of fact are necessary to address the parties' summary decision motions.

(2) Petitioner's Arguments: The Commissioner's Decision also states that the Initial Decision fails to provide a summary of Petitioner's arguments and the reasons for their rejection. Respectfully, there is no statutory or regulatory requirement that an Initial Decision summarize parties' arguments and the reasons for their rejection. The parties' arguments are set forth in their briefs that were transmitted to the Commissioner.

(3) Conclusions of Law: The Commissioner's Decision seeks a basis for the conclusions of law. I find and conclude that the Department's decision to deny the Board's application for retroactive funding for a school facilities project was not arbitrary, capricious or unreasonable.

The Board applied for retroactive funding pursuant to *N.J.S.A.* 18A:7G-9, which provides that such funding is available (1) where approval was obtained from the Commissioner between September 1, 1998, and July 18, 2000, of the educational specifications of a school facilities project or approval was obtained from the Department of Community Affairs or the appropriately licensed municipal code official since September 1, 1998 of the final construction plans and specifications, and the district had issued debt, or (2) where a district, which received approval

from the Commissioner for a school facilities project at any time prior to July 18, 2000, and has not issued debt, other than short term notes, for a school facilities project prior to that date. Since there is no credible evidence that Perth Amboy had issued debt for a school facilities project, such funding would have only been available if Perth Amboy received approval for a school facilities project prior to July 18, 2000.

N.J.S.A. 18A:7G-3 defines a "school facility" as any structure, building or facility used wholly or in part for academic purposes. Clearly, the mere obtaining of land does not meet this definition. Land acquisition along with or as a component of formal plans for construction would meet the definition, however. In this case, Perth Amboy did not receive approval for a school facilities project prior to July 18, 2000. Indeed, Perth Amboy did not even add a school facilities project to its Long Range Facilities Plan until July 18, 2001. In conclusion, the Department's application of EFCFA is consistent with its intent.

The Department's April 1999 recommendation for land approval pursuant to *N.J.A.C.* 6:22-2.1 did not constitute approval of a school facilities project. Indeed, the land acquisition was approved pursuant to *N.J.A.C.* 6:22-2.1, which was in place prior to the enactment of EFCFA, and does not require a school district to submit information regarding new construction, rehabilitation. The Department's correspondence stated that the request for land acquisition approval was being reviewed for compliance with former *N.J.A.C.* 6:22-2.1. The evidence is clear that under the regulatory scheme Perth Amboy sought approval solely for land acquisition, not a school facilities project. There is no question that prior to July 18, 2000 the Board had not received approval for the construction, rehabilitation or acquisition of a school facility on the site.

Petitioner contends that the Department violated the New Jersey Constitution and the *Abbott v. Burke* cases. However, since I find and conclude that the Department acted in conformance with EFCFA and its implementing regulations, I likewise find and conclude that there is no violation of the Constitution and *Abbott v. Burke.*

Perth Amboy, in relying on the doctrine of substantial compliance, contends that it substantially complied with the requirements of *N.J.S.A.* 18A:7G-9 and that, therefore, the denial

of its application was unfair. However, the substantial compliance doctrine does not give the Department the authority to alter the July 18, 2000, deadline. *See In the Matter of the Application of Virgo's, Inc.*, 355 *N.J. Super.* 590, 595 (App. Div. 2002) (finding that the substantial compliance doctrine did not apply where a liquor license had lapsed on June 30, 1998, but it was not until July 16, 2001, that the Petitioner had applied for the renewal of the license). In this case, the statute clearly delineates that retroactive funding may be available for certain projects that had received approval prior to July 18, 2000. Perth Amboy did not have a school facilities project, which had progressed to the required point by July 18, 2000. This is confirmed by the fact that Perth Amboy had not added a school facilities project to its Long Rang Facilities Plan until July 18, 2001 – one year later.

Finally, Perth Amboy claims the Department is estopped from denying its application for retroactive funding as untimely. However, the Department takes no issue as to when Perth Amboy filed its application for retroactive funding. Indeed, the Department in its October 14, 2003, decision did not deny Perth Amboy's application as untimely. Moreover, Perth Amboy fails to prove the elements necessary to establish an estoppel claim.

ORDER

In conclusion, the Department's denial of retroactive funding is consistent with Educational Facilities Construction and Financing Act and its implementing regulations, and does not violate the New Jersey Constitution or the *Abbott* cases. Accordingly, I hereby **DENY** the Board's motion for summary decision and **GRANT** the Department's motion for summary decision. The Board's Petition of Appeal is **DISMISSED**.

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

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

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

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

April 27, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

5/2/05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

LIST OF EXHIBITS

Joint Exhibits:

J-1 Stipulation of Facts

J-1 Exhibit "A"

WILENTZ, GOLDMAN & SPITZER P.A.
Attorneys at Law
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Petitioner
Perth Amboy Board of Education

RECEIVED
2005 APR 22 A 10:45
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-920-04
AGENCY REF. NO. 19-1/04

THE BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, Petitioner, -v.- THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, Respondent.	On Referral from the Commissioner of Education **STIPULATION OF FACTS**

Petitioner, the Board of Education of the City of Perth Amboy (the "Board"), and respondent, the State of New Jersey Department of Education (the "Department"), hereby stipulate to the following facts for purposes of this proceeding:

1. On April 28, 1999, the Middlesex County Superintendent of Schools recommended approval of the acquisition of property known as Lots 1 and 10 through 25 in Block 259 of the official Tax Map of Perth Amboy (the

"Property") for the construction of a new early childhood education center. (See Certification of John M. Rodecker, Exhibit G; Certification of Bernard Piaia, ¶ 2).

2. On June 14, 1999, the Office of School Facility Financing sent correspondence approving the Board's acquisition of the Property pursuant to N.J.A.C. 6:22-2.1. (See Certification of Rodecker, Exhibit M, Section 1; Certification of Piaia, ¶ 3).

3. On July 18, 2001, the Board submitted an application to amend its Five-Year Long Range Facilities Plan to the Department's Division of Facilities and Transportation and requested retroactive funding for acquisition of the Property for the construction of a new early childhood education center. (See Certification of Rodecker, Exhibit J; Certification of Piaia, ¶ 4).

4. On August 21, 2001, the Department approved a school facilities project involving the construction of a new childhood education center on the Property (but not the acquisition of the Property) as part of the Board's Long Range Facilities Plan. (Certification of Piaia, ¶5).

5. On September 20, 2001, the Department determined that the 1) Board's request for retroactive funding for the acquisition of the Property was not received prior to the

Department's June 30, 2001, deadline for such submissions and that 2) the land acquisition alone did not meet the requirements of N.J.S.A. 18A:7G-9(c), because it was inconsistent with the definition of a school facilities project pursuant to N.J.S.A. 18A:7G-3. (See Certification of Rodecker, Exhibit K; Certification of Piaia, ¶ 6).

6. On October 22, 2001, the Board submitted a request for an informal hearing concerning the September 20, 2001, decision. (See Certification of Rodecker, ¶ 19, Exhibit L).

7. On February 13, 2002, an informal hearing occurred pursuant to the Board's request. The informal hearing pertained to the Board's application for retroactive funding for the acquisition of the Property for its early childhood center. (See Certification of Rodecker, ¶ 20, Exhibit M; Certification of Piaia, ¶ 7).

8. On February 20, 2002, the Board supplemented its retroactive funding request with additional documents. (See Certification of Rodecker, Exhibit M; Certification of Piaia, ¶ 7).

9. On October 14, 2003, the Department again denied the application for retroactive funding, finding that the Department had indeed issued a land approval on June 14, 1999, pursuant to N.J.A.C. 6:22-2.1, but that the Department approved

a school facilities project, which included educational specifications, on August 21, 2001, over one-year after the July 18, 2000, statutory deadline for funding eligibility, N.J.S.A. 18A:7G-9(c). The Department further found that land acquisition alone is not a school facilities project, but a land acquisition project as defined in N.J.A.C. 6:23A-1.3 and N.J.A.C. 6A:26-1.2. The Department concluded that its September 20; 2001, decision remained unchanged and that the land acquisition was not eligible for State funding under N.J.S.A. 18A:7G-9(c). (See Certification of Rodecker, Exhibit N; Certification of Piaia, ¶ 8).

10. On January 9, 2004, the Board filed a petition of appeal challenging the 2003 Decision with the Commissioner of Education. The Department filed its answer to the petition on February 9, 2004.

11. The matter was transmitted to the Office of Administrative Law on March 8, 2004.

12. During a telephone conference among counsel for parties and the Administrative Law Judge ("ALJ") Douglas H. Hurd the parties agreed that this matter may be resolved by cross-motions for summary decision.

13. The Department and the Board each submitted cross-motions for summary decision on September 29, 2004, and

responses were simultaneously filed by the parties on November 18, 2004.

14. On December 20, 2004, ALJ Hurd rendered an Initial Decision rejecting the Board's challenge to the denial of retroactive funding, denying the Board's cross-motion for summary decision and granting the Department's cross-motion for summary decision.

15. On January 5, 2005, the Board filed exceptions to the Initial Decision with the Commissioner of Education. On January 12, 2005, the Department filed a reply to the Board's exceptions.

16. On February 2, 2005, the Commissioner of Education entered a Decision remanding the Initial Decision to the Office of Administrative Law for revision of the Initial Decision.

WILENTZ, GOLDMAN & SPITZER P.A.
Attorneys for Petitioner
The Board of Education of
the City of Perth Amboy

DATED: April 20, 2005 **By:** _____
FRANCIS X. JOURNICK, JR.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
New Jersey Department of Education

DATED: April 15, 2005 **By:** _____
CAROLYN G. LABIN
Deputy Attorney General

247-05

G.E.S. AND N.D.S., ON BEHALF OF MINOR CHILDREN, G.E.S., K.L.S. AND N.J.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the respondent Board's determination that the non-public school attended by petitioners' children was not "remote" (over two miles) from their home; this determination deemed them ineligible for transportation services or aid-in-lieu-of transportation pursuant to *N.J.S.A.* 18A:39-1. Respondent Board subsequently re-measured the disputed walking route between the non-public school and petitioners' home, determined that the distance is more than two miles, and advised petitioners and the OAL of same.

The ALJ found that the sole purpose of submitting this matter to the OAL was to determine whether petitioners were entitled to aid-in-lieu-of transportation services from the respondent Board for the 2003-2004 school year when actual transportation was not provided, and that respondent had conceded as much. Thus, the ALJ concluded that there was no longer a controversy to consider, and ordered respondent Board to provide aid-in-lieu-of transportation to petitioners pursuant to *N.J.S.A.* 18A:39-1 for that portion of the 2003-2004 school year when busing services were not provided by the Board.

The Commissioner concurs with the ALJ's conclusions and recommended order, and adopts the initial decision of the OAL as the final decision in this matter. In so doing, the Commissioner adds that petitioners' children are entitled to free transportation prospectively. In addition, the Commissioner finds that the exception issue raised by petitioners is immaterial, and points out that the ALJ did not rely on the language in respondent's concession letter, to which petitioners' take issue, in reaching his 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.

July 6, 2005

247-05

OAL DKT. NO. EDU 10759-04
AGENCY DKT. NO. 264-7/04

G.E.S. AND N.D.S., ON BEHALF OF MINOR CHILDREN, G.E.S., K.L.S. AND N.J.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

The Commissioner has carefully and independently reviewed the record, the initial decision of the Office of Administrative Law (OAL), petitioners' "exception" and respondent's reply to same, and he has determined to adopt the Administrative Law Judge's (ALJ's) initial decision.

This matter concerns transportation for the petitioners' children to a non-public school. Respondent had declined to provide it, due to its determination that the school was not "remote" (over two miles) from petitioners' home. Petitioners appealed.

By letter decision dated November 24, 2004, ruling on two motions to dismiss, the Commissioner initially forwarded this case to the OAL

> for the limited purpose of determining whether petitioners' children were entitled to bus transportation services or aid-in-lieu thereof, pursuant to *N.J.S.A.* 18A:39-1, for that portion of the 2003-04 school year when busing services were not provided by the Board, and prospectively, assuming no change in circumstances. (Commissioner's decision, p. 8)

Petitioners did not appeal that decision on motion. Thus, narrow parameters corresponding to the Commissioner's decision were imposed on the ALJ's determinations in this case. The Commissioner finds that the ALJ properly conformed to those parameters, and adopts the ALJ's finding that petitioners are entitled to aid-in-lieu of transportation for the designated time period. (Initial decision at 2.) The Commissioner adds that the relief shall also be prospective, assuming no change in circumstances.

N.J.S.A. 18A:39-1 provides, in pertinent part: "Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance * * * the district shall provide transportation to and from school for these pupils." The same statute directs that

> When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil * * * .

And the statute further provides that

> It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation, then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 or the amount determined pursuant to section 2 of P.L. 1981, c. 57 (18A:39-1a) * * * .

Clearly, the core question was whether petitioners live over two miles from the children's parochial school. In the course of the proceedings at the OAL, respondent conceded that they do. Thus, respondent had been obligated to, but had not, provided bus service for petitioners' children during part of the 2003-2004 school year. Accordingly, respondent agreed that petitioners were entitled to aid-in-lieu-of transportation for the time during which respondent did not provide the bus service. The ALJ therefore correctly concluded that there was no longer a controversy before him. (Initial decision at 2.)

The gravamen of petitioners' exception is that the ALJ attached to the initial decision the letter from respondent conceding that a remeasuring of the distance between petitioners' house and the children's school established the distance to be over two miles. In the body of his initial decision the ALJ had identified respondent's concession by quoting the following language in the letter: "Consequently petitioners would be entitled to 'aid-in-lieu' thereof pursuant to *N.J.S.A.* 18A:39-1, for that portion of the 2003-2004 school year when busing services were not provided by the Board."

Petitioners contend as their exception that respondent's letter contains a material error, i.e., that respondent "remeasured the disputed walking route, in the fashion requested by Petitioners . . . ." Even assuming that petitioners are correct that respondent's method of measurement did not comply with petitioners' requests, the Commissioner finds the issue to be immaterial to the resolution of the controversy. A determination by respondent that the petitioners' children's parochial school was "remote" settled the issues. Moreover, while the ALJ attached respondent's letter to the initial decision, he did not rely on the language to which petitioners object.

Accordingly, for the reasons expressed by the ALJ and stated herein, the ALJ's recommended order for relief is to be implemented forthwith.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of decision: 7/6/05

Date of mailing: 7/6/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10759-04
AGENCY DKT. NO. 264-7/04

G.E.S. AND N.D.S., ON BEHALF OF MINOR CHILD, G.E.S., K.L.S. AND N.J.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,

Respondent.

Robert DeChellis, Esq., for petitioners

Jamie D. Zogby, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 3, 2005 Decided: June 7, 2005

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns whether petitioners are entitled to transportation benefits. Petitioners' children attend a non-public elementary school, which they contend is more than two

miles from their home. This would entitle petitioners to transportation services or financial aid in lieu thereof. Petitioners filed a petition with the Department of Education seeking aid-in-lieu of transportation for the 2003-2004 school year when bus transportation was not provided. On November 24, 2004, the Commissioner of Education issued a letter decision forwarding this matter to the Office of Administrative Law (OAL) for "the limited purpose of determining whether petitioners' children were entitled to bus transportation services or aid-in-lieu thereof, pursuant to *N.J.S.A.* 18A:39-1, for that portion of the 2003-04 school year when busing services were not provided by the Board." The matter was originally scheduled for hearing on April 22, 2005, but an adjournment was granted to respondent because of witness unavailability. Hearing was re-scheduled for June 3, 2005. Prior to that date the respondent re-measured the disputed walking route using different criteria and determined petitioners' residence is more than two miles from the children's parochial school. As a result of that conclusion, counsel for respondent wrote the undersigned on June 3, 2005 (Exhibit A attached) advising the Court, "Consequently petitioners would be entitled to 'aid-in-lieu' thereof pursuant to *N.J.S.A.* 18A:39-1, for that portion of the 2003-2004 school year when busing services were not provided by the Board."

FINDINGS OF FACT

I **FIND** the purpose of the submission of this matter to the OAL was to have a hearing to determine whether petitioners were entitled to aid-in-lieu of transportation services from the respondent for the 2003-2004 school year when actual transportation was not provided. I further **FIND** the respondent has conceded that petitioners are entitled to aid-in-lieu of transportation services for the time period under consideration.

CONCLUSION

I **CONCLUDE**, based on the representation of respondent, that there is no longer a controversy before me.

ORDER

I **ORDER** respondent provide aid-in-lieu of transportation to petitioners in accordance with its letter to me of June 3, 2005.

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

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

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

June 7, 2005
DATE

JOHN SCHUSTER III, ALJ

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

6-7-05
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN - 9 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

Exh. A

PORZIO
BROMBERG&NEWMAN P.C.
ATTORNEYS AT LAW

TELEPHONE (973) 538-4006 • FAX (973) 538-5146

JAMIE D. ZOGBY
MEMBER, NJ AND NY BARS
DIRECT DIAL NO.: 973-889-4327
E-MAIL ADDRESS: JDZOGBY@PBNLAW.COM

June 3, 2005

RECEIVED
2005 JUN -3 P 4:35
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

VIA FACSIMILE AND FIRST CLASS MAIL

Hon. John Schuster, A.L.J.
New Jersey Office of Administrative Law
PO Box 049
Quakerbridge Road, Building 9
Mercerville, NJ 08625-0049

Re: *G.S. and N.S. o/b/o G.S., et al. v. Clinton Township Bd. of Educ.*
Docket No.: EDS 10759-2004S
Our File No.: 01214.49825

Dear Judge Schuster:

We are counsel to the respondent Clinton Township Board of Education ("the Board") in the above matter. As you know, petitioners are disputing the Board's determination that their children do not live more than two miles from the parochial school they attend in Hunterdon County for the purpose of determining transportation eligibility. On November 24, 2004, the Commissioner of Education issued a letter decision forwarding this matter to the Office of Administrative Law for "the limited purpose of determining whether petitioners' children were entitled to bus transportation services or aid-in-lieu thereof pursuant to *N.J.S.A.* 18A:39-1, for that portion of the 2003-2004 school year when busing services were not provided by the Board."

In April 2005, the Board re-measured the disputed walking route, in the fashion requested by petitioners, and determined that petitioners' current residence is more than two miles from their children's non-public elementary school. Consequently, petitioners would be entitled to "aid-in-lieu thereof pursuant to N.J.S.A. 18A:39-1, for that portion of the 2003-2004 school year when busing services were not provided by the Board."

Accordingly, we respectfully request that the hearing previously scheduled in this matter be adjourned as moot based upon the foregoing concession by the Board and that a decision be issued based upon the above finding.

PORZIO
BROMBERG&NEWMAN P.C.
ATTORNEYS AT LAW

Thank you for your kind attention and courtesies in this regard. Please do not hesitate to contact this office with any questions or concerns.

Respectfully submitted,

Jamie D. Zogby

Cc: Robert DeChellis, Esq. (via facsimile)

PORZIO, BROMBERG & NEWMAN, P.C.
COUNSELORS AT LAW
100 SOUTHGATE PARKWAY
MORRISTOWN, NJ 07962-1997
TEL: 973-538-4006 FAX: 973-538-5146

FAX COVER SHEET

FROM:	Jamie D. Zogby, Esq.
DATE:	Friday, June 03, 2005 4:31:20 PM

Please send the annexed document to:

NAME:	Hon. John Schuster III, A.L.J.
COMPANY:	New Jersey Office of Administrative Law
CITY AND STATE:	Mercerville, NJ
FAX NUMBER:	16095886574
CLIENT-MATTER NUMBER:	01214.49825
TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET:	03
MESSAGE:	

RECEIVED
2005 JUN -3 P 4:35
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

If you have any problems receiving this transmittal, please call (973)538-4006, ext. .

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

251-05

#251-05

G.P. ON BEHALF OF MINOR CHILD, R.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that his niece, R.P., was not eligible for a free education in the Township of West Orange School District based on family or economic hardship. Petitioner's appeal included an affidavit from R.P.'s mother, who resides in Haiti, alleging persecution of her family for its political beliefs. Petitioner did not appear at the OAL hearing and respondent moved for dismissal of the petition and an award of tuition reimbursement.

The ALJ found that: petitioner enrolled his niece, R.P., in West Orange High School in September 2004; R.P. attended the school on a regular basis through the date of the hearing on June 3, 2005; the tuition rate at West Orange High School for the 2004-05 school year was $12,655; and petitioner failed to attend the scheduled hearing or call to ask for an adjournment or to explain the reason for his failure to appear. Based on the petitioner's failure to appear at hearing, the ALJ concluded that he failed to meet his burden of proof pursuant to *N.J.S.A.* 18A:38-1(b) (1), and further concluded that respondent did meet its burden under *N.J.S.A.* 18A:38-1(b) (2), and is entitled to tuition reimbursement and removal of R.P. from the district schools; the ALJ so ordered.

Upon review of the record, the initial decision of the OAL, and a letter from petitioner dated June 17, 2005, the Commissioner rejects the ALJ's recommendations, and remands the matter to the OAL for a hearing on the merits. In so deciding, he states that there is enough in the record to justify, at minimum, a hearing to determine whether the allegations in R.P.'s mother's affidavit about the family's political oppression and economic hardship in Haiti are legitimate and sufficient to justify tuition-free attendance for R.P. in West Orange schools, and notes that such an important inquiry should not be short-circuited by dismissal of petitioner's appeal, where petitioner is *pro se*, where there was one hearing notice four months before hearing date and no further communication between the parties and the OAL, and where petitioner promptly took action when he learned that he missed the hearing. Accordingly, the Commissioner remands this matter to the OAL for an expedited hearing.

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

July 14, 2005

OAL DKT. NO. EDU 10926-04
AGENCY DKT. NO. 373-10/04

G.P. ON BEHALF OF MINOR CHILD, R.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record in this matter, the initial decision of the Office of Administrative Law (OAL), and a communication from the petitioner, a copy of which is annexed hereto, have been reviewed. Upon consideration of the foregoing, the Commissioner of Education (Commissioner) remands the matter to the OAL for a hearing on the merits.

Factual and Procedural History

G.P. (petitioner) applied to the West Orange Board of Education (respondent) to allow his niece, R.P., to receive a free public education in West Orange. Respondent denied his application on September 13, 2004, for the stated reason that it did not meet the statute's requirement of family or economic hardship. On October 25, 2004 the Commissioner of Education received an appeal from the petitioner which included an affidavit dated October 21, 2004, from R.P.'s mother, R.D.P., who resides in Haiti.

In the affidavit, R.D.P. alleged that her family was persecuted for its political beliefs: that they lived from house to house in fear; that after a beating in retaliation for attendance at a protest against Haiti's president, R.P.'s brother fled to the United States and applied for asylum; that before R.P. arrived in the United States to live with her uncle, the petitioner, she had been in hiding from the militia, which had tried to kidnap her; that R.P. was traumatized as a result of the conditions in Haiti; and that petitioner would care for R.P. gratis because of her mother's inability to provide her with security and basic necessities.

Respondent filed an answer on November 30, 2004, including a counterclaim for tuition reimbursement for the period in which R.P. had attended school in West Orange, and the matter was transmitted to the OAL. On February 7, 2005, the OAL sent a notice to the parties advising that the hearing would take place on June 3, 2005, at 9 a.m.

Petitioner did not appear at the hearing on June 3, 2005, and did not call the OAL to request an adjournment or explain his absence (Initial Decision, p.2). Respondent's counsel represented that he had left petitioner a telephone message on June 2, 2005, with the date and location of the hearing and his telephone number, but petitioner had not returned the call. *Ibid.* At 10:15 a.m. on June 3, respondent moved for dismissal of the petition and an award of tuition reimbursement. *Ibid.* Testimony was presented about R.P.'s school attendance and about tuition rates in West Orange. *Ibid.* The matter was held until Monday, June 6, 2005. *Ibid.* When petitioner failed to appear, respondent's motion for dismissal of the petition and an award of tuition fees was granted. *Ibid.*

The administrative law judge's (ALJ) initial decision was issued on June 8, 2005. The ALJ found that petitioner enrolled R.P. as an eleventh grader in West Orange High School on September 13, 2004; that she attended the school regularly throughout the year; that tuition

for the 2004-2005 school year was $12,655; and that petitioner failed to attend the hearing scheduled to adjudicate R.P.'s right to a free education in West Orange (Initial Decision, p.3). He concluded that since petitioner failed to attend the hearing, and in so doing failed to meet his burden to show that R.P.'s residency with him entitles her to a free education in West Orange, pursuant to *N.J.S.A.* 18A:38-1(b)(1), the petition should be dismissed. *Ibid.* In addition, he concluded that, pursuant to *N.J.S.A.* 18A:38-1(b)(2), and based upon the evidence, petitioner owed respondent tuition for the 2004-2005 school year (*id.* at 4).

Nine days after the initial decision, on June 17, 2005, petitioner hand delivered to the office of the Commissioner of Education the letter, a copy of which is annexed hereto, wherein he reports that he did not know about the hearing until two days after it took place. The letter further states in pertinent part:

> If I were to know, I would not have ever made the mistake of not attending, I was waiting for that chance for so long. Please I would like to have the opportunity to prove my case. I am pleading for another chance to be able to do so.

Discussion

Petitioner's letter was submitted within the time allowed for exceptions and can be regarded as a challenge to the initial decision. While the letter does not set forth specific facts explaining why petitioner did not know about the hearing date, the Commissioner notes that there was no contact between the parties and the OAL between the February 7, 2005 hearing notice and the June 3, 2005 hearing date, a period of four months. Also, respondent's counsel's representation that he left a message for petitioner on the day before the hearing is not grounds for concluding that petitioner knew about the hearing. The reference in the initial decision to

counsel's representation contains no specifics about how counsel left the message and with whom.

N.J.S.A. 18A:38-1(b)(1) allows a free public education for anyone (of qualifying age) who lives with and is supported gratis by a person domiciled in the school district, so long as the supporting person makes certain representations, and the parent of the student shows reasons why he or she cannot support or care for the student. More specifically, *N.J.S.A.* 18A:38-1(b)(1) states in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child.

The record does not include what, if anything, petitioner initially submitted to respondent concerning his domicile, his intention to support R.P., and his commitment to assume responsibility for her for the long term. However, respondent does not appear to be challenging those issues. Respondent alleges that R.P.'s parents have not made a showing that economic or family hardship warrants that R.P. live with her uncle.

GABRIEL PREVIL
77 HIGH STREET
WEST ORANGE, NJ 07052
TEL: (973) 324-5706

COMMISSIONER OF THE DEPARTMENT OF EDUCATION
ATTN: BUREAU OF CONTROVERSIES AND DISPUTES
100 RIVERVIEW PLAZA 4TH FL.
P.O. BOX 500
TRENTON, NJ 08625-0500

June 17, 2005

To Whom It May Concern:

This is to inform you that I had missed the hearing because I did not know about it until two days after. If I were to know, I would not have ever made the mistake of not attending, I was waiting for that chance for so long. Please I would like to have the opportunity to prove my case.
I am pleading for another chance to be able to do so.

Sincerely,

Gabriel Previl

The Commissioner has determined that there is enough in the record to justify, at a minimum, a hearing to determine whether the allegations in R.P.'s mother's affidavit about the family's political oppression and economic hardship in Haiti are legitimate and sufficient to justify tuition-free attendance for R.P. at West Orange High School. Such an important inquiry should not be short-circuited by dismissal of petitioner's appeal, where petitioner is *pro se*, where there was one hearing notice four months before the hearing date and no further communications between the parties and the OAL, and where petitioner promptly took action when he learned that he missed the hearing.

Accordingly, for the reasons stated herein, the Commissioner remands this matter to the OAL for an expedited hearing on the merits of petitioner's appeal.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/05

Date of Mailing: 7/14/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10926-04

AGENCY DKT. NO. 373-10/04

G.P., ON BEHALF OF MINOR CHILD,

R.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondents.

G.P., *pro se*

Stephen J. Christiano, Esq., for respondents

Record Closed: June 6, 2005 Decided: June 8, 2005

BEFORE **CAROL I. COHEN,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The petitioner, G.P. appeals from the denial by the Board of Education of the Township of West Orange, Essex County (respondent/West Orange) of her application to allow his niece (R.P.) to be educated in the West Orange School System. West Orange denied the petitioner's application on September 13, 2004, based on the fact that the application did not meet the statute's requirements of family or economic hardship. The petitioner filed his appeal on October 22, 2004. The respondent filed its

answer on November 30, 2004. In its answer, the respondent requested tuition reimbursement for the period during which R.P. was ineligible to attend the West Orange schools. The matter was filed with the Office of Administrative Law (OAL) on January 4, 2005. On February 7, 2005, the Clerk's Office sent a notice to the parties scheduling a hearing date for June 3, 2005. On that date the petitioner failed to appear. Mr. Christiano represented that he had called the petitioner on June 2, 2005 and left a message reminding him of the date and place of the hearing and leaving his telephone number for the petitioner. According to Mr. Christiano, the petitioner did not contact him. The petitioner failed to appear at the hearing, which was scheduled for 9:00 a.m. At 10:15 a.m., the district made a motion to dismiss G.P.'s petition and to grant its counterclaim for tuition reimbursement. The District presented testimony from Josepha Lopez, the registrar and attendance officer in West Orange, regarding R.P.'s attendance and the tuition rate for the school district. The matter was held until Monday, June 6, 2005. Since no communication was received from the petitioner by the court by that date, the respondent's motion to dismiss G.P.'s petition was granted.

ISSUES

1. Whether the petitioner is supporting the child gratis for longer than the school year as required by *N.J.S.A.* 18A:38-1b(1).

2. Whether the child's parents are incapable of supporting or providing care for the child due to a family or economic hardship.

3. Whether the respondent is entitled to tuition reimbursement.

4. Whether the child shall be Ordered to be removed from the district's high school.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess her credibility, I make the following **FINDINGS OF FACT:**

1. The petitioner enrolled his niece R.P. in the West Orange High School as an eleventh grade student on September 13, 2004.

2. Except for one or two days of absences, R.P. has attended the school on a regular basis from that date until the day of the hearing.

3. The tuition rate for a student attending the West Orange High School is $12,655.00 for the 2004-2005 school year.

4. G.P. failed to attend the scheduled hearing or to call the court to ask for an adjournment or to explain the reason for his failure to appear.

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - *N.J.S.A.* 18A:38-1(a). Under section b(1) of this statute, there are certain requirements for any person who is kept in the home of another person domiciled within school district. These requirements state that:

> The petitioner must show that they are supporting the child gratis and will assume all personal obligations for the child relative to school requirements; that he intends so to keep supporting the child gratuitously for a longer time than merely through the school term ...that the child's parents or guardian are not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The petitioner shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria.

Since the petitioner did not appear at the hearing, he failed to meet his burden of proving the statutory requirements. Based on the District's motion, his petition should be dismissed.

N.J.S.A. 18A:38 b(2) allows the district to apply for removal of the child from the District, if they do not meet the statutory requirement and to ask for the reimbursement of tuition costs during the period of ineligibility. The District presented testimony that the child attended school from September 13, approximately two school days after the semester began, until the date of the hearing. Since the school year will conclude at the end of the third full week of June, it is clear that the student has attended school for the entire school year.[1] Therefore, the entire tuition for the year is due and owing the District.

CONCLUSION

Thus, I **CONCLUDE** that the petitioner has failed to meet his burden under the statute. I further **CONCLUDE** that the District has met its burden under *N.J.S.A.* 18A:38 b(2) and is entitled to tuition reimbursement and removal of R.P. from the District.

ORDER

Based on the foregoing, I hereby **ORDER** that the petitioner's appeal of the District's residency denial be dismissed.

I further **ORDER** that the District's application for tuition reimbursement is hereby **GRANTED**.

I further **ORDER** that R.P. be removed from the District effective the last day of the 2004-2005 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

[1] Since the school will be in recess in less than one month, I see no reason to remove the student from West Orange High School prior to the end of the school year.

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

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

6/8/05
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

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

6/8/05
DATE

Mailed to Parties:

JUN 09 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Exhibits

For Petitioner

None

For Respondent

R-1 Tuition Costs

R-1

Tuition Costs
2004-2005

Pre-K & Kindergarten	$8,525
Grades 1-5	$9,632
Grades 6-8	$10,639
Grades 9-12	$12,655
EMR	$18,071
N.I.	$13,616
P.I.	$11,616
CH	$12,282
ED	$18,071
PSH	$12,908

252-05

OAL DKT. NO. EDU 4599-05
AGENCY DKT. NO. 163-6/05

MARK ZYDIAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE CHARTER-TECH HIGH SCHOOL FOR THE PERFORMING ARTS, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on July 7, 2005, the papers submitted by the parties and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Commissioner in making his determination herein.

Upon such review, the Commissioner concurs that the emergent relief sought by petitioner must be denied as moot. Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein and petitioner's request for emergent relief is, therefore, denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/05
Date of Mailing: 7/14/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 4599-05

AGENCY DKT. NO. 163-6/05

MARK ZYDIAK,

Petitioner,

v.

BOARD OF TRISTEES OF THE CHARTER-TECH HIGH SCHOOL FOR THE PERFORMING ARTS, ATLANTIC COUNTY,

Respondent.

Mark Zydiak, petitioner, *pro se*

Garry Griffith, Esq., for respondent (Griffith and Carlucci, attorneys)

BEFORE **BRUCE M. GORMAN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 21, 2005 petitioner filed a letter *pro se* with the Commissioner of Education which he characterized as a, "...Motion for Emergent Relief to restore me Marc Zydiak...to my position as Vice Principal of the chARTer~TECH High School for the Performing Arts..." In his moving papers, petitioner asserted that respondent's Board of Education was scheduled to meet on June 22, 2005, at 7:00 p.m. to consider a motion to terminate his contract with

respondent's school district. Petitioner sought to enjoin respondent from taking such action so that he could be "restored" to his administrative position.

The Division of Controversies and Disputes transferred the case to the Office of Administrative Law on June 29, 2005, and the matter was set down to be heard on an emergent basis on July 7, 2005. On that date, the parties appeared before me, and petitioner reiterated his demand to be restored to his position as Vice Principal at respondent's school.

However, petitioner also stated that on June 28, 2005, respondent's Board of Education met and voted to terminate his employment. Consequently, admitted petitioner, the emergent relief he sought was no longer available to him because respondent's Board had already acted, and therefore, any Order enjoining respondent from taking such action would have no effect.

Given that respondent's Board has already acted, the emergent relief sought by petitioner must be **DENIED** as moot.

The remaining question before me is whether this Order disposes of the appeal. I have reviewed petitioner's letter-petition carefully, and I am satisfied that although couched in terms of a "Motion for Emergent Relief," the petition's true purpose is to seek petitioner's reinstatement to his former position as Vice Principal of respondent's school. That matter can and should proceed to trial in the ordinary course.

ORDER

I **ORDER** that petitioner's application for emergent relief be **DENIED.** A **plenary hearing** is scheduled for **October 20, 2005,** for **9:00 a.m.**, at the OAL office located at 1601 Atlantic Avenue, Atlantic City. New Jersey.

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

7/7/05
DATE

BRUCE M. GORMAN, ALJ

/sd

APPENDIX

Documents In Evidence

For Petitioner:

None

For Respondent:

None

Witnesses

For Petitioner:

None

For Respondent:

None

253-05

#253-05

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS WACHENDORF,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, MOUNTAINVIEW	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

SYNOPSIS

The Department of Corrections (DOC) filed tenure charges of conduct unbecoming against Thomas Wachendorf, a tenured teacher at Mountainview Youth Correctional Facility, and sought his removal following an incident on May 2, 2004 which led to his arrest on charges of resisting arrest, obstruction of justice, eluding, and for failure to report his arrest to DOC within 48 hours.

The ALJ found -- based on testimony presented at hearing and the police videotape of the incident in question -- that the actions and conduct of the respondent constitutes unbecoming conduct so egregious as to warrant dismissal from respondent's tenured teaching position, and so recommended in his Initial Decision.

Upon careful review and consideration, the Commissioner adopts the OAL's Initial Decision, concluding that the record amply establishes that respondent's behavior on May 2, 2004 constituted conduct unbecoming a teaching staff member, and further concurs that dismissal from his tenured teaching position is warranted. The Commissioner emphasizes that the focus here is not the respondent's guilt or innocence regarding specific criminal charges, but rather whether his exhibited behavior underlying those charges amounts to unbecoming conduct; the behavior in question evidences total disregard and disrespect for the law and the authority of law enforcement officials, and is directly contrary and inimical to the expectations placed on teaching staff members – particularly an educator in a corrections facility which is charged with encouraging the rehabilitation of incarcerated persons and reintegrating them into the community as law abiding citizens. Accordingly, the respondent is hereby dismissed from his teaching position with DOC as of the date of this decision and the Commissioner will refer this matter to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

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

July 14, 2005

OAL DKT. NO. EDU 6860-04
AGENCY DKT NO. 258-7/04

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS WACHENDORF,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, MOUNTAINVIEW	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent requested and received an extension of time within which to file exceptions to the Initial Decision. These exceptions and those of the New Jersey Department of Corrections ("DOC") were filed in accordance with the modified timeline.

Respondent's exceptions, in large measure, recast and reiterate his arguments advanced below. Specifically, he submits that he was not found guilty of the charges of eluding, resisting arrest, and obstruction of justice but, rather, entered Pre-Trial Intervention, which he completed on March 3, 2005, resulting in the dismissal of these charges. Moreover, respondent argues, the Administrative Law Judge (ALJ) in his Initial Decision does not conclude, even under the preponderance of the credible evidence standard, that he committed these underlying offenses which formed the basis of the tenure charges against him. Because the ALJ did not find respondent's conduct to constitute eluding, resisting arrest or obstruction, the specific conduct upon which the tenure charges are founded, dismissal from his tenured employment is unwarranted. (Respondent's Exceptions at 2)

Respondent charges that the ALJ recommends termination of his employment for unbecoming conduct, essentially based on two "findings": "(1) that [he] 'disregarded' a police/emergency vehicle for approximately one-half mile after he saw the vehicle (Initial Decision, p. 8) and, (2) that [he] waited 7 seconds before opening the door of his vehicle, which he had stopped in the driveway of his home, after a police officer shouted to him to exit the car." Respondent maintains that these "findings" neither constitute the crimes with which he was charged nor do they equate to conduct for which a tenured teacher should be terminated. (*Id.* at 2-3)

Next, although the ALJ finds the "most credible evidence" of the events which transpired on May 2, 2004 to be the videotape admitted into evidence, respondent submits that "[his] description of the images captured on the video is selective and misleading." (*Id.* at 4) Respondent presents his version of, what he categorizes as, "[t]he undisputed facts" evidenced on the videotape, corroborated by his testimony and that of his witnesses, and submits that the ALJ's two findings, for which he recommended respondent's termination from his position, must be viewed in light of these facts which, he avers, represent the "context of the entire off-duty incident." (*Id.* at 4-6)

Further, even assuming, *arguendo*, that any aspect of his actions on May 2, 2004 could be construed as unbecoming conduct, respondent cites to a string of education law cases involving charges of unbecoming conduct or other just cause where termination was found to be the appropriate penalty and submits that the two findings which the ALJ in the present matter found sufficient to sustain the tenure charges against him are far less egregious and fall well short of the type of conduct which the Commissioner has deemed sufficient to terminate a tenured teacher. (Respondent's Exceptions at 16) Also, again referencing his cited cases,

respondent points out that tenure charges of unbecoming conduct have been sustained by the Commissioner in instances where there is a nexus between the teacher's conduct and his or her fitness for duty. Here, in contrast, he avers, the May 2, 2004 incident "was a one-time circumstance, occurring off-duty, not involving any students, and unconnected to [his] position as a teacher." (Id. at 19) The ALJ's attempt to fashion a nexus between his two findings and respondent's fitness to teach with his off-handed assertion that "allowing Wachendorf to continue teaching in a correctional facility sends the wrong message to the Mountainview residents," respondent maintains, is conclusory and purely speculative in nature, as there is no evidentiary support that Mountainview students are even aware of the tenure charges or that respondent would not be able to perform his duties effectively upon reinstatement. (Respondent's Exceptions at 17-18) Moreover, he asserts, in making his penalty recommendation the ALJ erred in failing to consider any mitigating factors. Respondent submits that he is a 13-year State employee, with no prior history of discipline. Pursuant to *West New York v. Bock*, 38 *N.J.* 500 and its progeny, which espouse the principle of progressive discipline, an employer is obligated to review an employee's entire record before meting out discipline. It is abundantly clear, respondent argues, that given his long, unblemished work history, the first step in the disciplinary process cannot be termination. (*Id.* at 19-20)

Finally, respondent points out that the ALJ determined that the DOC's Human Resources Bulletin 84:19 is unreasonable and unenforceable (Initial Decision at 10), and, therefore, clearly erred when he, nonetheless, found respondent guilty of violation of this policy and imposed a two-week suspension for such violation. Not only is it impossible for an unenforceable policy to form the basis for a tenure charge, he argues, but the instant record neither establishes that respondent's conduct with respect to the notice provision of this policy

equated to unbecoming conduct nor does it provide a basis for a two-week suspension. (Respondent's Exceptions at 21-22)

The DOC's exceptions concur with the findings and conclusions of the ALJ with one objection. It professes that the ALJ made a factual finding which is in error and must be rejected by the Commissioner. Specifically, with respect to the construction and interpretation of the DOC's Human Resources policy, HRB 84-19, the ALJ found as fact:

> [t]he position of Corrections that only the employee can notify the institution of an arrest, only the immediate supervisor can receive notification, and that both must be done within 48 hours of the arrest is arbitrary, capricious and unreasonable. A policy which does not allow for serious medical conditions, or vacations or absences of personnel cannot be considered reasonable and enforceable. (Initial Decision at 9-10)
> (DOC's Exceptions at 2)

The DOC submits that neither the construction of this policy nor the DOC's interpretation of it were at issue at the hearing and there was no testimony with respect to either of these topics. Consequently, the DOC charges, the record contains no credible evidence in support of this finding. Moreover, it proposes, this finding is not necessary to the ALJ's valid conclusion that the policy was violated as "neither Wachendorf nor his representative, notified Corrections of Wachendorf's arrest until after a Readington police officer advised Mountainview Principal Investigator Smith on May 10 of the incident." (Initial Decision at 10) (DOC's Exceptions at 3)

Upon careful review and consideration of the record in this matter, which included transcripts of the three days of hearing conducted at the OAL[1] and a videotape of the May 2, 2004 incident at issue herein, the Commissioner, finding respondent's exception advancements without merit, determines to adopt the Initial Decision of the ALJ, as he concludes that the record before him amply establishes that respondent's behavior with respect to the

[1] Hearing was held on December 1, 2004, January 4, 2005 and February 4, 2005.

incident surrounding the DOC's tenure charges constitutes conduct unbecoming a teaching staff member. He further concurs with the ALJ that, under the circumstances existing here, respondent's dismissal from his tenured teaching position is warranted.

In so determining, the Commissioner first finds that the criminal justice system outcome of the criminal charges which form the basis of Count 1 of the tenure charges is wholly irrelevant here. It is well settled that diversion or dismissal of criminal charges has no impact whatsoever on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville*, 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, *aff'd* State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph*, 1980 *S.L.D.* 721, *aff'd* State Board, 1980 *S.L.D.* 728, *aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District*, 96 *N.J.A.R.* 2d (EDU) 726. Such is the case because of the fundamental differences in the purpose and scope of these adjudicating forums. Not only is the quantum of proof necessary to sustain criminal charges significantly enhanced from that required to prove tenure charges in administrative proceedings, *i.e.*, beyond a reasonable doubt as opposed to a preponderance of the credible evidence, but, most significantly, the interests implicated in a tenure matter are intrinsically distinct from those in a criminal matter. As observed by the Commissioner in *Dusel, supra*:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (at 531)

For the above reasons, it is neither possible nor necessary for the ALJ to find respondent "guilty" of the criminal charges by a preponderance of the credible evidence in order to reach a determination of unbecoming conduct, notwithstanding these charges form the basis of the tenure charge against him. Rather, the touchstone of a charge of unbecoming conduct is fitness to discharge the duties and functions of one's office or position. *See Laba v. Newark Board of* Education, 23 *N.J.* 364 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), *certif.* denied 65 *N.J.* 292 (1974) Said differently, a finding of unbecoming conduct does not require a violation of any specific law, rule or regulation, but is based primarily on a violation of an implicit standard of good behavior. Thus, the focus of the inquiry in this tenure matter is not respondent's guilt or innocence of specific criminal charges but, rather, whether his exhibited behavior underlying those charges amounts to unbecoming conduct.

The Commissioner, next, rejects as incongruous respondent's categorization of the factual underpinnings upon which the ALJ based his determination and criticism of his recitation of the events which transpired on the police videotape. More particularly, upon his reasoned review of both the transcripts and the videotape, the Commissioner is in full agreement with the ALJ's summarization in this regard:

> Having viewed the video during the hearing and again in preparation of this decision[,] I find the testimony of Thomas Wachendorf to be incredible and the testimony of Robert Wachendorf to be unsupported by the video. The overhead flashing lights on DeWire's vehicle were in operation for 4 minutes and 15 seconds before Wachendorf entered his driveway and are seen reflecting off Wachendorf's car. DeWire's siren was sounding for the final 3-1/2 minutes of the pursuit; the loud "squawk" horn was heard on the video tape for approximately 3 minutes. Automobiles approaching Wachendorf and DeWire from the opposite direction pulled to [the] shoulder of the road as required by law. After Wachendorf finally stopped his car and DeWire walked to the driver's door, Wachendorf delayed opening

> the car door. Wachendorf waited 7 seconds – and four shouts from DeWire – before starting to open the door. I noted that DeWire holstered his weapon before ordering Wachendorf to exit his vehicle. Wachendorf admitted that he saw DeWire's car behind his vehicle before Wachendorf turned into his driveway, yet he did not drive to the shoulder of the road and stop. Wachendorf traveled about ½ mile knowing a police car was behind his vehicle, signaling Wachendorf to stop. When Wachendorf finally stopped he made no effort to inquire why he was being pursued. On the contrary, *Wachendorf's every effort – during and after the police pursuit – "stone-walled" the police.* I **CONCLUDE** that Wachendorf's disregard of the police/emergency vehicle and the police officer is conduct which brings discredit to himself and his public employer. ***(Initial Decision at 7-8) (emphasis supplied)

Like the ALJ, the Commissioner is persuaded that the respondent's explanations for his actions lack substance. He offers a curious concatenation of events to explain his behavior which, the Commissioner observes, lack persuasive evidential corroboration in the within record. Rather what is abundantly apparent is that respondent's deportment *throughout* this incident evidences a total disregard and disrespect for the law and the authority of law enforcement officials. Such behavior is directly contrary and inimical to the expectations placed on teaching staff members and, undeniably, conduct unbecoming a teacher, most particularly for an educator in a corrections facility which is charged with the responsibility of "provid[ing] an environment for incarcerated persons which encourages rehabilitation and reintegration into the community" (*N.J.A.C.* 10A:1-1.1(6)) as law abiding citizens.

Finally, turning to the requirement of notification of arrest, pursuant to DOC's Human Resources Bulletin 84-19, as amended, (Exhibit P-2), to the extent that the DOC may interpret this policy to require that only the employee may notify of an arrest and that notification must be communicated directly to the employee's immediate supervisor within 48 hours, the Commissioner concurs with the ALJ that such a stringent requirement, under a number of circumstances such as those existing here, would be impossible to satisfy and, therefore, would

render application of the policy arbitrary, capricious and unreasonable. However, the Commissioner finds it unnecessary to reach to the reasonableness of the policy as applied here as he agrees with the ALJ that there is no evidence in the record that *anyone* notified Wachendorf's supervisor *or any other person at his job site* of his arrest within 48 hours of such arrest.

In considering the appropriate penalty in this matter, the prior education law decisions cited by respondent in support of mitigation of penalty in consideration of what he claims is the "less serious" nature of his offense, his 13-year exemplary work record and his contention that his conduct here was not work related, are not particularly beneficial to him in the context of this case. As elucidated in *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185:

> The Commissioner finds significant differences between these ***cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion *each matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.* (Ostergren, at 188) (emphasis supplied)

Said differently, because in tenure matters each case is extremely fact sensitive, meaningful comparisons between cases can be difficult to make. The Commissioner's full review persuades him that none of the cases advanced by respondent is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for respondent's position.

The Commissioner, additionally, does not share respondent's belief that because the incident at issue herein occurred while he was off-duty and didn't involve students that there

is no nexus between his offending actions and fitness for his position. Rather, as correctly observed by the ALJ:

> The responsibility of a teacher is not mitigated by when or where the improper behavior occurs nor the backgrounds of his/her students. Whether teaching in a suburban school district, inner-city school, or a State youth correctional facility, the teacher must set the standard of appropriate conduct. Respect for lawful authority becomes a greater responsibility for the teacher of a student body who [has] already demonstrated a great lack of respect for the rule of law. Wachendorf's return to his classroom at Mountainview would be vindication of his flaunting of lawful authority. ***Permitting Wachendorf to return to Mountainview, ***makes a farce of the risk associated with interfering, ignoring and obstructing law enforcement officers at work.
> (Initial Decision at 8-9)

Although duly considering respondent's lengthy, apparently unblemished record with the State, the Commissioner concludes that these factors, which ordinarily could serve to militate against respondent's dismissal, are greatly outweighed by the seriousness of his conduct in this matter. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) The Commissioner concludes that such is the case here.[2]

---

[2] It is noted that the civil service concept of progressive discipline plays no role whatsoever in this matter. Although as a State employee, respondent's employment rights and responsibilities are generally controlled by the provisions of Title 11A and the implementing regulations set forth in Title 4A, as a State employee working as a teacher in a State institution, respondent was granted tenure pursuant to *N.J.S.A.* 18A:60-1.1 which specifies:

> The Legislature hereby finds that it is in the best interest of the State of New Jersey to provide job security during good behavior and efficiency for the teachers and other certified professional educators employed in State institutions within the Department of Corrections and the Department of Human Services.

Accordingly, for the reasons expressed therein, the Commissioner adopts the Initial Decision of the OAL, and hereby orders that Thomas Wachendorf be dismissed from his teaching position with the New Jersey State Department of Corrections, Mountainview Youth Correctional Facility as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/05

Date of Mailing: 7/14/05

To accomplish this goal it is appropriate to provide tenure protection for such professionals teaching in such State institutions *subject to the provisions set forth in this act.* (emphasis supplied)

As such, dismissal or reduction of salary for these individuals for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause is governed by subarticle B of article 2 of chapter 6 of *N.J.S.A.* 18A. (*See N.J.S.A.* 18A:60-2), not rules and regulations of civil service.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6860-04

AGENCY DKT. NO. 258-7/04

IN THE MATTER OF THE TENURE HEARING OF THOMAS WACHENDORF, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, MOUNTAINVIEW CORRECTIONAL FACILITY.

Christopher Josephson, Deputy Attorney General, appeared for the Department of Corrections (Peter C. Harvey, Attorney General of New Jersey, attorney)

Annemarie Pinarski, Esq., appeared for Thomas Wachendorf (Weinsmann & Muntz, LLC, attorneys)

Record Closed: April 19, 2005 Decided: May 3, 2005

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Department of Corrections ("Corrections") seeks the removal of Thomas Wachendorf ("Wachendorf") from his tenured position of Teacher 1 at the Mountainview Youth Correctional Facility ("Mountainview") pursuant to *N.J.S.A.* 18A:6-10 for unbecoming conduct or other just cause arising from his actions on May 2, 2004 leading to his arrest on charges of

Wachendorf stopped at the stop sign at the intersection of School Road and Pulaski Road, but continued across the intersection onto Koscusko Road. He did not pull to the right shoulder of the road nor did he stop. Wachendorf drove the entire length of Koscusko Road, stopped at its intersection with Readington Road and continued onto Holland Brook Road. Wachendorf entered the long driveway to his home and finally stopped in front of his house. DeWire followed Wachendorf for more than two miles; the entire pursuit was videotaped (Exhibit P-7) once DeWire activated his emergency lights.

Sergeant Scott Crater ("Crater") joined DeWire's chase of Wachendorf. Crater heard DeWire's radio transmission and went to back-up DeWire. Crater reached DeWire on Holland Brook Road and followed Wachendorf and Crater for a half-mile until Wachendorf reached his home. Crater confirms that the emergency lights and siren on DeWire's patrol car were in operation at the time.

DeWire and Crater approached Wachendorf's car. DeWire ordered Wachendorf to exit the vehicle. Wachendorf did not immediately respond to DeWire's order, but after "a few seconds" Wachendorf opened the front, driver-side door. DeWire handcuffed Wachendorf's wrist and pulled Wachendorf from the car, placing Wachendorf on the ground to complete the handcuffing process. Wachendorf first drew himself into a fetal position before turning onto his stomach. After being handcuffed Wachendorf was assisted to his feet to be taken to the patrol car.

Sean D. McMurty is an assistant Mercer County prosecutor. On Sunday May 2, 2004, McMurty was driving on Housel Road approaching its intersection with Holland Brook Road when he saw Wachendorf's car traveling south on Holland Brook Road and DeWire's patrol car approximately 4-to-5 car lengths behind. McMurty testified that the police car's overhead lights were flashing at the time. McMurty followed Wachendorf and DeWire and a second, unmarked police car into the Wachendorf driveway. McMurty parked a distance away from the three cars and walked up the driveway to observe the situation. DeWire and Crater stood over Wachendorf. Wachendorf was "very still, very tense;" one police officer placed his hand on Wachendorf's leg to complete the handcuffing. After being handcuffed Wachendorf would not stand; the officers pulled at Wachendorf's arms to get Wachendorf to stand. As the officers walked Wachendorf to

Robert Wachendorf also lives at the Holland Brook Road address. Thomas lives in the main house with his father and mother, Robert and his wife live in another dwelling on the farm. Robert saw Thomas drive into the yard on May 2. Robert described the scene, beginning with Thomas starting to open the car door and continuing with the two officers "grabbing" Thomas and "throwing him on the ground." Robert thought the officers were kneeling on Thomas; they "picked him up and put him in the back of the second police car." Thomas was not resisting but was totally compliant."

Bruce Fralinger is the Staff Representative of Local 1040 of the Communications Workers of America. Fralinger testified to his two attempts to reach Wachendorf's immediate supervisor and the letters (Exhibit R-2, -3, -4, and -5) he sent to Corrections to confirm and verify the notice given to Mountainview of Wachendorf's arrest and hospitalization.

On May 10, 2004, Greg Bartkowski, Associate Administrator at Mountainview learned that Wachendorf had been arrested by the Readington Police Department on May 2. Bartkowski testified that he was a secondary supervisor of Wachendorf; a Ms. Hansen was Wachendorf's immediate supervisor. Hansen did not mention Wachendorf's arrest when Bartkowski inquired of Wachendorf's attendance record after May 2.

Wachendorf was charged with eluding police, obstruction of the administration of law, and resisting arrest. On July 9, 2004 Wachendorf signed a waiver of indictment on the charge of eluding police and obstruction of the administration of law. A complaint and summons was issued to Wachendorf on the resisting arrest charge. Wachendorf was admitted into the Pre-Trial Intervention Program in Hunterdon County for 12 months.

ANALYSIS AND CONCLUSION

Conduct unbecoming a public employee has been defined to include "any conduct with adversely affects the moral or efficiency of a public entity, conduct which has a tendency to destroy respect for public employee and their appointing authorities, or conduct which destroys confidence in public service." "*Washington v. John J. Montgomery Medical Home,* 96 *N.J.A.R.* 2d. (CSV) 100, 102. To demonstrate unbecoming conduct the public authority does not have to

overborne by other testimony.' *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). "*Mack v. Forensic Psychiatric Hospital*, 96 *N.J.A.R.* 2d (CSV) 269, 272-273.

In this matter, the testimony of the witnesses for Corrections concerning the incident is disputed as inaccurate and untrue by the testimony of Wachendorf and his brother. It is thus my obligation and responsibility to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. *Carbo v. United States,* 314 *F. 2d* 718 (9th Cir. 1963). The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor,* 38 *N.J. Super* 6, 24 (App. Div. 1955); See, also, *Gilson v. Gilson,* 116 *N.J. Eq.* 556, 560 (E. & A. 1934). A fact finder is expected to base decisions of credibility on his or her own common sense, which is also referred to as intuition or experience. *Barnes v. United States,* 412, U.S. 837 (1973).

The Readington Township police vehicles are equipped with video cameras, which are connected with the roof-top flashing emergency lights. When DeWire activated the flashing lights on his vehicle the video camera began to capture the events in front of the police vehicle. The old adage that one picture is worth 10,000 words is not only appropriate, but when expanded to 5 to 10 minutes of continuous pictures is the most credible evidence of the events of the morning and worth more than the testimony of all the witnesses.

Having viewed the video during the hearing and again in preparation of this decision. I find the testimony of Thomas Wachendorf to be incredible and the testimony of Robert Wachendorf to be unsupported by the video. The overhead flashing lights on DeWire's vehicle were in operation for 4 minutes and 15 seconds before Wachendorf entered his driveway and are seen reflecting off Wachendorf's car. DeWire's siren was sounding for the final 3½ minutes of the pursuit; the loud "squawk" horn was heard on the video tape for approximately 3 minutes. Automobiles approaching Wachendorf and DeWire from the opposite direction pulled to shoulder of the road as required by law. After Wachendorf finally stopped his car and DeWire

If, as stated by the Commissioner in *In re McIntyre, ibid.*, "educators of this state serve as role models, they are required to set a good example for the children entrusted to them," allowing Wachendorf to continue teaching in a youth correctional facility sends the wrong message to the Mountainview residents. Permitting Wachendorf to return to Mountainview, regardless of the reduction in compensation, makes a farce of the risk associated with interfering, ignoring and obstructing law enforcement officers at work.

The second charge against Wachendorf "failure to notify supervisor within 48 hours of an arrest" in violation of Department of Corrections Human Resources Bulletin ("HRB") 84:19, as amended. The decision and penalty recommended for the unbecoming conduct charge, if accepted, would render most discussion of the notification charge. Nevertheless and analysis of the testimony and documentary evidence should be included in order to dispose of all of the issues in this matter.

The parties do not dispute that Wachendorf did not personally notify anyone at Mountainview within 48 hours after his arrest by the Readington Police. Wachendorf admits that those 48 hours were spent in the custody of the police, at Hunterdon Medical Center, and at home recuperating from Sunday's trauma. Wachendorf is sure someone – probably his brother – called Mountainview on the Monday or Tuesday after the arrest; Wachendorf could not recall exactly who called either day. Wachendorf testified that on Tuesday, May 4, he went to see Harold J. Bush, Esq., an attorney retained by Wachendorf's brother. On that day Wachendorf told Bush to notify Corrections of the arrest, emphasizing the importance of the notice. Bush's June 9 letter to Bruce Fralinger. (Exhibit R-3) affirms that Bush called Mountainview "on or about May 5" to speak with Linda Hansen. Instead of speaking to Hansen, Bush spoke with Bartkowski. Bush's letter and the additional correspondence from Fralinger to the Director of the Office of Education in Corrections (Exhibit R-4 and -5) explain Wachendorf's physical condition after he was released by the police and presume Corrections had notice of Wachendorf's arrest.

The residuum rule (*N.J.A.C.* 1:1-15.5(b)) precludes the ultimate Finding of Fact that Bush notified Wachendorf's supervisor of Wachendorf's arrest within 48 hours of the arrest. The position of Corrections that only the employee can notify the institution of an arrest, only the

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

May 3, 2005
DATE

ANTHONY T. BRUNO, ALJ

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

May 3, 2005
DATE

Mailed to Parties:

MAY 9 2005

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

For Thomas Wachendorf:

R-1 Contract Between CWA and State of New Jersey (7/1/03 – 6/30/07)

R-2 Correspondence: Wachendorf to Director of Office of Education, Department of Corrections (6/8/04)

R-3 Correspondence: Harold J. Bush, Esq., to CWA (6/9/04)

R-4 Correspondence: CWA to Director of Office of Education with medical report (6/17/04)

R-5 Correspondence: CWA to Director of Office of Education with additional medical information

R-6 Annual Performance Evaluation Report (APER) – 6/15/02 to 6/14/03

R-7 APER – 6/15/01 to 6/14/02

R-8 Hunterdon Medical Center Emergency Record

254-05

OAL DKT. NO. EDU 2854-05
(EDU 10205-04 ON REMAND)
AGENCY DKT. NO. 369-10/04

IN THE MATTER OF THE TENURE	:	
HEARING OF BETTY HERRING,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
CAMDEN, CAMDEN COUNTY.	:	
	:	

The Initial Decision on Remand of the Office of Administrative Law (OAL), the parties' revised settlement agreement, and the record of this matter have been reviewed,[1] mindful of the Commissioner's May 3, 2005 determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge failed to address the standards of *Cardonick, infra*, contained no indication of Board of Education approval, and suggested restrictions on access to documents which are by law public records.

Upon review of the revised agreement and record on remand, the Commissioner approves the settlement terms, since they now comport with the *Cardonick* standards for review of settlements in tenure matters and have been approved by the Board of Education.[2] *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The Commissioner adopts the settlement as the final decision in

[1] On July 11, 2005, the Board filed a letter brief in support of the settlement agreement. However, because applicable rules of the OAL (N.J.A.C. 1:1-19.1) make no provision for such submissions, the Board's filing has not been considered herein.

[2] The Commissioner notes the Board attorney's letter dated July 1, 2005, attesting to the Board's approval of the revised settlement at its June 16, 2005 meeting and enclosing a revised signature page bearing her signature as the Board's authorized representative in this matter.

this matter, which is hereby dismissed, subject to compliance with the terms of the settlement and subject to the understanding that the agreement shall be interpreted in a manner consistent with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq*. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/05

Date of Mailing: 7/18/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2854-05

(ON REMAND EDU 10205-04)

AGENCY DKT. NO. 369-10/04

IN THE MATTER OF THE TENURE HEARING OF BETTY HERRING, SCHOOL DISTRICT OF THE CITY OF CAMDEN.

Jennifer Mazaway, Esq., for Camden Board of Education (Genova, Burns & Veronia, attorneys)

James Katz, Esq., for Betty Herring (Jennings Sigmund, attorneys)

Record Closed: June 20, 2005 Decided: June 22, 2005

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

This matter was remanded by the Commissioner of the New Jersey Department of Education to the Office of Administrative Law (OAL) on May 11, 2005, further expansion of the record and revision of the Settlement Agreement.

On June 20, 2005, the parties filed an revised Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

June 22, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

6-24-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

CAMDEN CITY BOARD OF EDUCATION

AND

BETTY JANE HERRING

SETTLEMENT AGREEMENT

The Petitioner Camden City Board of Education (hereinafter referred to as the "Board") and Respondent Betty Jane Herring (hereinafter referred to as either "Ms. Herring" or "the Respondent"), collectively referred to as "the parties," being fully aware of the requirements for a Settlement Agreement as announced by the State Board of Education in the matter entitled *In Re Cardonick*, 1990 S.L.D. 842, 846 (April 8, 1983), hereby agree that this matter shall be deemed settled and withdrawn, based upon the following terms and conditions, subject to the approval of the Administrative Law Judge and the Commissioner of Education.

WHEREAS, Ms. Herring as a tenured teacher and administrator, has been employed by the Board as a biology teacher at Camden High School between 1976 and 1989; as an assistant principal at Hatch Middle School from 1989 through 1993; as an assistant principal at Lincoln Elementary School from 1993 to 1994; as an assistant principal at the W. Powell School from 1994 through 1997; as vice principal at Camden High from 1997 through 2001; and as principal of Camden High from July of 2001 through March 29, 2004; and

WHEREAS, the Board of Education certified tenure charges against the Respondent on or about October 15, 2004; and

WHEREAS, the Board of Education certified five (5) charges against the Respondent, alleging the following: 1. Respondent was guilty of neglect of duty and unbecoming conduct by not reporting acts of violence at Camden High School throughout the 2003-2004 school year; 2. Respondent was guilty of neglect of duty and conduct unbecoming by refusing and/or failing to evaluate non-tenured staff; 3. Respondent was insubordinate to the Superintendent and/or her supervisors by failing and/or refusing to comply with orders and instructions from the Superintendent and/or the Assistant Superintendents; 4. Respondent was guilty of neglect of duty, conduct unbecoming and/or insubordination by refusing and/or failing to comply with direct orders and instructions from the Superintendent and/or Assistant Superintendents relative to implementing the corrective action plan for Camden High School; 5. Respondent was guilty of neglect of duties in failing and/or refusing to ensure that Camden High School basketball team was in full compliance with N.J.S.I.A.A. rules, as necessary; and

WHEREAS, the Statement of Charges is attached hereto as Exhibit 1 ; and

WHEREAS, none of those tenure charges involve any criminal allegations or inappropriate behavior towards a student or encompassed any issues relating to Ms. Herring's

fitness to be a teacher, personal integrity, or to act as an administrator in a different setting, but concerned alleged allegations primarily regarding neglect of duty and insubordination between September 2003 and March 2004 at Camden High School; and

WHEREAS, Ms. Herring on or about November 4, 2004 filed an Answer and Affirmative Defenses to those charges, vigorously denying the factual allegations set forth in the charges and raising a number of affirmative defenses; and

WHEREAS, a copy of Respondent's Answer and Affirmative Defenses is attached hereto as Exhibit 2; and

WHEREAS, Ms. Herring's efforts as an educator and administrator have been recognized in the community and by her peers and she received satisfactory performance evaluations from the District (see Exhibits A through L attached to Exhibit 2) ; and

WHEREAS, at no time was Ms. Herring's salary withheld or rescinded in connection with any of the tenure charges that were filed against her; and

WHEREAS, after the filing of tenure charges and Respondent's answer as well as an initial review of discovery, it became clear that there were going to be factual and legal issues relating to the tenure charges; and

WHEREAS, the Board is aware of the risks involved in litigating this matter to conclusion, in that the Respondent may not ultimately be dismissed from her position; and

WHEREAS, the Board would like to move the district forward with its current core of administrators; and

WHEREAS, it would be in the best interests of the community to resolve the outstanding issues without the necessary expense and time constraints placed on district employees to testify at hearing, especially in light of the risks involved in litigating this matter; and

WHEREAS, Respondent does not intend to seek a position as an administrator in a public school district in the State of New Jersey; and

WHEREAS, Ms. Herring is of retirement age and eligible to retire and she has been fully advised of her rights; and

WHEREAS, based upon the totality of the circumstances, both parties determined that the public interest would be served by an amicable resolution of this matter, and settlement would be prudent and in the interest of the parties, this Agreement is made and entered into this _____ day of _____, 2005 by and between Betty Jane Herring and the Camden Board of Education and is intended to amicably resolve all pending matters related to the employment of Betty Jane Herring by the Board as follows:

1. Betty Jane Herring agrees to retire from employment with the Board no later than September 1, 2005. Ms. Herring's irrevocable letter of resignation from employment with the Board effective no later than September 1, 2005 as a result of her retirement is attached hereto as Exhibit 3. She further understands that in entering into this settlement agreement, her letter of retirement is irrevocable.

2. The Board agrees to withdraw the tenure charges which have been filed against Betty Jane Herring and to remove from her files any and all references to such charges.

3. Betty Jane Herring will continue to be paid her contractual salary and all available contractual benefits as a Board employee up to the date of her retirement, but in no instance later than August 31, 2005. Her records with the Board will reflect that she was on a paid leave of absence up to her retirement date.

4. As a result of her retirement from the Board, the Board agrees to pay Betty Jane Herring for her unused accumulated sick leave days and her earned but unused vacation days and any other benefit to which she is entitled upon retirement, pursuant to and in accordance with the terms of the collective bargaining agreement between the Camden Board of Education and the Camden City Federation of School Administrators, Local 39.

5. The Board agrees that upon request for a reference from any prospective employer, the only information provided will be Ms. Herring's dates of employment with the Board, her titles and positions held; and salary information.

6. In consideration for the above, Ms. Herring agrees to waive any and all claims she has against the City of Camden Board of Education with regard to the subject matter of this Agreement, including any claims for pay beyond the scope of paragraphs 3 and 4, counsel fees or other monetary relief.

7. The parties agree that they have been duly represented by their respective attorneys and that they have voluntarily, without coercion, agreed to the resolution of the matters related to Ms. Herring's employment by the Board of Education as set forth above.

8. Both parties fully understand all of the terms of this Settlement Agreement and have voluntarily enter into and consent to this Agreement as evidenced by the signatures below.

9. Respondent Betty Jane Herring has entered into this Agreement with a full understanding of her rights and has been fully advised that pursuant to N.J.A.C. 6A:9-17.6(a)(1), the Commissioner of Education may forward this matter to the State Board of Examiners for possible revocation or suspension of her certificates.

10. This Agreement contains all of the terms of the parties' Agreement and cannot be modified or changed unless all parties agree to do so in writing.

11. The parties agree that this Agreement shall be non-precedential and shall not be evidence of past practice or policy of the Board and has been entered into without any admission of liability or wrongdoing by either party.

IN WITNESS WHEREOF, the parties have signed, delivered and acknowledged this Agreement.

For the Camden Board of Education

By: _____
President of the Board

Dated: 6-16-05

By: _____
Board Secretary

Dated: 6/16/05

For Betty Jane Herring

By _____

Dated: 6/8/05

Witness: Tracy Schaffer

Dated: 6/8/05

The Camden City Board of Education approved this agreement at a public meeting held on June 16, 2005

_____
Jennifer Mazawey
Attorney for the
Camden City Board of Education

11. The parties agree that this Agreement shall be non-precedential and shall not be evidence of past practice or policy of the Board and has been entered into without any admission of liability or wrongdoing by either party.

IN WITNESS WHEREOF, the parties have signed, delivered and acknowledged this Agreement.

For the Camden Board of Education

By: _____
President of the Board

Dated: 6-16-05

By: _____
Board Secretary

Dated: 6/16/05

For Betty Jane Herring

By _____

Dated: 6/8/05

Witness: Tracy Schaffer

Dated: 6/8/05

GENOVA, BURNS & VERNOIA
354 Eisenhower Parkway
Eisenhower Plaza II
Livingston, New Jersey 07039
Tele: (973) 533-0777
Attorneys for the Camden City Board of Education

IN THE MATTER OF THE TENURE HEARING OF BETTY HERRING, CAMDEN CITY BOARD OF EDUCATION, CAMDEN COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref. No. O.A.L. Docket No. **CERTIFICATE OF DETERMINATION**

STATE OF NEW JERSEY :
SS:
COUNTY OF CAMDEN :

I, LEE E. BROCKINGTON, being duly sworn according to law upon my oath depose and say:

1. I am employed by the Petitioner, the Camden City Board of Education (hereinafter referred to as "the Board"), as the School Business Administrator/Board Secretary for the Camden City Public School District.

2. On September 8, 2004, the Respondent, Betty Herring, was served with tenure charges and supporting statement of evidence (hereinafter referred to as the "charges"), which contained the following charges of unbecoming conduct:

(a) CHARGE NO. 1: Ms. Herring is guilty of neglect of duty and unbecoming conduct for violating state law by not reporting acts of violence at Camden High School throughout the 2003-04 year.

(b) CHARGE NO. 2: Ms. Herring is guilty of neglect of duty and conduct unbecoming for violating state law by refusing and/or failing to evaluate

AHachmeetI

non-tenured teaching staff as required by statute and the Administrators' Contract and Teacher's Contract.

(c) CHARGE NO. 3: Ms. Herring has been insubordinate to the Superintendent and/or her supervisors, by failing and/or refusing to comply with orders and instructions from the Superintendent and/or the Assistant Superintendents.

(d) CHARGE NO. 4: Ms. Herring is guilty of neglect of duty, conduct unbecoming and/or insubordination by refusing and/or failing to comply with direct orders and instructions from the Superintendent and/or the Assistant Superintendent relative to implementing the corrective action plan for Camden High School.

(e) CHARGE NO. 5: Ms. Herring is guilty of neglect of her duties as a Principal in failing and/or refusing to ensure that the Camden High School basketball team was in full compliance with N.J.S.I.A.A. rules, as necessary.

(Exhibit 1)

In support of the charges, the Respondent was also served with the Statement of Evidence and Exhibits 1 through 39. (Exhibit 2).

3. On September 24, 2004, the Respondent filed a written statement of position in opposition to the charges. (Exhibit 3).

4. On October 13, 2004, the Board met in closed executive session at its Special Board meeting held at 201 N. Front Street, Camden, New Jersey, to review the merits of the charges. After evaluating the charges, together with the supporting statement of evidence, and the Respondent's written opposition thereto, the Board made the following determinations by a majority vote of its full membership:

(a) There is probable cause to credit the evidence in support of the five (5) charges of unbecoming conduct;

(b) The five (5) charges of unbecoming conduct and the evidence in support thereof are sufficient, if true in fact, to warrant the Respondent's dismissal from her employment with the Board; and

(c) The five (5) charges of unbecoming conduct shall be certified to the Commissioner of Education; and

(d) Respondent's current suspension with pay shall be continued.

5. The Board has directed me to file the charges, together with the instant certificate of determination, with the Commissioner of Education and to forthwith notify Betty Herring of the Board's determination.

6. On October 15, 2004, I served the Respondent as well as Respondent's counsel with notice of the Board's determination to certify the charges with the Commissioner of Education, by certified mail (Exhibit 4).

Lee E. Brockington, RSBO
School Business Administrator/Board Secretary

Sworn and subscribed to
before me this 18th day
of October, 2004.

Notary Public

MARIA J. DIAZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires [illegible]

f:\users\common\us5\1791\021 bh\certificate of determination.doc

STATEMENT OF CHARGES

I, Jan E. Gillespie-Walton, Assistant Superintendent for Curriculum and Instruction, do herewith charge that Betty Jane Herring, employed by the Board of Education of the City of Camden, as a tenured Principal, is guilty of neglect of duty and conduct unbecoming a Principal due to violations of state and federal statutes regarding the reporting of violence at Camden High School; violations of statute regarding the evaluations of non-tenured teaching staff; insubordination and other conduct unbecoming an employee so as to require that her employment with the Board of Education of the City of Camden be terminated. More particularly, it is charged that:

CHARGE NO. 1

Ms. Herring is guilty of neglect of duty and unbecoming conduct for violating state law by not reporting acts of violence at Camden High School throughout the 2003-04 year. On July 8, 2003, Camden High School was declared a persistently dangerous school under the federal No Child Left Behind Act. Beginning in September of 2003, Ms. Herring, as a Principal of Camden High School, began a pattern of unbecoming conduct, in an effort to subvert the No Child Left Behind statutory designation and in violation of the reporting requirements of the Electronic Violence and Vandalism Reporting Act, N.J.S.A. 18:17-46, et seq., Ms. Herring intentionally did not report incidents of violence. More specifically, although Camden High reported over two hundred incidents of violence in the 2003-2004 Academic Year, as of April 1, 2004, Ms. Herring submitted less than forty-five (45) reportable incidents for Camden High School in the 2003-2004 Academic Year (Exhibit 1). During this same time period, Ms. Herring received over one hundred seventy (170) incident reports from the school nurse and school law enforcement officer (Id.). As required by statute and school procedure, Ms. Herring was required to submit these

reports to the Chief of Security for evaluation and reporting to the State. Despite the fact that Ms. Herring submitted approximately forty-two (42) reportable incidents, during this time period, an ambulance was required to respond to the hospital over forty (40) times; teachers were assaulted; over one hundred and twenty-five (125) students were attacked and/or injured; weapons were recovered from students which included knives, a razor blade and a .45 Caliber handgun; and at least one student was sexually assaulted (Exhibits 1-6). By not reporting incidents of violence, Ms. Herring endangered the safety, health and welfare of the students and staff and prevented the District from learning of and properly addressing these safety issues which resulted in continued and/or escalating violence at Camden High School. Under reporting of violence also precluded the effective delivery of educational services to the students. Such conduct establishes Ms. Herring's unfitness to administer a school and violates the public trust placed with Ms. Herring as a tenured Principal. Ms. Herring's conduct also endangered the physical safety of the students and staff of the school she was charged with protecting. The above incidents are only examples of Ms. Herring's neglect of her duties and unbecoming behavior as a Principal which warrants her dismissal from the position of Principal in the Camden School District.

CHARGE NO. 2

Ms. Herring is guilty of neglect of duty and conduct unbecoming for violating state law by refusing and/or failing to evaluate non-tenured teaching staff as required by statute and the Administrators' Contract and Teacher's Contract.. N.J.S.A. 18A:27-31 mandates a minimum of three(3) evaluations per year for each non-tenured teaching staff member. The Collective Negotiation's Bargaining Agreement covering vice-principals and teachers specifies the time

period by which each of these three (Administrators) or four (Teachers) evaluations is to occur (Exhibit 7). Ms. Herring did not evaluate the Vice-Principals at Camden High School as required by statute and contract. Neither did she evaluate nor direct the proper evaluation of the teachers at Camden High School as required under the statute and the applicable Agreement (Exhibits 7-20). This conduct deprived the District of the opportunity to evaluate properly and review non-tenured teaching staff and deprived these teachers and administrators of the appropriate supervision and guidance for them to effectively instruct and supervise. Such conduct establishes Ms. Herring's unfitness to administer a school, and violates the public trust placed in Ms. Herring as a tenured Principal to adhere to the law and the appropriate Collective Negotiations Agreements. The above incidents are only examples of Ms. Herring's unbecoming behavior and warrant her dismissal from the position of Principal.

CHARGE NO. 3

Ms. Herring has been insubordinate to the Superintendent and/or her supervisors, by failing and/or refusing to comply with orders and instructions from the Superintendent and/or the Assistant Superintendents. For example, on or about October 9, 2003, when the Superintendent inquired regarding an incident of violence at Camden High School, Ms. Herring responded, "There was no fighting. No blood has been drawn. The only blood around here is on a pad between my legs." Despite being instructed by one of the Assistant Superintendents to apologize, Ms. Herring refused to apologize for this behavior (Exhibit 21) . Ms. Herring regularly failed and/or refused to comply with directives from her supervisors (Exhibit 22). Such conduct establishes Ms. Herring's insubordination, unfitness to administer a school, and violates the public trust placed with Ms. Herring as a tenured Principal to properly follow instruction

from the administrators to whom she reports. These are but examples of Ms. Herring's insubordination and unbecoming conduct which warrant her dismissal from the position of Principal in the Camden School District.

CHARGE NO. 4

Ms. Herring is guilty of neglect of duty, conduct unbecoming and/or insubordination by refusing and/or failing to comply with direct orders and instructions from the Superintendent and/or the Assistant Superintendents relative to implementing the corrective action plan for Camden High. Ms. Herring did not implement that plan or institute any significant changes at the school and failed to submit required updates regarding the safety measures at the high school despite numerous directives from the Superintendent and Assistant Superintendents (Exhibits 23-31) . By failing and/or refusing to comply with the corrective action plan and by failing and/or refusing to address the safety problems at Camden High School, Ms. Herring created and allowd a dangerous situation for students to continue at Camden High School. Such conduct establishes Ms. Herring's neglect of her duties; insubordination, unfitness to administer a school; and, violates the public trust placed in her as a tenured Principal to properly follow directives from the administrators to whom she reports. The above incidents are only examples of Ms. Herring's neglect of duties, insubordination and unbecoming behavior which warrant her dismissal from the position of Principal.

CHARGE NO. 5

Ms. Herring is guilty of neglect of her duties as a Principal in failing and/or refusing to ensure that the Camden High School basketball team was in full compliance with N.J.S.I.A.A. rules, as necessary. Ms. Herring was instructed to ensure compliance with the N.J.S.I.A.A. rules

for the boys' basketball team. During the 2003-2004 year, due to a late application and the use of a new player from Europe, without the proper notifications to the N.J.S.I.A.A., the boys basketball team was required to forfeit games they had won, lost the opportunity to host two tournament games, and was required to surrender a high initial ranking in the tournament and accept a lower ranking just in order to be allowed to play (Exhibits 32-39). Such conduct establishes unfitness to administer and govern a school, and violates the public trust placed with Ms. Herring as a tenured Principal to comply with all required rules and regulations and to follow instructions from the administrators to whom she reports. The above incidents are only examples of Ms. Herring's neglect of duty, insubordination and unbecoming conduct which warrant her dismissal from the position of Principal at the Camden Board of Education.

Jan E. Gillespie-Walton, Assistant
Superintendent, Curriculum & Instruction

Sworn to and subscribed by
and before me this 8th
day of September, 2004.

Notary Public

MARIA J. DIAZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires

JENNINGS SIGMOND
By: James Katz, Esquire
1040 North Kings Highway, Suite 300
Cherry Hill, NJ 08034
(856) 755-3484
Attorneys for Respondent Betty Jane Herring

In the Matter of the Tenure Hearing of Betty Herring, Camden City Board of Education, Camden County	:	Before the Commissioner of Education In the State of New Jersey Agency Reference No. 369-10/04 OAL Docket No.
	:	ANSWER AND AFFIRMATIVE DEFENSES ON BEHALF OF RESPONDENT BETTY HERRING

NOW HERE COMES, James Katz of Jennings Sigmond, P.C., and on behalf of Betty Jane Herring (hereinafter referred to as "Ms. Herring" or the "Respondent"), employed by the Board of Education of the City of Camden for 28 years, with the last 15 of those years as a tenured Assistant Principal or Principal, files the following Answer and Affirmative Defenses to the tenure charges brought against Ms. Herring by the School District of the City of Camden. Based upon an objective view of the totality of the circumstances and the evidence, there is not probable cause to credit the evidence in support of the charges and/or to justify Respondent's termination from employment, and these charges should be dismissed without the need for a hearing before the Office of Administrative Law.

The Respondent has spent her life devoted to education and has endeavored to provide a quality education for all Camden students, which is conducive to learning and personal, social, and academic growth. Between 1976 and 1989, the Respondent was employed as a biology teacher at Camden High School. From 1989 through 1993, she worked as an Assistant Principal

Attachment 2

at Cooper B. Hatch Middle School. From 1993 to 1994, she was Assistant Principal at Lincoln Elementary School, and employed Assistant Principal of the W. Powell School from 1994 through 1997.

In 1997, the Respondent became Vice-Principal of Camden High, where she worked from 1997 through 2001. During this time, she was responsible for assisting and supporting the building Principal with the administration and management of the building and instructional program. She was appointed Principal of Camden High School by the Board of Education (hereinafter "the Board") in July of 2001, and worked as Principal of Camden High from 2001 through March 29, 2004, when she was improperly transferred to the position of Acting Supervisor of Science at the Riggs Center.

Throughout this period of time, Ms. Herring's efforts have been recognized in the community and by her peers. The Respondent consistently received satisfactory performance evaluations from the District. She received the Camden County Board of Freeholders 1996 Women's Recognition Award in Education. In March of 1998, she received the New Jersey Alliance of Black School Educators Award for excellence in education. In January of 2000, she was asked to serve on the Middle States Accreditation Committee. In June of 2003, she received the first Presidential Cultural Diversity Award from the Camden City Council. In October of 2003, she was inducted into the National Association of University Women.

Throughout her employment, the Respondent was consistently praised for her efforts. On July 1, 1991, Jan E. Gillespie-Walton, currently the District's Assistant Superintendent for Curriculum and Instruction and formerly Respondent's immediate supervisor, wrote as follows:

> This letter of commendation is one that is long overdue. For, indeed, your efforts on both daily and weekly basis are commendable.

> You not only do the many things expected of an Assistant Principal, but go far beyond those expectations. It is most comforting and reassuring to realize that we are truly a team supporting and enhancing each other's efforts for the good of the organization.
>
> I could neither have asked for nor received more support, energy or effort from anyone. You have assisted in program development. You have soothed ruffle feathers and connective calmed trouble times. You are both a strong disciplinarian and gentle surrogate parent. You are quick to praise and eager to constructively assist in professional growth . . . Thank you for all you do. Your efforts are truly appreciated [Exhibit A].[1]

On March 8, 1993, Ms. Gillespie wrote in support of her recommendation on the Respondent's behalf for a Middle School Principal position:

> Betty Herring would be an asset to any educational institution as its instructional leader [Exhibit B].

On August 16, 1993, former Superintendent Dr. Arnold Webster, in transferring Ms. Herring to the Lincoln School, wrote:

> Your loyalty and dedication to the District have been greatly appreciated and we encourage you to continue to utilize your many skills to assist in the facilitation of the district's education program." [Exhibit C].

In May of 1995, Respondent's evaluation as Assistant Principal at Lincoln stated that:

> Ms. Herring has worked well with her staff in order to meet the many needs of her students. A job well done. [Exhibit D].

On January 5, 1996, in naming the Respondent to the system-wide curriculum steering committee, Dr. Frazier explained that it was felt that her presence "would be an asset to the group through [her] contributions to the development of curriculum and the improvement of instructions." (Exhibit E). On May 30, 1997, in her annual performance report, it was written:

[1] The exhibits referenced with a letter are attached hereto and incorporated herein. Those referenced with a number were annexed to the District's tenure charges.

"Ms. Herring is commended for her fine performance this year. Powell School has been fortunate to have a fine leader." (Exhibit F).

Subsequently, Ms. Herring was named as Vice Principal to Camden High School and Dr. Knox, the current Superintendent, recommended and the Board approved Respondent's promotion to Principal on July 1, 2001. Regarding Respondent's work since becoming Principal at Camden High School, Charles H. Highsmith, Assistant Superintendent, on December 14, 2001, wrote as follows:

> Congratulations on the changes that have occurred at Camden High School to date. It is obvious you are a tireless worker who has a vision for an improved Camden High School. Prior to my arrival, I was told by many that Camden High School was as the kids say 'Off the Hook.' I have been delighted by your early efforts to bring lasting-substantive change to your high school. The new spirit in the 'Castle on the Hill' is exciting. You will be able to continue to build on this enthusiasm. You have been responsive to suggestions as evidenced in some procedures you have implemented. You and your staff have implemented many positive changes that have sustained this climate of change. Our success is directly tied into our willingness to change practices, grow professionally, and provide improved instructional opportunities for the clients we serve. Teaching and learning is the heart of our efforts.
>
> Your managerial performance is solid . . . I have no doubt you will reach all the goals you set because you will work hard, remain focused, and know that improvement is part of all of lives. . . Ms. Herring, your potential is great and the Camden school district is counting on your effort and continued growth [Exhibit G].

On September 9, 2002, Dr. Knox, provided the following performance review for the Respondent (Exhibit H), writing in pertinent part as follows:

> You have demonstrated great leadership in a difficult situation.
>
> Planning – In the short period of 8 months, you have begun a significant push to shift the culture of a school (1500 students) that was in great disorder with little or no focus on the academic progress of students. Student schedules were poorly planned,

> many teachers were not programmed for full instructional engagement. There were many physical disturbances in the school, i.e. fights, fires, etc. . . . In my opinion, you have done a satisfactory job as the principal leader at Camden High School. I believe that the staff, the students, and the community is beginning to believe that the 'Castle on the Hill' is to be respected again [Exhibit H].

Since that evaluation in September of 2002, the Respondent received no further written evaluations from Superintendent Knox.

While the Respondent was Principal at Camden High, the Commission on Secondary Schools of the Middle States Association accredited Camden High School for the period of May 1, 2003 through May 1, 2010, finding that Camden High has demonstrated to evaluators that is effectively advancing the quality of the educational experience it offers its students and complies with the standards established by the Commission on Secondary Schools and approved by members of the Association (Exhibit I). In its report which was issued on January 27, 2003, the Middle States Commission wrote as follows:

> 1.) School Climate and Culture: The Visitor experienced a focused, purposeful climate with well-behaved, respectful students and staff. School rules, such as no hats and required hall passes, are followed and strictly enforced. Students seem to honor these rules and no misbehavior was observed.
>
> Much student work is proudly displayed in classrooms and in halls. The Visitor was impressed with the dedication demonstrated to student needs . . . Security also seems good. Rooms are kept locked when not in use. Eighteen security personnel are in evidence throughout the building. Unannounced hall sweeps are used . . . There is a palpable feeling of pride in the school's rich 126-year history. The Visitor was stuck by how well-prepared individuals were for this visit and how heartfelt their comments were.
>
> 2.) Technology and Library: Considerable attention has been given to technology . . .

6.) Curriculum and Student Activities Offerings: . . . Curriculum is aligned with the New Jersey Core Curriculum Content Standards and the state tests.

The Visitor was impressed with the wide range of offerings, and a few examples will help to show the range . . .

5.) Continued emphasis on addressing the dropout rate: CHS has instituted a range of programs to address the dropout problem. Progress is being made. At the time of the team visit in 1999, the dropout rate was 32%. Now, it is 20%. A Twilight program, School-to-Career Program, Night School, and a GED Program are in place to address this concern.

6.) Continued focus on attendance: A Perfect Attendance Wall greets the Visitor upon entering the building. Monthly attendance charts and recognition for specific students are used. The state standard for attendance is 95%. At the time of the team visit, CHS attendance was at 74%. Now, it is 82-83%. The school is on the right path, but knows it must continue its efforts in this area [Exhibit J].

On May 12, 2003, Dr. Fred Reiss, Assistant Superintendent of Schools in Camden, recommended the Respondent as a candidate for the Rutgers Camden Leadership Program, describing her experience as Principal of Camden High School and stating as follows:

> During the nearly two years [Ms. Herring] has been Camden High's principal, Betty has efficiently grappled with difficult administrative crises, academic and curricular issues, parental and student problems, and faculty concerns. For example, Betty has dealt with staff undermining her authority, student violence and vandalism, parents making unrealistic demands on her, creating new programs, implementing new curricula, and successfully leading her school through a Middle States evaluation.
>
> Betty has shown a great deal of growth and maturity in the nearly two years in her position and undoubtedly will benefit from interacting with colleagues in similar situations and with university staff able to help her turn theory into practice.
>
> Betty is an intelligent, articulate, and hard working administrator who daily demonstrates her love of the children and her desire to succeed in her position. The urban high school principal's job is, in my opinion, among the most difficult in the entire field of

> education, and every consideration should be given to her to allow her to participate in this program. I know that she will succeed in the Rutgers-Camden Leadership Program, and consequently, I highly recommend Ms. Betty Herring to you without any reservation whatsoever [Exhibit K].

On October 6, 2003, Dr. Albert A. Monillas, Assistant Commissioner for Southern and Regional Office of the Department of Education, wrote in pertinent as follows:

> What a wonderful morning visit we had at your school! The 'southern regional' team was impressed with so many exciting things occurring at Camden High School.
>
> First, the new security measures will provide your staff and students with a feeling of safety. The security surveillance cameras will enable your staff to pinpoint any trouble areas. Your security software will enhance discipline. Besides security, your facility was very clean and welcoming.
>
> Second, your students appeared well behaved in the formal settings during instruction as well as during the change of classes. Your security staff appeared 'on their toes' keeping the school safe and orderly. We were very impressed at your personal touch in knowing so many students as you walked the halls with us.
>
> Third, your idea in creating 'small learning communities' is a research-driven decision that we are certain will yield good results. Basing your decisions on data is truly commendable.
>
> Finally, your initiatives revolving around academics are truly commendable . . . Your corrective action plan was gladly accepted by the team. . . .
>
> Thank you for inviting us to upcoming activities at Camden High School. Your genuine and welcoming response to our visit was heartwarming as we work together to make Camden High School a place where 'teaching and learning' prevail [Exhibit L].

Although Ms. Gillespie on or about September 8, 2004 certified tenure charges against the Respondent, it should be noted that no issues regarding tenure charges concerning the Respondent were raised until after March 31, 2004, when Ms. Herring filed a Petition before the Commissioner of Education of New Jersey, challenging the decision made by the Board of

Education at its meeting on March 29, 2004, to transfer the Respondent, without her consent from the position of Principal of Camden High School to the position of Acting Supervisor of Science at the district's Riggs Center effective April 1, 2004 (Exhibit M).[2] At the time that the Superintendent recommended and the Board decided to transfer Ms. Herring to the position of Acting Supervisor of Science, no tenure charges had been brought. The Respondent was not informed at that time by anyone from the District that tenure charges would be brought, nor were doubts raised regarding her performance, such that it was felt that the Respondent should not be named Acting Supervisor of Science.

On April 20, 2004, the Commissioner of Education (hereinafter "the Commissioner") issued his opinion in which he held that the Respondent's transfer to the position of Acting Supervisor of Science was impermissible. In granting Respondent's petition, the Commissioner stressed that the Respondent would be:

> Irreparably harm by the District's decision to assign her, a tenured Principal, to the position of Acting Supervisor of Science in that the illegal transfer and the consequent de facto demotion to the separate and subordinate position of Acting Supervisor of Science can never be adequately addressed over time, nor can monetary damages ameliorate the blemish on her professional standing among her peers and her reputation in the school district and in the community. With respect to the balancing of the interests, the Board's argument that returning petitioner to her tenured position would disrupt the school operations with less than 90 days remaining in the school year is absolutely ludicrous. The Board exhibited no such concern for continuity in its school operations near the end of the school year when it acted a little over two weeks ago to transfer petitioner and appoint a non-tenured individual to fill the opening created by such illegal transfer.

[2] Nor were the contractual provisions regarding Respondent's performance evaluations complied with during 2003 and 2004. Under the collective bargaining agreement then in effect, tenured administrators are to be formally evaluated twice a year, once before December 31 and the second evaluation before May 31. Copies of individual Professional Improvement Plan, Administrative Observation Forms and Administrative Annual Performance Report are to be given to the Administrator being evaluated immediately upon completion. When areas of performance are identified as unsatisfactory, suggestions are to be given to the Administrator and time given to implement them. Follow-up conferences are to be held (Exhibit N). These procedures were not followed in connection with the Respondent's evaluations as Principal of Camden High School.

> Accordingly, I cannot conclude that the Board will suffer any harm from returning petitioner to her position.
>
> Finally, I cannot ignore that this is the second incident in just over a year when the Camden Board has transferred and demoted a tenured principal, without her consent, to a subordinate position in *blatant disregard* of her statutory tenure and seniority rights. *See Sanchez, supra.* Moreover, although petitioner's suspension is not before me at this juncture, it is noted that petitioner claims that she was suspended, pending the filing of tenure charges in retaliation for filing the within petition and motion for emergent relief. While I make no finding with respect to this claim, I cannot discount that the timing *of the decision to suspend petitioner is suspect.* The Board is, therefore, *strongly* cautioned that subsequent actions and violation of school law will not be tolerated (emphasis in original) [Exhibit O].

The Commissioner noted in his opinion that not only had no tenure charges been filed against Ms. Herring, but also her suspension pending the filing of tenure charges "occurred after the Board transferred [Ms. Herring] to the position of Acting Supervisor of Science." (Exhibit O at note 1).

Subsequently, the Board filed a motion for reconsideration, claiming that the Commissioner's decision dealt with a set of facts which did not exist as of April 20, 2004 because the Board had indicated that at a special meeting scheduled for April 19, 2004, it intended to return the Respondent to her position as High School Principal and suspend her pending the filing of tenure charges. The Commissioner denied the Board's motion for reconsideration, concluding that neither its intention to suspend Ms. Herring's transfer nor the Superintendent's recommendation to rescind the improper transfer had any effect on her status, and reiterated once again that the Respondent's transfer was effectuated on April 1, 2004, prior to any reference to the filing of tenure charges (Exhibit P).

Notwithstanding the assertion in April of 2004 that tenure charges were to be filed against the Respondent, no charges were filed for five months until September of 2004. The

circumstances surrounding the charges, the timing of the charges, the fact that rather than filing tenure charges on March 29, 2004, it was recommended to the Board and the Board approved the Respondent's transfer to the position of Acting Supervisor of Science, evidences that these tenure charges represent an unfortunate effort to punish the Respondent for having challenged the District's decision to assign her, a tenured Principal, to the position of Acting Supervisor of Science.

RESPONSE TO CHARGE NO. 1

The Respondent denies each and every factual allegation set forth in Tenure Charge No. 1 and/or that she was guilty of neglect of duty and/or unbecoming conduct for violating state laws by not reporting acts of violence at Camden High School throughout the 2003-2004 school year. On the contrary, the Respondent sought to report and did report all incidents of violence that occurred at Camden High School of which she was made aware.

Although ignored by the District, Camden High has had persistent problems with violence which predated Respondent's appointment as Principal. The finding that Camden High is a Persistently Dangerous School (hereinafter "PDS") under the federal No Child Left Behind Act was based upon statistics, two of the three years of which (1999-2000 and 2000-2001) predated Ms. Herring's appointment. Further, two other schools in Camden, both with lower enrollments than Camden High School, East Camden Middle and Bonsall, were also classified as Persistently Dangerous Schools (Exhibit W). Further, the Superintendent appointed co-principals for the 2003-2004 school year at Camden High School, who were to share administrative duties.

As is demonstrated in response to Charge No. 4, the Respondent and the entire staff of Camden High School took the issue of student violence and the Persistently Dangerous School

designation extremely seriously and organized a wide-range of activities to confront this problem (see response to Charge No. 4). The Respondent and the staff repeatedly sought to address safety issues at Camden High and undertook a variety of steps and strategies.

Further, the Respondent vehemently denies that she intentionally failed to report incidents of violence during the 2003-2004 academic year at Camden High School or made any effort to subvert the No Child Left Behind statutory designation or the reporting requirements of the Electronic Violence and Vandalism Reporting Act. On the contrary, the Respondent had been informed that if several individuals were involved in an act or an incident of violence, that should be reported as a single act or incident of violence rather than reporting it as multiple acts or incidents. That is the procedure which was followed during the 2003-2004 academic year. At no time during the year was the Respondent informed that the foregoing procedure was incorrect or improper. As indicated, Ms. Herring sought to faithfully report all incidents of violence of which she was aware, which occurred at Camden High School.

The manner in which the administration at Camden High School reported incidents of violence was never done with any intent to preclude the effective delivery of educational services to students, nor was it designed to endanger the physical safety of students and staff. Indeed, that was a foremost priority of the Administration. Throughout the year, the Respondent remained vigilant and undertook a number of efforts and activities to try to enhance the safety of students and staff at Camden High.

RESPONSE TO CHARGE NO. 2

The Respondent denies each and every factual allegation set forth in Tenure Charge No. 2 and/or and that she was guilty of neglect of duty and/or conduct unbecoming for violating state law by refusing and/or failing to evaluate non-tenured teaching staff and/or Vice-Principals at

Camden High School, as required by statute and the pertinent collective bargaining agreements. Although ignored by the District, for the 2003-2004 school year, administrative responsibilities at Camden High School were divided between co-principals, the Respondent and Mr. Gregory Allen. The non-tenured teaching staff, whose evaluations were allegedly not completed, were not staff members who were assigned to the Respondent to evaluate, but rather were staff members whose evaluations were to be conducted by her co-principal Mr. Allen. Further, for those administrators and/or non-tenured teaching staff employed during the 2003-2004 school year for whom Respondent was responsible, she performed their evaluations and forwarded the requisite copies of same and/or would have completed those evaluations in a timely fashion had the Respondent not been improperly removed as principal.

Respondent was principal of Camden High since July of 2001. At no time during the 2001-2002 or 2002-2003 school years, were any issues raised regarding her non-performance of evaluations. During the 2003-2004 school year, Respondent evaluated those non-tenured teachers for whom she was responsible to conduct observations and evaluations. The Respondent was never informed that the District was unable to properly review non-tenured teaching staff because evaluations for which she was responsible had not been completed.

RESPONSE TO CHARGE NO. 3

The Respondent denies each and every factual allegation set forth in Tenure Charge No. 3 and/or that she was insubordinate to the Superintendent and/or her supervisors, by failing and/or refusing to comply with orders and instructions from the Superintendent and/or the Assistant Superintendents. The District sets forth only two examples of insubordination in this charge. First, this charge states that on or about October 9, 2003, the Respondent allegedly made an inappropriate remark to the Superintendent. The Respondent categorically denies that she

made such a statement. Immediately after this occurred, Ms. Herring wrote to the Assistant Superintendent and the Superintendent requesting a meeting to discuss this matter, as she was appalled by the allegation. Further, she retained counsel who made a similar request (see Exhibit Q). No meetings were arranged and the Respondent heard nothing further about this incident.

Second, the only other reference to failing and refusing to comply with orders or instructions from the Superintendent and Assistant Superintendent is to a memo dated February 20, 2004 from Ms. Gillespie to the Respondent and Mr. Allen (Exhibit 22), her co-principal, a copy of which accompanied the District's charges, claiming that the Respondent and Mr. Allen did not furnish a list of teachers to formulate a focus group to discuss issues, concerns, and remedial efforts to help reorganize Camden High School. The memo indicated that because the Assistant Superintendent did not receive such a list, she had to create one and will be meeting with the faculty shortly. Such a list was provided (Exhibit V). During the Respondent's over 15 years as an administrator, she was never previously accused of being insubordinate or refusing to comply with orders and instructions from the Superintendent and/or the Assistant Superintendent.

RESPONSE TO CHARGE NO. 4

Respondent denies each and every factual allegation set forth in Tenure Charge No. 4 and/or denies that she was guilty of neglect of duty, conduct unbecoming and/or insubordination by refusing and/or failing to comply with direct orders and instructions from the Superintendent and/or the Assistant Superintendent relative to implementing the corrective action plan for Camden High School. On the contrary, the Respondent and the rest of the staff were committed to addressing the safety problems at Camden High School, responding to the Persistently

Dangerous School (PDS) designation, and implementing the School's corrective action plan.. These activities included, but certainly were not limited to the following:

July

- Sent letters out to parents concerning Camden High being designated as a Persistently Dangerous School.

August

- Ninth and tenth grade orientation with parents, students and staff to discuss the goals and mission of Camden High School, along with the corrective action plan that addressed Camden High being designated as a Persistently Dangerous School.
- Held parent conferences concerning the PDS.

September

- Reviewed with staff the corrective action plan for PDS and set up committees to address PDS for Camden High School.
- Met with parents to review the corrective action plan for PDS and how they could become involved in the process.
- All administrators were assigned to a strategic area of the Camden High School complex in the mornings from 7:50 a.m. to 9:00 a.m.
- Administrative meetings were held regularly to discuss the climate, culture, and education of the students.
- All ninth graders were assigned to the main building for all of their classes, with the exception of gym, health and technology.
- Pictures for I.D. badges were taken for all students.

- All students and staff were required to wear their I.D. badges and present them upon entering the building.
- A list was composed of 100 students by administrators, staff, and security of those students who were "at risk" and submitted to the Superintendent.
- A list of all staff vacancies that had not been filled, that were crucial to the educational and cultural climate and concerns of the schools were submitted to the Superintendent.
- Rules and regulations on attendance, bullying, vandalism, and violence were formulated and discussed with staff and students.
- Daily 9th grade success academy meetings were held to discuss: (1) academic strategies; (2) develop thematic units and team teaching across the curriculum; (3) plan assemblies that focused on careers, self-esteem and cultural diversity.
- Back to School Night with emphasis on cultural diversity, academics, attendance and self-esteem.
- Revision of teacher and student schedules for purpose of effective teacher-student ratios and to provide a more positive learning environment.
- Weekly assemblies for 9th graders to address cultural diversity and academics and career orientation.
- Car passes were given to all staff to display in their cars.
- Security was stationed at the gate to monitor all traffic entering the driveway to the school.
- All visitors and administrators to the building were required to sign in and visitors were required to receive a visitor's pass.

- All 9th graders through their English classes were required to read the book *The Bully* and discuss it in class.
- Each administrator was assigned to a specific cafeteria duty and the principal monitored all four lunches.
- After school detention for lateness for school and parent conferences held for lateness to school.
- Unannounced hall sweeps were conducted.
- Utilized the support services of Link, the school nurse, and the guidance counselor to assist students and families in crisis situations.
- Parent conferences were held regarding students who were involved in more than three lateness to school, acts of violence, bullying and vandalism and absenteeism problems.

October

- 9th grade "Making High School Count" assembly, presented by PriceWaterhouse Coopers.
- 9th grade assembly speaker, World B Free spoke on self-esteem.
- Monitoring staff absences and lateness to school, with lists submitted to the Superintendent.
- Corrective action plans were written by staff who had severe attendance problems.
- Monitoring by Dr. Albert B. Monillas, Assistant Commissioner for the Southern Regional Office, to review school's corrective action plan activities in response to Camden High's PDS designation. We were subsequently informed in a letter

dated November 3, 2003 that all of the compliance documents, including the corrective action plan, to respond to Camden High's PDS designation were approved (Exhibit R).

- Mid-semester reports sent to parents.
- Rules and regulations established concerning beepers, pagers, cell phones in the school, with notices sent home to parents and given to students, signs placed throughout the school, and students checked for the above items by security after sufficient notification.
- Five step program with mandatory anger management classes for students involved in fights.
- Conferences were held with Sgt. Ways, Lt. Martin of the COPS program, Det. Pease for updates on conflicts in the community that involved Camden High students that might have an impact on the High School.
- Inservice for school secretaries in Spanish to improve communication with Hispanic parents.
- Administrators and the school law enforcement officers were present to meet and greet and monitor a safe entrance and dismissal of all Camden High School students.
- Weekly attendance accountability meetings were held to discuss activities and strategies to increase attendance, decrease lateness to school, locate students who never entered school, and to improve school culture and climate.
- Establishment of Learning Walks by all administrators.

November

- Corrective action plan and compliance for documentation for Camden High School was approved by the State of New Jersey (Exhibit R).
- Enrichment material "Ten Skills You Really Need to Succeed" was distributed to all students.
- Information was given to the staff on small learning communities.
- Third submission of 100 at-risk students for placement in alternative educational settings was forwarded to the Superintendent.
- Administrators attended all athletic events to ensure good sportsmanship, crowd control, and community and school spirit.
- Parent conferences were held with some of the at-risk students identified through PAC team referrals to develop support services.
- Town meeting to review with parents, students and staff the mission goals and activities implemented to remove the PDS label from Camden High School.
- School uniform presentation to parents, staff, and students and the rationale for the wearing of a school uniform.
- 50 Thanksgiving baskets were distributed to needy families.

December

- Fourth submission of 100 at-risk students to Superintendent.
- Regular meetings with Assistant Superintendent and Dr. Frazier on PDS and implementation of activities to address this issue.
- Conferences with seniors and their parents and guidance counselors who were in danger of not graduating.

- Cultural diversity assemblies for all grade levels.
- Community student involvement through student government.
- Holiday baskets for needy families, coat drive, after school tutorial program for all students, with teachers and administrators donating their services.

January

- Man-II Man Martin Luther King Program for all male students
- 9th Grade Book of the Month (The Bully)
- Parent Center Activities to Address Cultural Diversity
- "Salute to Cultural Diversity Service Men"
    a. Cultural Diversity
    b. Self-Esteem
    c. Pride In Our Community
    d. Stop the Violence
- First Restructuring Faculty Workshop with Dr. Ivory

February

- Security Surveillance Review of Placement of Additional Cameras
- Bullying Focus Group
- Faculty Inservice on Bullying by Focus Group
- Violence Prevention Intervention Bullying Initiatives
- Meeting with At Risk Students and their parents
    a. Academics
    b. Attendance
    c. Bullying

d. Alternative Placement

- Cultural Diversity Assembly

March

- Identify At Risk Students and Potential Placements
- 11th Grade Class Meeting (Academics, Attendance, Bullying)
- 10th Grade Class Meeting (Academics, Attendance, Bullying)
- SNAKOFA – Violence Prevention Update
- 9th Grade Class Meeting (Academics, Attendance, Bullying)
- 12th Grade Class Meeting (Academics, Attendance, Bullying)
- Camden Collaboration Meeting
- Bullying Character Education
- Administrative Bullying Focus Meeting
- Bullying Follow-Up Meeting

Throughout this period of time, Camden High School representatives had regular conferences with parents and students; referrals and counseling through PAC, Guidance, Link and the Child Study Team; ongoing administrative meetings to discuss and plan PDS intervention strategies; Learning Walks by all administrators; daily rotating hall sweeps, and collaboration with Parent Rangers to address class cutting and hall monitoring.

At no time did the administrators at Camden High School ever ignore the PDS designation. Rather, the staff engaged in a wide variety of activities and strategies to respond to the issue of violence and to promote the Corrective Action Plan (Exhibit S).

Further, the Corrective Action Plan, as any Corrective Action Plan, is an ongoing living document. It included timeframes for performance through June 15, 2004. At the time that the

Respondent was removed as Principal, the Camden High School administrators were in the process of complying with that document and making a concerted effort to do so, based upon that timeframe, through a variety of initiatives (Exhibit S).

RESPONSE TO CHARGE NO. 5

The Respondent denies each and every factual allegation set forth in Tenure Charge No. 5 and/or any claim that Respondent is guilty of neglect of duties as a Principal in failing or refusing to ensure that the Camden High School basketball team was in full compliance with N.J.S.I.A.A. rules, as necessary. Although ignored by the Board, there were serious problems with the performance of Al Hall as Athletic Director at Camden High School, whose responsibility was to ensure that the Camden High School basketball team was in full compliance with N.J.S.I.A.A. rules. On April 11, 2003, the Respondent wrote to Mr. Hall and indicated that she was recommending to the Superintendent that he be removed from his position as of that time because of repeated performance problems. The Respondent further recommended that his increment be withheld for the 2003-2004 school year. At the time of Mr. Hall's retirement as of April 1, 2004, it was in the context of the District considering bringing tenure charges against him and the Respondent's recommendation for his removal for the very problems which were identified in Charge No. 5 (Exhibit T).

As the report of the New Jersey State Interscholastic Athletic Association indicated, the use of a new player from Europe without proper notification to the N.J.S.I.A.A. and the team's failure to timely file entry forms occurred as a result of decisions and actions made by Athletic Director Al Hall (Exhibit X). This decision was not appealed by the District. These events did not occur as a result of the Respondent's conduct and were not the Respondent's responsibility.

Indeed, it were these failings by Mr. Hall that led to the Respondent's February 24, 2004 recommendation that he be removed as Athletic Director (Exhibit U).

The Athletic Director is responsible to ensure that the basketball team was in full compliance with N.J.S.I.A.A. Rules as necessary. The incidents which resulted in the penalties imposed upon the boy's basketball team in February 2004 were a direct result of the actions of Mr. Hall and not due to any neglect of duty by the Respondent.

AFFIRMATIVE DEFENSES

1. The tenure charges against the Respondent should be dismissed for failure to state a claim upon which relief may be granted.

2. The tenure charges against the Respondent should be dismissed as they have been brought in bad faith and in retaliation for the Respondent's protected activity of petitioning the Commissioner of Education of New Jersey to challenge the decision made by the Camden Board of Education at its meeting on March 29, 2004 to transfer the Respondent, without her consent, from the position of principal of Camden High School to the position of acting supervisor of science, effective April 1, 2004.

3. The tenure charges brought against the Respondent should be dismissed as they are untimely and based upon false representations and groundless assertions designed to harass the Respondent because the Respondent challenged the District's decision to transfer her, in the middle of the school year without her consent, from her position as principal of Camden High School to the position of acting supervisor of science at the District's Riggs Center, effective April 1, 2004.

4. The tenure charges brought against the Respondent should be dismissed as they are procedurally defective, in that they fail to enumerate all of the evidence and factual claims that are being asserted against the Respondent.

5. The tenure charges brought against the Respondent should be dismissed, since at most they amount to claims of inefficiency, and the Board has failed to comply with the provisions of N.J.S.A. 18A:6-11 regarding allegations of inefficiency.

6. The tenure charges brought against the Respondent do not warrant her removal.

WHEREFORE, the tenure charges which have been brought against the Respondent should be summarily dismissed and the Respondent immediately reinstated to her position as principal of Camden High School.

Respectfully submitted,

James Katz, Esquire
JENNINGS SIGMOND
1040 North Kings Highway, Suite 300
Cherry Hill, NJ 08034
(856) 755-3484
Attorneys for Respondent Betty Jane Herring

Dated: November 4, 2004

Cooper B. Hatch Middle Scho

Park Boulevard and Euclid Ave
Camden, New Jersey 08
Telephone 609-966-5

Jan E. Gillespie
Principal

July 1, 1991

Dear Ms. Herring,

This letter of commendation is one that is long overdue. For, indeed, your efforts on both daily and weekly basis are commendable.

You not only do the many things expected of an assistant principal, but go far beyond those expectations. It is most comforting and reassuring to realize that we are truly a team supporting and enhancing each others' efforts for the good of the organization.

I could neither have asked for nor received more support, energy or effort from anyone. You have assisted in program development. You have soothed ruffled feathers and connectively calmed troubled hearts. You are both a strong disciplinarian and gentle surrogate parent. You are quick to praise, and eager to constructively assist in proffessional growth.

Betty, you have done an excellent job with your ecology academy and all of its activities under your auspices. Your George Washington Carver Peanut showcase was exemplary as were your recycling drive efforts and your planting ceremonies. You complemented the Knowledge Bowl agenda so supportively by writing that outstanding curriculum. What a special administrator you are!!

Thank you for all you do. Your efforts are truly appreciated.

Sincerely,

Jan E. Gillespie

JEG:dk

Exhibit A

Cooper B. Hatch Middle School

Park Boulevard and Euclid Avenue
Camden, New Jersey 08103
Telephone 609-966-5122

Jan E. Gillespie
Principal

March 8, 1993

Dr. Arnold Webster
Superintendent
Camden City Board of Education
1800 West Pavilion, 3rd Floor
2101 Ferry Avenue
Camden, New Jersey 08103

Dear Dr. Webster,

This is a letter of high recommendation for Ms. Betty Herring for the position of middle school principal.

"Betty" who has been my "right hand" for the past three years is an exceptionally talented professional who is both eager to learn and to implement state-of-the-art information and delivery system mechanisms. Because of her conscientious efforts, The Mae Jemison Ecology Academy, the school-within-a-school that she is administratively responsible for, has been a most successful component to the Hatch Experience. This group has maintained a grow lab, brought Zoo on Wheels to the school, adopted animal programs, held health fairs, developed a Wellness Room, and held annual Walk-a-Thons to benefit Cooper Hospital's Pediatric Program.

Indeed, while all of the aforementioned are both important and relevant, they cannot begin to describe "Betty's " sense of loyalty and commitment to the organization and to me. She has put in long evening and weekend hours assisting in volunteer programs and program development. She has been admirably involved in community volunteerism at Dayton Manor, Cooper Hospital, Forest Hill Elementary School via her Ecology Academy efforts and her Rites of Passage young ladies.

Betty gives her all to every positive educational thrust at Hatch Middle School. Indeed, she would be an asset to any educational institution as its instructional leader. And, I therefore strongly support Ms. Betty J. Herring for the position she is seeking.

Most Sincerely,

Jan E. Gillespie

Mrs. Jan E. Gillespie
Principal

Exhibit B

BOARD OF EDUCATION
1800 West Pavilion
2101 Ferry Avenue
Camden, New Jersey 08104

ARNOLD W. WEBSTER, Ph.D.
SUPERINTENDENT OF SCHOOLS

(609) 962-58
FAX (609) 962-58

August 16, 1993

Dear Ms. Herring,

I hope the final weeks of the summer have been restful as well as enjoyable for you. We have been reviewing each school and it's staff members so as to ascertain the staff placements that will be in the best interest of the school district for the coming school year. With this in mind we have decided to recommend that you be transferred to a new assignment.

Your loyalty and dedication to the district have been greatly appreciated and we encourage you to continue to utilize your many skills to assist in the facilitation of the districts educational programs. For the school year 1993-94 I am recommending to the board that you be transferred to Lincoln School.

Again, thanks for your continued support and dedication as we work together to prepare our students for the challenges of the future. All of us in the central office are available to assist you in your quest for professional excellence.

Sincerely,

Arnold W. Webster

Arnold W. Webster, Ph.D.
Superintendent

cc: Ms. Gillespie
Ms. Morales

8/23/93 DS

Exhibit C

CAMDEN CITY PUBLIC SCHOOLS

ADMINISTRATOR'S OBSERVATION REPORT

Name Betty Herring School/Division Lincoln Date May 24, 19

Position Assistant Principal Non-Tenure ___ Tenure X Observation No. 1

Conference ✓

I. SUPERVISORY PRACTICES

_____Uses supervision as an aid to the improvement of instruction.
_____Maintains a planned program of supervisory activities.
_____Encourages experimentation and new teaching methods, techniques and procedures.
_____Encourages the use of a variety of teaching aids.
_____Promotes the appropriate use of standardized and teacher-made test results.
_____Places proper emphasis on the observance of curriculum requirements in subject areas.
_____Makes use of community resources in the instructional program.
_____Promotes and supervises non-instructional activities.

II. ADMINISTRATIVE PRACTICES

_____Assumes responsibility for building control.
_____Is accessible to staff.
_____Uses suggestions.
_____Keeps and uses records.
_____Assumes responsibility for general appearance of school.
_____Exhibits functional bulletin boards and/or educational displays.
_____Participates in the school community projects.
_____Supports the staff in their relationships with parents, staff, and the community.
_____Uses time efficiently.
_____Accepts full responsibility for delegated authority.
_____Attempts to unify and develop teamwork among members of the staff.
_____Delegates appropriate responsibilities with necessary authority.
_____Enforces Board policies and regulations.
_____Provides a good balance between administrative and supervisory responsibilities.
_____Keeps the central administration informed of the physical condition and needs of the school plant.
_____Makes efficient use of school plant.
_____Makes every effort to facilitate the flow of instructional supplies to teachers.
_____Organizes the total school program to assure the safety and welfare of all members of the staff and student body.
_____Organizes and encourages the non-teaching employees to become an integral part of the school staff.
_____Develops a well-organized office routine for service to teachers, pupils, and parents.
_____Makes it possible for teachers to obtain and use pupil records.
_____Maintains a continuous and planned program of public relations.
_____Demonstrates rapport with student body.

(Over)

Exhibit D

_____Promotes and/or participates in student activities.

III. RELATIONSHIPS WITH THE SUPERINTENDENT AND HIS STAFF

_____Accepts and carries out the administrative policies as outlined in the job description.
_____Keeps the Superintendent informed in matters which may involve him or the Board of Education.
_____Makes use of the services offered by the central office.
_____Knows and uses the proper channels for referrals of complaints, misunderstandings, and commendations.

IV. PROFESSIONAL QUALIFICATIONS

_____Assumes responsibility for progress in the educational program.
_____Demonstrates proper use of language.
_____Shows interest in current theory and practice.
_____Is cooperative.
_____Is prompt and accurate with reports.

V. PERSONAL QUALIFICATIONS

Exhibits or displays the following characteristics:

___Articulation of speech	___Flexibility	___Patience
___Cleanliness	___Good grooming	___Positive reactions to suggestions
___Confidence	___Good use of voice	___Respect for others
___Enthusiasm	___Initiative	___Self-control
___Fairness	___Judgment	___Understanding of people
___Firmness	___Kindness	
	___Leadership	

VI. ATTENDANCE

_____Shows good attendance
_____Is prompt
_____Is punctual for assignments

NOTE: A checked (✓) item indicates an area of concern in which present performance needs improvement. Therefore, the administrator should conduct a self-evaluation, seek help, and take steps to bring about the desired improvement.

COMMENTS: Mr Herring has worked well with his staff in order to meet the many needs of his students. A job well done.

EVALUATEE'S RESPONSE REQUESTED Yes ☐ No ☐

The administrator's signature below indicates that he/she has seen this report.

Evaluator's Signature _____ Administrator's Signature _____ Date 6/15/95

BOARD OF EDUCATION
DIVISION OF CURRICULUM AND ASSESSMENT
CAMDEN, NEW JERSEY

ROY I. DAWSON, JR., Ed.D.
SUPERINTENDENT OF SCHOOLS

MARY A. FRAZIER, Ph.D.
ASSISTANT SUPERINTENDENT

January 5, 1996

Ms. Betty Herring
Assistant Principal
Powell School
10th & Linden Streets
Camden, New Jersey 08102

Dear Ms. Herring:

It pleases us to inform you that you have been selected to serve on our system-wide Curriculum Steering Committee for the 1995-96 school year. It was felt that you would be an asset to this group through your contributions in the development of curriculum and the improvement of instruction.

Enclosed you will find a copy of the bulletin which gives attention to the particulars. Provision is being made for substitute coverage of teachers on meeting dates. For our first meeting, please come prepared to suggest curricular topics for subcommittee in-depth study.

Thank you in advance for your anticipated cooperation. We are looking forward to a very fruitful year on the part of this committee.

Yours very truly,

Mary A. Frazier

Mary A. Frazier, Ph.D.
Assistant Superintendent

Gail D. Brooks

Gail D. Brooks
Director of Curriculum & Assessment

MAF/GDB:b
Enc.
c: Mr. Jones, Principal

Exhibit E

CAMDEN CITY PUBLIC SCHOOLS

ADMINISTRATOR'S ANNUAL PERFORMANCE REPORT

Name BETTY HERRING School/Division POWELL Date 5/30/97

Position ASSISTANT PRINCIPAL Evaluator(s) DOLORES SANCHEZ - PRINCIPAL

SATISFACTORY	UNSATISFACTORY		
X		I. Supervisory Practices	Ms. Herring is commended for the demostrative effective leadership. She has displayed at Powell School.
X		II. Administrative Practices	Ms. herring is a firm, fair administrator. She is knowledgeable in her field.
X		III. Relations with Superintendent and His Staff	Very Good.
X		IV. Professional Qualifications	Excellent. Ms. Herring holds a Principal's certification.
X		V. Personal Qualifications	Cooperative. Rapport with total school community is excellent.
X		VI. Attendance	Very Good.

REVIEW OF PROGRESS AND GROWTH TOWARD PROGRAM OBJECTIVES

Ms. Herring is commended for her fine performance this year. Powell School has been fortunate to have a fine leader. Best wishes for the 97-98 school year.

The tenured staff member shall have the right to submit his/her response within ten (10) days of the presentation of the annual performance report.

EVALUATEE'S RESPONSE REQUESTED YES ☐ NO ☒

Dolores Sanchez 5/30/97 Betty K. Herring 5/30

Evaluator's Signature Date Evaluatee's Signature Date

BOARD OF EDUCATION
CAMDEN, NEW JERSEY 08102
TEL (856) 966-2081 • FAX (856) 966-2090

201 N. Front Street
Camden, New Jersey 08102

CHARLES A. HIGHSMITH, JR.
ASSISTANT SUPERINTENDENT

DATE: December 14, 2001

TO: Ms. Betty Herring, Principal
Camden High School

FROM: Mr. Charles A. Highsmith, Jr. CAHJr.
Assistant Superintendent

SUBJECT: OBSERVATION ON 12/6/01

Congratulations on the changes that have occurred at Camden High school to date. It is obvious that you are a tireless worker who has a vision for an improved Camden High School. Prior to my arrival I was told by many that Camden High school was as the kids say "Off The Hook." I have been delighted by your early efforts to bring lasting - substantive change to your high school. The new spirit in the "Castle on the Hill" is exciting. You will be able to continue to build on this enthusiasm. You have been responsive to suggestions as evidenced in some procedures you have implemented. You and your staff have implemented many positive changes that have sustained this climate of change. Our success is directly tied into our willingness to change practices, grow professionally and provide improved instructional opportunities for the clients we serve. Teaching and learning is the heart of our efforts.

Your managerial performance is solid. I ask that you read the attached documents with an eye and ear to professional growth. I have no doubt you will reach all the goals you set because you will work hard, remain focused and know that improvement is part of all of our lives. If you have any questions, comments or concerns please feel free to contact me immediately. Ms. Herring your potential is great and the Camden school district is counting on your effort and continued growth.

ms

Exhibit G

BOARD OF EDUCATION, CAMDEN, NEW JERSEY
(856) 966-2040/2047
(856) 966-2138 FAX

201 N. Front Street, 7th Floor
Camden, New Jersey 08102

ANNETTE D. KNOX
Superintendent of Schools

Camden . . . *"It's All for the Children"*

September 9, 2002

Ms. Betty Herring
Principal
Camden High School
1700 Park Blvd.
Camden, NJ 08103-2897

Dear Ms. Herring:

As we move forward with our plans to focus the district's resources for collegial planning and more effective instruction, each of the district's principals has been required to participate in a Performance Review Conference. The purpose of the Performance Review is three-fold:

- to plan for the 2002-2003 instructional school year,
- to serve as the Individual Professional Improvement Plan,
- to involve principals in their evaluations.

During each conference, we discussed the following—Curriculum & Instruction, including all content areas, i.e., bilingual, ESL, etc.; budget; student performance and special needs; personnel; Technology; facilities; staff evaluations (certified and non-certified) and professional development.

Literacy is handled at Camden High School in the following ways:

- Data enabled school to identify students in need of additional support.
- Principal utilized "Closing the Achievement Gap" text to support steps used at Camden High School.

Exhibit H

- The principal set long and short term goals for the school.

- Key ingredients:
  dedicated teachers,
  challenging courses,
  high expectations,
  creative ways to implement curriculum

- Teachers were able to plan and implement workshops: Thinking Out Loud, Writing, Goal Setting, Pacing, Poetry

- Workshops were conducted during teacher prep time.

- Writing project for seniors

- One book, "The Price of A Child", was used.

This focus is unusual for the Camden High faculty. You have demonstrated great leadership in a difficult situation.

Planning—In the short period of 8 months, you have begun a significant push to shift the culture of a school (1500 students) that was in great disorder with little or no focus on the academic progress of students. Student schedules were poorly planned, many teachers were not programmed for full instructional engagement. There were many physical disturbances in the school, i.e. fights, fires, etc.

At this time, you spend a great amount of your time moving through the building on Learning Walks. These walks allow a principal the opportunity to observe the methodology of her building; to determine how the building could be organized better for instruction and security; to identify hall walkers and students in need of another kind of academic setting. The walks also provide an opportunity for the principal to observe individual teachers and staff, and to be able to respond in writing to what is seen. They also create an opportunity for the establishment of a comfort level between staff and principal.

The things that you refer to have been evidenced by my observation of what has happened in Camden High School during the 2001-2002 school year. There are

areas that continue to be of concern, i.e. the push for a creative arts curriculum which will present opportunities for more students to be immersed in the arts, but should not be confused with what is currently occurring at Creative Arts High School. There are numerous programs at Camden High School that are progressing well: the School to Work Program (Cisco, American Airlines, Dell Academy). There needs to be more student access to these programs. The plan is to advertise these on Channel 19.

In my opinion, you have done a satisfactory job as the principal leader at Camden High School. I believe that the staff, the students and the community is beginning to believe that the "Castle on the Hill" is to be respected again.

Please note also that attendance has improved. During the month of March 2002, the attendance rate was 82%. Although it fluctuates, attendance is improving.

Benchmarks for your school for the 2002-2003 year are as follows:

•Language Arts Literacy	10.0 %
•Mathematics	10.0 %
•Science	10.0 %

In my judgment, your evaluation is as follows—satisfactory.

Sincerely,

Annette D. Knox
Superintendent of Schools

/a

I acknowledge receipt of this letter and understand that a copy will be placed in my personnel file.

Signature

9/10/02
Date

THE COMMISSION ON SECONDARY SCHOOLS OF THE MIDDLE STATES ASSOCIATION

LET IT BE KNOWN THAT

Camden High School

HAS DEMONSTRATED TO EVALUATORS THAT IT IS EFFECTIVELY ADVANCING THE QUALITY OF THE EDUCATIONAL EXPERIENCE IT OFFERS ITS STUDENTS

AND

COMPLIES WITH THE STANDARDS ESTABLISHED BY THE COMMISSION ON SECONDARY SCHOOLS AND APPROVED BY THE MEMBERS OF THE ASSOCIATION

AND IS THEREFORE, GRANTED

ACCREDITATION

FOR THE PERIOD

May 1, 2003 - May 1, 2010

SUBJECT TO THE TERMS OF ACCREDITATION MAINTENANCE SET BY THE MIDDLE STATES ASSOCIATION

an K. Nicklas
ve Director of the Commission

Chair of the Com

Exhibit I

THE COMMISSION ON SECONDARY SCHOOLS
OF THE
MIDDLE STATES ASSOCIATION

LET IT BE KNOWN THAT

Camden High School

HAS DEMONSTRATED TO EVALUATORS THAT IT IS EFFECTIVELY ADVANCING THE QUALITY OF THE EDUCATIONAL EXPERIENCE IT OFFERS ITS STUDENTS

AND

COMPLIES WITH THE STANDARDS ESTABLISHED BY THE COMMISSION ON SECONDARY SCHOOLS AND APPROVED BY THE MEMBERS OF THE ASSOCIATION

AND IS THEREFORE, GRANTED

ACCREDITATION

FOR THE PERIOD

May 1, 2000 - May 1, 2003

SUBJECT TO THE TERMS OF ACCREDITATION MAINTENANCE SET BY THE MIDDLE STATES ASSOCIATION

Executive Director of the Commission

Chair of the Commission

CSS MSA Middle States Commission on Secondary Schools
3624 Market Street, Philadelphia, PA 19104-2680 Tel: 215-662-5603 Fax: 215-662-0957
www.css-msa.org info@css-msa.org

January 27, 2003

Betty Herring, Principal
Camden High School
Park and Baird Boulevards
Camden, New Jersey 08103

Dear Betty:

Thank you for the opportunity to visit Camden High School. I enjoyed meeting you, Dr. Reiss, Central Office staff, and the Camden High School staff. I especially appreciated the chance to meet and talk with your students.

Attached is a copy of the report I will be forwarding to the Commission on Secondary Schools for its April 2003 meeting. You can expect to receive notification from the Commission by May 1, 2003.

Sincerely,

Susan K. Nicklas

Susan K. Nicklas, Ed.D.
Executive Director

enclosure: Camden High School Report

Exhibit J

The Middle States Association of Colleges and Schools is a non-profit association serving elementary, secondary and higher education institutions through programs of self-study, evaluation and accreditation

CHS has been changing demographically and is now about 60% African American and 40% Hispanic. Since 47% of the student body is bilingual, the school has placed emphasis on hiring bilingual teachers. There is a bilingual guidance counselor and a bilingual nurse. The school has a large special needs population, including a mild cognitively-impaired class. About 150 students each year are returnees from the adjudicated youth system.

Areas of Strength/Where Improvements have been seen:

1.) School Climate and Culture: The Visitor experienced a focused, purposeful climate with well-behaved, respectful students and staff. School rules, such as no hats and required hall passes, are followed and strictly enforced. Students seem to honor these rules and no misbehavior was observed.

Much student work is proudly displayed in classrooms and in halls. The Visitor was impressed with the dedication demonstrated to student needs. In the many conversations held with students, staff, and administration, the emphasis was first and foremost on individual students and their success. Next year, the school will begin to move toward small learning academies with the 9th Grade Success Academy. This is being done in an effort to ensure that attention is given to every child and to deal effectively with the varying needs of each grade level.

Security also seems good. Rooms are kept locked when not in use. Eighteen security personnel are in evidence throughout the school. Unannounced hall sweeps are used. The school is large and has 55 exits/entrances that may not, by law, be locked, but must be supervised.

District-wide, there has been much emphasis on the development of its 2002 Emergency Management Plan. An excellent, easy-to-use document has been developed that outlines procedures for over 15 possible crises including biological agents, shootings, bomb threats, and hostage situations. Each Camden City school was then required to make its own emergency management decisions, and there are plans to enact "model scenarios" at CHS. Because of its location, for example, CHS has contracted a 24-hour bus service should students need to be taken away from the school to another location. Staff inservice has been provided by the principal, and the school nurses are involved in this effort. A Health and Safety Committee made up of staff and administration has been appointed. Also available is an extensive School Health Services Guidelines notebook developed by the state in October 2001.

There is a palpable feeling of pride in the school's rich 126-year history. The Visitor was struck by how well-prepared individuals were for this visit and how heartfelt their comments were.

2.) Technology and Library: Considerable attention has been given to technology, and the school has about 900 computers, including several mobile/portable laptop labs. Every classroom has a minimum of 4 computers, all Internet connected. There are five labs located throughout the school. One of these is designated as a Research Lab where teachers bring classes for projects over a period of time. There is a full-time technology resource teacher who works with the classroom teachers on the design of the lesson plans and how best to use technology to achieve lesson objectives. This lab is so popular that sign-up sheets show it is fully booked through the end of April. LCD projectors were seen in wide use, and the school has camcorders and digital cameras.

regular training. The District offers at least 20 credits of courses per year for both staff and administration. This year, the school has offered two workshops on inclusion practices.

6.) Curriculum and Student Activities Offerings: The Visitor was presented with copies of the Camden City Public Schools curriculum guides. Guides are current (all have been developed/revised within the last 7 years) and are structured in a similar way. They include the educational goals for Camden City Public Schools, quarterly topic plans and assessment matrices. Some contain sample assessment questions and writing assignments. The quarterly topic plans include clearly written objectives/concepts/skills, materials and resources, interdisciplinary focus, and student expectations. The assessment matrices identify the assessment used and show relationships to state tests, core curriculum content standards, and cross content workplace standards. Curriculum is aligned with the New Jersey Core Curriculum Content Standards and the state tests.

The Visitor was impressed with the wide range of offerings, and a few examples will help to show the range.

- A political science elective provides experiences with current policy concerns and issues of leadership. Two Rutgers law students have volunteered to work with the class on an established schedule; the Visitor met these students and was impressed with their dedication, backgrounds similar to the CHS students, and the excellent role model they provide.
- The Visitor observed a research course where students were reading Fahrenheit 451 and debating the concept of censorship.
- A fully equipped Sylvan Lab with 3 full-time teachers (with reading specialist backgrounds) provides remedial assistance primarily to incoming, below-level 9th graders.
- Returnees from the judicial system meet with their parole officer at school each day for the first two months after returning to school. Workshops are run for these students, and CHS has an office dedicated to the needs of these students.
- The vocational side of the school was also exciting to see with 11 state-occupationally approved vocational programs, including well-equipped ASAE certified auto tech and auto body facilities, Dell A+, American Airlines Academy, and a Cisco Networking Academy. The Visitor observed students in the print shop, designing materials on the computers and then doing a range of large and small print jobs. The students were focused, engaged, and skilled.
- The Visiting Team report encouraged the school to involve more Hispanics in extra- and co-curricular activities. It is notable that Hispanics are represented in the homecoming court, the Student Government president, debate team, cheerleaders, band, and fine arts.

Other curriculum and student activity options include: radio journalism, BEES (Building Environmental Education Solutions), Man-to-Man Program (men mentoring male students), Model Congress competitions, Science Fair (CHS took five positions last year), Goodwill program for special needs students, Compass labs for reinforcement and advancement, HSPA and Terra Nova support classes, annual Career Days, internships and partnerships with businesses such as Jiffy Lube and Jo-Ann Fabrics, a special play room/kitchen area where teenage mothers can bring their babies for the day, and four-year foreign language sequence in three languages.

7.) Budgeting Practices: At the time of the team visit, budgeting was centralized and schools had limited input. Now, schools make up their own budgets, and the vast majority of the budget

returnees from the adjudicated youth system to ensure a smooth transition from a very structured environment to the freedom of the school and community settings.

5.) Continued emphasis on addressing the dropout rate: CHS has instituted a range of programs to address the dropout problem and progress is being made. At the time of the team visit in 1999, the dropout rate was 32%. Now, it is 20%. A Twilight program, School-to-Career Program, Night School, and a GED Program are in place to address this concern.

6.) Continued focus on attendance: A Perfect Attendance Wall greets the visitor upon entering the building. Monthly attendance charts and recognition for specific students are used. The state standard for attendance is 95%. At the time of the team visit, CHS attendance was at 74%. Now, it is 82-83%. The school is on the right path, but knows it must continue its efforts in this area.

7.) Curriculum revision: Curriculum needs to be revised in the health areas. There is a desire to add a civics course.

Staff Recommendation

Grant the remainder of the full ten-year term of accreditation to Camden High School to May 1, 2010.

Require submission of a Progress Report by May 1, 2006 (to take the place of the Five Year Report that would have been required by May 1, 2005).

BOARD OF EDUCATION
CAMDEN, NEW JERSEY 08102
TEL(856) 966-2011 • FAX (856) 966-2020

201 N. Front Street
Camden, New Jersey 08102

FRED REISS, Ed.D.
ASSISTANT SUPERINTENDENT

May 12, 2003

To Whom It May Concern:

It is with great pleasure that I recommend Ms. Betty Herring to you as a candidate for the Rutgers-Camden Leadership Program. During the nearly two years she has been Camden High's principal, Betty has efficiently grappled with difficult administrative crises, academic and curricular issues, parental and student problems, and faculty concerns. For example, Betty has dealt with staff undermining her authority, student violence and vandalism, parents making unrealistic demands on her, creating new programs, implementing new curricula, and successfully leading her school through a Middle States evaluation.

Betty has shown a great deal of growth and maturity in the nearly two years in her position and undoubtedly will benefit from interacting with colleagues in similar situations and with university staff able to help her turn theory into practice.

Betty is an intelligent, articulate, and hard working administrator who daily demonstrates her love of the children and her desire to succeed in her position. The urban high school principal's job is, in my opinion, among the most difficult in the entire field of education, and every consideration should be given to her to allow her to participate in this program. I know that she will succeed in the Rutgers-Camden Leadership Program, and consequently, I highly recommend Ms. Betty Herring to you without any reservation whatsoever.

Sincerely,

Fred Reiss

Fred Reiss, MA, MSCS, Ed.D
Assistant Superintendent of Schools

Exhibit K

State of New Jersey

DEPARTMENT OF EDUCATION
SOUTHERN REGIONAL OFFICE
1492 TANYARD ROAD
SEWELL, N.J. 08080-4222
PHONE: (856) 468-5530 FAX: (856) 468-8426

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

ALBERT MONILLAS, ED.D.
Assistant Commissioner

October 6, 2003

Ms. Betty Herring, Principal
Camden High School
Park & Baird Blvds.
Camden, NJ 08103

Dear Ms. Herring:

What a wonderful morning visit we had at your school! The "southern regional" team was impressed with so many exciting things occurring at Camden High School.

First, the new security measures will provide your staff and students with a feeling of safety. The security surveillance cameras will enable your staff to pinpoint any trouble areas. Your security software will enhance discipline. Besides security, your facility was very clean and welcoming.

Second, your students appeared well behaved in the formal settings during instruction as well as during the change of classes. Your security staff appeared "on their toes" keeping the school safe and orderly. We were very impressed at your personal touch in knowing so many students as you walked the halls with us.

Third, your idea in creating "small learning communities" is a research-driven decision that we are certain will yield good results. Basing your decisions on data is truly commendable.

Finally, your initiatives revolving around academics are truly commendable. We eagerly await the follow up of your Corrective Action Plan activities to see if these work to decrease any acts of violence and vandalism as you ardently work to remove your school from the designated list of "persistently dangerous" schools. Your corrective

action plan was also gladly accepted by the team. It is good we saw you personally to review this because it was not received previously. Mrs. Spates and Mr. Dotoli will be reviewing its contents this coming week.

Thank you for inviting us to upcoming activities at Camden High School. Your genuine and welcoming response to our visit was heartwarming as we work together to make Camden High School a place where "teaching and learning" prevail.

Sincerely,

Albert Monillas

Dr. Albert A. Monillas
Assistant Commissioner
Southern Regional Office

c: Jennifer Beaumont
Isaac Bryant
Nicholas Dotoli
Glenn Ferguson
Annette Knox
Susan Martz
Daniel Mastrobuono
Carla Spates

May , 2005

Annette D. Knox
Superintendent of Schools
City of Camden
201 N. Front Street
Camden, NJ 08102

Dear Superintendent Knox:

This is to inform you that I am retiring from employment with the Camden Board of Education effective September 1, 2005 and as a result, I am resigning my employment with the Board effective the same date.

Sincerely,

Betty Jane Herring

153656-1

Attachment 3

255-05

OAL DKT. NO. EDU 00335-05
AGENCY DKT. NO. 335-9/04

J.M., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM AND BOARD OF EDUCATION OF RANCOCAS VALLEY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed for failure to prosecute.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/20/05

Date of Mailing: 7/20/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL OF CONTESTED CASE

OAL DKT. NO. EDU 00335-05S

AGENCY DKT. NO. 335-9/04

J.M. ON BEHALF OF S.F.,

Petitioners,

v.

EVESHAM BOARD OF EDUCATION AND RANCOCAS VALLEY REGIONAL BOARD OF EDUCATION,

Respondent.

Carole Ann Geronimo, Esq., for petitioners

Frank P. Cavallo, Jr., Esq., for respondent Rancocas Valley Regional Board of Education (Parker McCay, attorneys)

Jeffrey F. Belz, Esq., for respondent Evesham Board of Education

Record Closed: May 26, 2005 Decided: June 22, 2005

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition of Appeal filed by J.M. on behalf of S.F., ("petitioners") with the Commissioner of the Department of Education for allegations regarding pupil records involving the Evesham Board of Education and the Rancocas Valley Regional Board of Education ("respondents"). The Department of Education, Bureau of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law on January 26, 2005, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

It appears that the materials sought have either been provided or do not exist. Petitioner has not responded to requests for information as to whether the case needs to proceed. (See attached letters dated April 12, 2005 and May 16, 2005, to counsel from the undersigned judge.) Therefore, I **CONCLUDE** that this matter is now closed for failure to prosecute and failure to respond with any information about the status of the case. It is **ORDERED** that this matter be **DISMISSED** for failure to prosecute and returned to the transmitting agency.

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

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

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

June 22, 2005
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-24-05
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

KWK

Mailed to Parties:

JUN 27 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

May 16, 2005

Frank P. Cavallo, Jr., Esq.
Parker McCay
Three Greentree Centre
7001 Lincoln Drive West
PO Box 974
Marlton, NJ 08053-3292

Jeffrey F.Belz, Esq.
605 W. Route 70
Cherry Hill, NJ 08002

Carole Ann Geronimo, Esq.
10 South Franklin Turnpike, Suite 201
Ramsey, NJ 07446

Re: J.M. o/b/o S.F. v. Evesham BOE & Rancocas Valley Reg. BOE
OAL DKT. NO. EDU 00335-05S
AGENCY DKT. NO. 335-9/04

Dear Counsel:

On April 12, 2005, I wrote a letter to you in connection with the above matter. A copy is attached. Unless I am advised within five days by Ms. Geronimo that there is any reason for this matter to be scheduled for further proceedings, it will be dismissed for lack of prosecution or because it is moot. As you will recall, documents were sought and I believe that to the extent they were available, they have been provided. Again, dismissal of this case will occur without some immediate indication from counsel for the petitioner why it is necessary that it continue.

Yours very truly,

Jeff S. Masin

5/19/05 Geronimo's office "never got the 4/12/05 letter". Also, she has been on vac. + out sick a lot. Requests to ext. 1 week for response. Mar granted MJM

mjm
Attachment
c Joanne Restivo, Deputy Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

April 12, 2005

Frank P. Cavallo, Jr., Esq.
Parker McCay
Three Greentree Centre
7001 Lincoln Drive West
PO Box 974
Marlton, NJ 08053-3292

Jeffrey F.Belz, Esq.
605 W. Route 70
Cherry Hill, NJ 08002

Carole Ann Geronimo, Esq.
10 South Franklin Turnpike, Suite 201
Ramsey, NJ 07446

Re: J.M. o/b/o S.F. v. Evesham BOE & Rancocas Valley Reg. BOE
OAL DKT. NO. EDU 00335-05S
AGENCY DKT. NO. 335-9/04

Dear Counsel:

I have recently received the letters from Messr. Cavallo and Belz which report with respect to the search for records involving the student involved in this case. Based upon the information that she received, I request that Ms. Geronimo advise me within one week of whether there is a need to proceed with the current case, and if so, precisely what further relief she is seeking. If the current dispute that was forwarded to me by the Commissioner of Education regarding access to pupil records has been resolved as a result of the information provided, then I request that Ms. Geronimo so advise and withdraw the matter. Whether there needs to be some further proceeding arising out of the circumstances affecting this child, I do not know, but if the current relatively narrow dispute has been resolved, I would like to close this matter as quickly as possible. On the other hand, if Ms. Geronimo does identify some continuing need to proceed, then I want to schedule the matter for further proceedings as soon as possible.

Thank you for your attention to this matter and anticipating Ms. Geronimo's reply.

Yours very truly,

Jeff S. Masin

mjm
c Joanne Restivo, Deputy Clerk

256-05

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM A. BROWN,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY SPECIAL SERVICES	:	
SCHOOL DISTRICT.	:	DECISION
	:	

SYNOPSIS

The Board certified tenure charges of abandonment of position against William A. Brown, a tenured custodian in the Bergen County Special Services School District, stemming from his repeated, abusive, unexplained and unexcused absences from employment beginning in the 2002-2003 school year and continuing through the 2004-2005 school year.

Respondent was directed to file an Answer to the charges against him, and advised that failure to answer within 15 days from the date of filing of such charges, where no extension has been applied for and granted, would result in the charges being deemed admitted pursuant to *N.J.A.C. 6A:5-3(c).* No reply was filed.

The Commissioner reviewed the tenure charges certified against the respondent, and the evidence in support of those charges. Noting that the respondent has chosen not to deny the allegations against him and, therefore, deeming the within charges to be admitted, the Commissioner concludes that the Board has demonstrated that respondent is guilty of abandonment of position, warranting termination from his position. Summary judgment is granted to the District, and William A. Brown is dismissed from his tenured position as custodian as of the date of this order.

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

July 20, 2005

AGENCY DKT NO. 144-6/05

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM A. BROWN,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY SPECIAL SERVICES	:	
SCHOOL DISTRICT.	:	DECISION
	:	

For the Board, William C. Soukas, Esq. (Nowell Amoroso Klein Bierman, Attorneys)

William A. Brown, *Pro se*

This matter was opened before the Commissioner of Education on June 8, 2005, through the certification of tenure charges of abandonment of position against William A. Brown, a tenured custodian, by the Board of Education of the Bergen County Special Services School District.

By notice dated June 9, 2005, the Commissioner directed respondent, via both certified and regular mail, to file an Answer to the tenure charges against him.* This communication from the Bureau of Controversies and Disputes clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *shall have 15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, will result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent, or any attorney on his behalf, in response to the District's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

* The envelope mailed certified has been returned by the post office marked "unclaimed." The envelope mailed regular first class mail has not been returned and is presumed delivered.

The Commissioner has reviewed the tenure charges certified against respondent by the Board, and the evidence in support of those charges. They allege:

> 1. Repeated, abusive, unexplained and unexcused absences from employment beginning in the 2002-2003 school year and continuing through the 2003-2004 and 2004-2005 school years;
>
> 2. Failure to provide a doctor's clearance, as requested by the District on or about October 4, 2005 [sic], for the purpose of establishing respondent's ability to return to work;
>
> 3. Failure to advise the District on or after October 21, 2004 whether he intended to return to employment;
>
> 4. Failure to advise the District on or after January 10, 2005 whether he intended to return to employment; and
>
> 5. Failure of respondent to communicate with the District or respond to the District's correspondence and inquiries about his employment status or intentions since approximately January 2005.

Noting that respondent has chosen not to deny the allegations against him and, therefore, deeming the within charges to be admitted, the Commissioner concludes that the Board has demonstrated that respondent is guilty of abandonment of position, warranting termination from his position.[1]

IT IS THEREFORE ORDERED this _____day of July 2005 that summary decision shall be granted to the District, and William A. Brown shall be dismissed from his tenured position as a custodian in the District's employ as of the date of this order.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/20/05

Date of Mailing: 7/20/05

---

[1] Pursuant to *N.J.S.A.* 18A:17-3, public school janitors, or custodians, shall, unless appointed for a fixed term, hold office or employment under tenure of good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, ***except for neglect, misbehavior or other offense.

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

#258-05

258-05

F.R., on behalf of minor child, M.R., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner alleged that the principal – who is not named as a party in this matter -- of a Montville elementary school violated school district policies and humiliated his son, M.R., by disciplining him for selling merchandise in school by confiscating the money he collected from selling bracelets, accusing M.R. of "ripping off" his classmates and the cancer foundation, parading M.R. around to each classroom, and sending a public letter to each fifth grade parent. Petitioner sought: an apology from the principal; monetary compensation for slanderous remarks; a letter to each fifth grade parent acknowledging that the principal's letter about this matter sent previously was an overreaction; and "...legal fees and such other relief as the Court may deem fair and equitable."

Respondent Board filed a Motion to Dismiss with prejudice, arguing that the Commissioner lacks jurisdiction to award the relief requested by the petitioner in this matter. Furthermore, the Board disputes the characterizations set forth in the petition and claims that any actions taken by the principal were reasonable and appropriate.

Upon a thorough review of the parties' submissions, the Commissioner determined to grant the Board's Motion to Dismiss, based on lack of jurisdiction. In so deciding, he emphasizes that: applicable statute and regulation place public school personnel issues within the purview of the local board of education; the allegations giving rise to the request for money damages are based in tort law, over which the Commissioner has no jurisdiction; in the absence of express statutory authority to award damages, monetary sanctions to compensate for damages, or legal fees, the Commissioner may not direct that petitioner be awarded such relief. Accordingly, the petition in this matter is 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 21, 2005

AGENCY DKT. NO. 47-2/05

F.R., on behalf of minor child, M.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, John G. Geppert, Jr., Esq. (Wiley, Malehorn & Sirota)

For Respondent, Marc H. Zitomer, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

This matter was initiated by way of the filing of a Petition of Appeal on February 14, 2005 wherein petitioner alleges that the principal[1] of a Montville elementary school violated school district policies and humiliated his son when she disciplined him for selling merchandise in school by confiscating the money he collected from selling bracelets, accusing his son of "ripping off" his classmates and the cancer foundation, parading his son around to each classroom and sending a public letter to each fifth grade parent. (Petition of Appeal at 2-3) The relief that petitioner seeks is:

> "that [the principal] apologize to M.R. for falsely accusing him of 'ripping off' the cancer foundation and for selling illegal merchandise; the money seized from M.R. be returned to him to compensate for the slanderous remarks by [the principal] causing depreciation of his character; a written letter be sent to the parents of all fifth graders at the Hilldale School stating [the principal]'s letter of November 19, 2004 referring to the cancer foundation was an overreaction; and legal fees and such other relief as the Court may deem fair and equitable. (*Id.* at 6)

The Board filed its Answer on March 7, 2005 admitting that the principal had confiscated the money M.R. had collected and that a letter had been sent to parents, but denying petitioner's allegations

[1] It is noted that the principal is not a named party in this matter.

that the principal had taken action to humiliate M.R. or that any Board policies had been violated. (Board's Answer at 2) The Board asserted as affirmative defenses, *inter alia*, that the petition failed to state a claim upon which relief may be granted and that the Commissioner lacks jurisdiction to award the requested relief. (*Id.* at 3)

By letter of March 11, 2005, the Director of the Bureau of Controversies and Disputes notified the parties that the Commissioner would exercise his discretionary authority under *N.J.A.C.* 6A:3-1.12 to entertain a motion with respect to the Board's claims that the petition fails to state a claim upon which relief may be granted, and that the Commissioner lacks jurisdiction to award the requested relief in that these are threshold issues which appear to have merit. Accordingly, a briefing schedule was established to entertain a motion by the Board.

On April 29, 2005, the Board filed a Motion to Dismiss the petition in this matter with prejudice. In its motion, the Board notes that it adamantly disputes petitioner's characterization of the discipline, if any, imposed upon M.R. as set forth in the petition, and claims that any actions actually taken by the principal were reasonable and appropriate. (Motion to Dismiss at 2) The Board states, however, that for the limited purpose of its motion, even assuming, *arguendo,* that the facts as alleged by petitioner are true, the petition nevertheless must be dismissed because the Commissioner lacks jurisdiction to award the relief requested by petitioner. (*Id.* at 2-3)

In this regard, the Board points out that *N.J.S.A.* 18A:11-1(c) vests the power to control and regulate the conduct of public school employees exclusively in local boards of education, and the Board submits that ordering the principal, who is not named in this action, to apologize and to circulate a letter to all fifth-grade parents stating that she overreacted is clearly a disciplinary employment action.[2] (*Id.* at 3-4) Accordingly, in that there is no statutory authority for the Commissioner to order an employee of a public school district to tender an apology to students, parents or anyone else, and no statutory authority for the Commissioner to impose discipline on employees of a local board of education, with the exception of

[2] The Board observes that it is unclear whether petitioner is requesting that this letter be written by the principal or some other employee, but that, regardless, there is no statutory authority for the Commissioner to order anyone to write such a letter. (*Id.* at 5)

removal or reduction in salary of tenured teaching staff members in the course of tenure proceedings, the Board argues, the Commissioner may not grant the relief petitioner seeks. (*Id.* at 4-5)

Moreover, citing *Montagna v. Bd. of Ed. of Twp. of Belleville*, 97 *N.J.A.R.*2d (EDU) 46 and *Deborah E. Ciambrone v. Gerald Witty and the Board of Education of the Borough of Bloomingdale, Passaic County*, decided by the State Board October 6, 2004, the Board contends that the Commissioner does not have jurisdiction to award monetary damages as compensation for allegedly slanderous statements made by the principal as the allegations giving rise to this requested relief are based in tort law, an area of law over which the Commissioner has no jurisdiction whatsoever. (*Id.* at 6) In further support of its argument, the Board points out that it has repeatedly been held that the Commissioner lacks jurisdiction to award money damages absent statutory authority to do so and that the Commissioner's authority to award money damages is limited strictly to lost earnings of an employee or restoring an increment which has been improperly withheld. (*Id.* at 7-8) Finally, the Board contends that it is well-established that the Commissioner lacks jurisdiction to award attorneys' fees or legal costs. (*Id.* at 8)

In response, petitioner argues that jurisdiction to hear this matter arises from *N.J.S.A.*18A:6-9, which gives the Commissioner jurisdiction to hear and determine all controversies and disputes arising under the schools laws. (Petitioner's Response to the Board's Motion at 6) Petitioner further asserts that the provisions for oversight and discipline of students in the public schools, *N.J.S.A.* 18A:25-2, *N.J.S.A.* 18A:37-1, and *N.J.S.A.* 18A:27-2(b) and (e), provide jurisdiction for the Commissioner to hear this matter, arguing that petitioner has alleged that the Board acted arbitrarily and capriciously in imposing discipline on M.R. and that M.R. was not afforded the due process to which he was entitled under the Board's policy. (*Id.* at 6-7) Petitioner also asserts that the principal's handling of this matter was contrary to the provisions of *N.J.S.A.* 18A:37-13 *et seq.*, which prohibit harassment, intimidation and bullying and that the Board failed to adequately address the harassment, intimidation and bullying of M.R. by his school principal through the policies which it is required to maintain, pursuant to *N.J.S.A.* 18A:37-15. Moreover, pointing to *G.W.S., on behalf of minor child, A.F.S. v. William Petrino, Superintendent, and Rahway Board of Education, Union County*, decided by the Commissioner

November 29, 1999 and *R.A.M. v. Tabernacle Twp. Board of Education*, 94 *N.J.A.R.*2d (EDU) 573, petitioner asserts that the Commissioner has jurisdiction to review allegations involving local board of education policies. (*Id.* at 8)

Moreover, petitioner notes that he is appealing the decision of a board of education and that the Commissioner has the power to determine whether a disputed local decision by a board is improper as a matter of law, whether the evidence sustains the factual conclusions reached on the local level and whether there was a reasonable basis for the decision. (*Id.* at 9-10) Thus, petitioner argues, the Commissioner has jurisdiction to hear this matter under *N.J.A.C.* 6A:3-1.3(d) -- the regulation governing appeals to the Commissioner -- when the controversy arises under the school laws and involves an appeal of a decision by the board of education. (*Id.* at 10) Petitioner further submits that any ancillary matters related to the issues rising under the school laws are also within the Commissioner's jurisdiction, as in the present matter wherein a principal humiliated an elementary student and the Board determined not to hear the matter or take any action.[3] (*Id.* at 10-11)

Upon a thorough review of the parties' submissions,[4] the Commissioner has determined to grant the Board's Motion to Dismiss the within petition. In so concluding, the Commissioner points out that, even assuming, *arguendo*, all of petitioner's allegations to be true, the Commissioner lacks the authority to award any of the requested relief.

Specifically, petitioner seeks an order requiring that the principal apologize to M.R. for falsely accusing him, and that a letter be sent to all fifth-grade parents stating that the principal's letter was an overreaction. In accordance with applicable statute and regulations, personnel issues within the public schools are within the purview of the local board of education. See, *e.g.*, *N.J.S.A.* 18A:11-1(c), *N.J.S.A.* 18A:25-29 *et seq.*, and *N.J.A.C.* 6:3-4 *et seq.* The mere fact that a dispute involves a principal

[3] The petition states that "[p]etitioners have contacted the Board of Education, however, the Board has neglected to respond to their claims" (Petition of Appeal at 6, No. 13), a claim which is denied by the Board (Answer at 2, No. 13).

[4] The Commissioner notes that on May 17, 2005, the Board filed an additional submission not provided for in the briefing schedule established for consideration of the Board's Motion to Dismiss. In that the Board did not make application for the filing of additional arguments, and, thus, permission to file the additional brief was not granted, the May 17, 2005 submission was not considered in making this determination.

does not confer jurisdiction upon the Commissioner, nor can an alleged violation involving the treatment of others with dignity and respect be permitted to survive as an independent cause of action where the relief sought by a petitioner is beyond the Commissioner's authority to grant. The Commissioner of Education becomes involved in personnel issues in only two instances: first, if tenure charges have been certified to the Commissioner by a local board of education; and second, if person filing tenure charges at the local level appeals a board's decision not to certify such charges to the Commissioner. As such, the Commissioner does not have the authority to award the relief sought.

With respect to petitioner's request that "the money seized from M.R. be returned to him to compensate for the slanderous remarks by [the principal] causing deprecation of his character," the Commissioner does not have jurisdiction to award monetary damages as compensation for allegedly slanderous statements made by the principal because the allegations giving rise to this requested relief are based in tort law, an area of law over which the Commissioner has no jurisdiction. Such action is properly brought before the New Jersey Superior Court. See *Montagna, supra;* and *Ciambrone, supra*. Moreover, it is well-established that the Commissioner lacks authority to award money damages or monetary sanctions that constitute compensation for "damages" other than lost earnings or restoring an increment which has been improperly withheld. See *Scott and Yarnall v. Bd. Of Educ. of the City of Trenton*, decided by the Commissioner September 30, 2002, *affirmed* St. Bd. June 2, 2004 (*modified on other grounds*); *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 279, 281 (*Citing McLean v. Bd. of Ed. of Glen Ridge*, 1977 *S.L.D.* 311; 315; *Smith v. Bd. of Ed. of Hamilton,* OAL Dkt. No. EDU 5468-87 *adopted in part and rejected in part on other grounds*, decided by the Commissioner April 21, 1988) In the absence of express statutory authority to award damages or monetary "sanctions" to compensate for damages, the Commissioner may not direct that petitioner be compensated for any alleged damages in this matter.

Finally, with respect to petitioner's request for legal fees, in the absence of express statutory authority to award legal fees, the Commissioner may not direct that petitioner be compensated for legal fees in this matter. *See Hinfey v. Matawan Regional Board of Education,* 77 *N.J.* 514, 525 (1978); *B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District*

No. 1 and Donald Merachnik, Superintendent of Schools, Union County, 1987 *S.L.D.* 323*; Balsley v. North Hunterdon Bd. of Educ.,* 117 *N.J.* 434 (1990)*; and State Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

Accordingly, for the reasons set forth above, the Commissioner has determined to grant the Board's Motion to Dismiss the petition in this matter, with prejudice, as it seeks relief which the Commissioner is not empowered to grant.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 7/21/05

Date of Mailing: 7/22/05

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

259-05

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF :

DIRK DOMINICK, BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION OF THE BOROUGH OF : DECISION

PARAMUS, BERGEN COUNTY. :

SYNOPSIS

The Board filed a Motion for an Order to Show Cause, seeking suspension of respondent's instructional certificate for unprofessional conduct stemming from his failure to provide adequate notice of resignation pursuant to *N.J.S.A.* 18A:26-10.

The Commissioner issued an Order directing respondent to show cause why further order should not be entered suspending his certificate for unprofessional conduct. Based on respondent's failure to defend himself against the Show Cause Order allegations, each allegation against the respondent was deemed to be admitted.

Therefore, the Commissioner orders that respondent's instructional certificate be suspended for a period of one year commencing as of the date of this decision, and forwards the matter to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it may deem appropriate.

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

July 21, 2005

AGENCY DKT. NO. 128-5/05

IN THE MATTER OF THE SUSPENSION :		
OF THE TEACHING CERTIFICATE OF :		
DIRK DOMINICK, BOARD OF :		COMMISSIONER OF EDUCATION
EDUCATION OF THE BOROUGH OF :		DECISION
PARAMUS, BERGEN COUNTY. :		

For Petitioner, Steven M. Fleischer, Esq. (Sills, Cummis, Epstein & Gross)

For Respondent, Dirk Dominick, *Pro Se*

On May 26, 2005, the Paramus Board of Education (Board) filed before the Commissioner of Education a copy of a letter indicating on its face that an Order to Show Cause, signed by the Commissioner on May 17, 2005, and an accompanying affidavit were mailed by regular and certified mail to respondent Dirk Dominick notifying him that he had 20 days to submit a written answer addressing why an Order should not be entered suspending his teaching certificate for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10.[1] Respondent did not submit an answer within the time provided. Accordingly, on June 24, 2005, the Director of the Bureau of Controversies and Disputes sent a second and final notice to respondent advising him that, should an answer not be filed within ten days of receipt of the June 24 letter, the Commissioner may decide this matter by summary decision pursuant to *N.J.A.C.* 6A:3-1.12.[2]

[1] The Board subsequently provided a copy of the "green card" signed by respondent confirming receipt of the certified mail.

[2] The certified mail "green card" indicates that respondent received this letter on June 27, 2005.

In that respondent has failed to file an answer to the Order to Show Cause or to respond in any manner, the Commissioner has determined to decide this matter by summary decision, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-1.12.

The following facts are found to be true, based on the undisputed affidavit of Joseph P. Lupo, Assistant to the Superintendent/Human Resources, Paramus School District:

1. On August 16, 2005, respondent signed an Employment Contract (Contract) to serve as a Latin teacher at Paramus High School from September 1, 2004 through June 30, 2005.

2. The Contract provides that either party may terminate the Contract, but only with 60 days' written notice.

3. On March 14, 2005, respondent announced to his classes that March 15, 2005 would be his last day.

4. Respondent did not notify the Board that he would be resigning prior to March 14, 2005.

5. At a meeting on March 15, 2005, the Assistant to the Superintendent/Human Resources and the high school principal advised the respondent that, should he not honor his commitment to complete the 2004-2005 school year or at least honor his 60-day notification period, the District would seek all appropriate recourse available, including suspending his license based on abandonment of position.

6. At the March 15, 2005 meeting, the Assistant to the Superintendent/Human Resources requested that respondent reconsider his decision in that his departure would cause disruption to the school system and negatively impact his students.

7. Upon conclusion of the March 15, 2005 meeting, respondent exited the building, thus abandoning his duties at the close of the school day.

8. On March 21, 2005, the superintendent of schools received a letter from respondent, dated March 8, 2005, explaining that he was leaving his position because he found the coursework associated with his certification program too burdensome, and that he did not feel like continuing.

9. Respondent did not provide 60 days' notice of his intent to resign on March 15, 2005.

10. On April 11, 2005, the Board unanimously voted in the affirmative to refuse respondent's resignation.

11. "Respondent's abandonment of his position caused the Board to suffer the loss of a permanent, certified classroom instructor," requiring the Board to attempt to secure an appropriate substitute Latin instructor in the middle of the school year, and also caused the students who attend Paramus High School to suffer a serious disruption in their academic program.

(Affidavit of Joseph P. Lupo at 1-3)

Pursuant to *N.J.S.A.* 18A:26-10, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for ceasing to perform his duties before the expiration of his employment without consent of the Board. The Commissioner recognizes that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students.***" (citations omitted) (*Penns Grove-Carneys Point Board of Education v. Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, 407) In the instant matter, the Board claims that respondent's lack of adequate notice negatively affected his students by causing a serious disruption in their academic program. Moreover, the Board notes that respondent's lack of notice required that the Board find an appropriate substitute Latin teacher in the middle of the school year. However, even if the Board were able to find a replacement quickly, such replacement would not negate respondent's unprofessional conduct. (*See In the Matter of the Suspension of the Teaching Certificate of Patricia Aiken, School District of the Township of East Amwell, Hunterdon County*, 1986 *S.L.D.* 2816, 2821.) "The sudden departure of a teacher who has been working with a group of pupils for four months results in a disruption to the educational program to those

pupils, if only because of a sudden change in teachers." (*In the Matter of the Suspension of the Teaching Certificate of David T. Drake, School District of the Borough of Dunellen, Middlesex Co.,* 1987 *S.L.D.* 2016, 2019)

The Commissioner thus agrees with the Board that in resigning abruptly, respondent put his own self-interest above the interests of his students and his professional obligation to provide adequate notice to the Board. Accordingly, the Commissioner finds respondent guilty of unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10, and determines that the teaching certificate of respondent Dirk Dominick shall be suspended for a period of one year, which period shall commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of decision: 7/21/05

Date of mailing: 7/22/05

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

260-05

RONALD NELSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner contends that he acquired tenure rights based on his employment as a janitor in East Brunswick schools between April 2001 and June 2004, and appeals his termination by the Board following the end of the 2003-04 school year, claiming violation of tenure rights. The basis for petitioner's claim of tenure rights is a 1955 Board resolution granting tenure to custodians after three years of employment.

The ALJ concluded *inter alia* that: the Board's April 1995 revocation of the 1955 resolution—through approval of a board resolution which specifically revoked "Any Policy, ByLaw, Rule or Regulation for the governance of the Board" not contained in the written policy manual—negated any basis for the petitioner's claim to tenure rights; there was no implied contract between petitioner and the Board; and the authority of a board to make and rescind tenure related resolutions, and the notice required to do so, are well supported in case law. The ALJ granted the Board's motion for summary decision, and dismissed the petitioner's appeal.

The Commissioner concurs with the ALJ that the petitioner was a nontenured employee hired on a contractual basis, and the Board was not required to follow tenure removal procedures in terminating his employment. The Commissioner adopts the Initial Decision as his own for the reasons expressed therein, and dismisses 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.

July 22, 2005

OAL DKT. NO. EDU 8966-04
AGENCY DKT. NO. 356-10/04

RONALD NELSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the Board of Education's (Board) reply filed pursuant to *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner renews his contention, as previously argued before the OAL, that the Board's 1955 resolution granting tenure to custodians after three years of employment is still in effect. (Petitioner's Exceptions at 1-3) Petitioner reiterates that the Board's 1995 resolution revoking prior Board policies, on which the Administrative Law Judge (ALJ) relied in concluding that petitioner did not have tenure, did *not* nullify the Board's obligations in this regard because it did not *expressly* repeal the 1955 resolution or state a *specific* intent to discontinue custodial tenure. Citing *Newark Publishers' Association v. Newark Typographical Union*, 22 N.J. 419 (1956) as quoted with emphasis supplied in *Kirschling v. Board of Education of the Township of Pemberton*, 94 *N.J.A.R.*2d (EDU) 12, 20 (1993), petitioner urges that in deciding a

matter such as this, it is "*not the real intent but the intent expressed or apparent in the writing that controls*." (*Id.* at 4-6)

In reply, the Board counters that, as correctly found by the ALJ, the Board had long since taken all actions necessary to formally rescind its prior regulations and policies with respect to custodial tenure. Reiterating the district's litigation history and the uncontested intent of the 1995 resolution, and pointing to the language of the resolution itself, the Board urges: "It is beyond the pale to assert***that the words 'any policy, bylaw, rule or regulation for the governance of the board not contained (in the written policy manual) is specifically revoked' [do] not reflect the clear intent of the Board of Education to repeal and revoke not only the specific 1955 resolution***, but also any other unwritten rules, regulations or policies, whatever their source, which were not contained in the policy manual specifically being adopted at the 1995 Board reorganization meeting." (Respondent's Reply Exceptions at 2-5, quotation at 4)

Upon review, the Commissioner fully concurs with the ALJ that petitioner was a nontenured employee hired on a contractual basis, and the Board was not required to follow tenure removal procedures in terminating his employment because it had acted in 1995, six years prior to petitioner's hiring, to nullify its 1955 resolution granting tenure to custodians after three years of employment in the district.

Like the ALJ, the Commissioner distinguishes the current matter from the earlier cases cited by petitioner, since—unlike the situation in those cases—the Board here is not relying solely on silence about custodial tenure in policy manuals or a change in practice with respect to issuance of open-ended custodial employment contracts. Instead, the Board's position is based on an official resolution—duly adopted at a public

meeting, promulgated through distribution of manuals to every school in the district, and clear both on its face and in its genesis as a response to administrative and court rulings on the continuing effect of unrepealed policies—that *specifically* revoked *all* prior policies, regulations, etc., not contained within the Board policy manual adopted via the same resolution. In taking this action, and in repeating it at each reorganization meeting since 1995, the Board has left no doubt about its official abrogation of any past policy not included within the currently sanctioned manual, thus curing the primary defect that prevented it, in the pre-1995 cases cited by petitioner, from successfully claiming that district custodians were nontenured employees.[1] [2]

The Commissioner also rejects petitioner's contention that the Board could not disavow its obligations to him under the 1955 resolution without express notification to the effect that, as a result of the Board's 1995 action, custodians could no longer obtain tenure in the district. Petitioner was hired six years after the Board formally rescinded its one-time policy of granting tenure to custodial staff; there is no reference to tenure status for custodians in any Board policy manual in effect at the time of petitioner's hire or during his employment; petitioner was employed from the outset through a series of fixed-term contracts; and the record contains no indication whatsoever—nor does the Petition of Appeal allege—that petitioner was somehow given the promise or expectation that he would acquire tenure in the district.

---

[1] A board's general authority to rescind prior policies is beyond question, and indeed, is assumed in the very cases cited by petitioner; the claimants in those cases prevailed only because the Board had not taken the actions necessary for such rescission.

[2] It is noted that this matter represents the first custodial tenure case decided subsequent to the Board's adoption of the 1995 resolution.

Accordingly, the Commissioner finds no creditable basis for petitioner's claim, and the Initial Decision of the OAL, granting summary decision to the Board and dismissing the Petition of Appeal, is adopted for the reasons expressed therein.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/05

Date of Mailing: 7/22/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8966-04

AGENCY DKT. NO. 356-10/04

RONALD NELSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, PC, attorneys)

Martin R. Pachman, Esq., for respondent (Martin R. Pachman, PC, attorneys)

Record Closed: April 27, 2005 Decided: June 13, 2005

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE

Petitioner, Ronald Nelson, was employed as a janitor by the Board of Education of the Township of East Brunswick, Middlesex County (Board). He was initially hired in a part-time capacity April 6, 2001. Petitioner was approved to work in a full-time capacity commencing November 19, 2001. Petitioner worked to the end of the 2003-2004 school year, i.e. June 30, 2004. July 8, 2004, the Board confirmed that it did not intend to employ petitioner for the 2004-

2005 school year. Petitioner contends that he had acquired tenure prior to the Board's action and could not be terminated from employment in that manner. Petitioner appeals his discharge.

PROCEDURAL HISTORY

Petitioner filed a certified Petition dated October 4, 2004, with the Commissioner of Education where it was received on that same date. (Exhibit P-1). The Board filed an Answer to Petition dated October 22, 2004, that was received at the Commissioner's office October 25, 2004. (Exhibit R-1). The Department of Education, Bureau of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law (OAL) where it was filed November 3, 2004. OAL acknowledged receipt of the contested case by Notice of Filing dated November 8, 2004, to the parties and Department of Education that set forth procedural requirements. (Exhibit C-2). The case was assigned and a Case Management Order dated December 1, 2004, was issued to the parties superseding some of the directions in the Notice of Filing. (Exhibit C-1). The parties were informed to serve discovery requests by January 7, 2005, and serve answers to the requests by March 7, 2005. An in-person settlement conference was scheduled for March 29, 2005. Petitioner's attorney acknowledged receipt of the Case Management Order by letter dated December 9, 2004. (Exhibit P-2). She also advised that she had been in contact with her adversary and that both agree that the dispute is legal rather than factual and jointly requested to forego the settlement conference. Neither anticipated making discovery requests. A briefing schedule was requested in order that the matter be resolved by summary "judgment"[1], however, there was no reference as to whether oral argument was requested. Calls made personally by the judge to petitioner's attorney's office on December 15, 2004, and January 3, 2005, to inquire about oral argument were unsuccessful. Neither call was returned.

A telephone conference was scheduled for January 25, 2005, but could not be conducted because of problems with the OAL phone system. (Exhibit R-4). A second telephone conference was scheduled for February 28, 2005, however, it was cancelled due to a forecast of six to ten inches of snow. Because of the unsuccessful attempts to discuss the case, the previously scheduled March 28, 2005, settlement conference was maintained. A briefing

schedule was sent to the attorneys by letter dated March 2, 2005. (Exhibit C-3). At the March 29, 2005, settlement conference, attorney for respondent appeared, attorney for petitioner did not. (Exhibit P-4).

In compliance with the briefing schedule, respondent submitted a motion for summary "judgment" with attached brief and exhibits received at OAL April 5, 2005. (Exhibit R-2). Petitioner submitted similar filings that were received at OAL April 7, 2005. (Exhibit P-3). Subsequently, each party submitted a response to the brief filed by the adversary and, thereafter, the record closed for consideration of the motions. (Exhibits P-5 and R-3).

FACTUAL DISCUSSION

Petitioner and respondent, through their respective briefs and responses, concur that there is no material issue of fact that is in dispute. There is no stipulation between the parties regarding the facts, however, the recitations of the facts in their respective pleadings strongly coincide. Also, where one brief may reference a factual circumstance not contained in the other, ample opportunity was provided in their responses to the simultaneously filed briefs to challenge any factual assertion. There was but one.

Respondent accurately challenges petitioner's assertion of "fact" set forth as, "5. Prior to his termination, Petitioner acquired tenure with the board." (Exhibit P-3 at p. 2). In response, respondent's reply brief assails petitioner's "fact" by stating, "Not only is this conclusion one of law rather than a 'fact,' but it is the centrally disputed issue which is submitted to the court by the petition." Clearly, tenure does not qualify in this instance as a material fact not in dispute, but is the primary legal issue that forms the basis of this case. Whether tenure was acquired will be determined by examination of the applicable, controlling law.

Therefore, following are the material facts that are relevant to this matter to which there is no genuine issue . They are neither disputed nor contested by the parties:

[1] *N.J.A.C.* 1:1-12.5, Motion for Summary Decision.

1. In 1955 the Board passed a resolution that stated, "Resolved that it is the stated policy of the Board of Education of East Brunswick Township to grant tenure to efficient janitors, who are members of the State Pension and Annuity Fund after three years of service." At its annual reorganization meeting of April 24, 1995, the Board adopted the following resolution: "Moved by Mrs. Paulson, seconded by Mrs. Teicher that the Board of Education hereby adopt the Policies, By-Laws and Rules and Regulations as presented and contained in the policy manual and referenced by the attached index. Any Policy, By-Law, Rule or Regulation for the governance of the Board not contained therein is specifically revoked and Move that a copy of all Polices, By-Laws and Rules and Regulations be available for review in each building throughout the school district." (Exhibit R-2 at Attachment G, pp. 9 and 10).
2. Petitioner was hired as a part-time custodian for the contractual term of April 6, 2001 until June 30, 2001. (Exhibit R-2 at Attachment A).
3. Petitioner was employed by the Board as a part-time custodian for the contractual term of July 1, 2001 until June 30, 2002. (Exhibit R-2 at Attachment B).
4. November 16, 2001, the Board approved petitioner as a full-time custodian for the term of November 19, 2001 through June 30, 2002. (Exhibit R-2 at Attachment C).
5. Petitioner was employed by the Board as a full-time custodian for the contractual term of July 1, 2002 to June 30, 2003. (Exhibit R-2 at Attachment D).
6. Petitioner was employed by the Board as a full-time custodian for the contractual term of July 1, 2003 to June 30, 2004. (Exhibit R-2 at Attachment E).
7. July 8, 2004, the Board voted to not renew petitioner's employment for the 2004-2005 school year. (Exhibit R-2 at Attachment F).
8. The Board's Policy Manual, created in 1969, contains no reference to the 1955 resolution regarding janitorial tenure. (Exhibit R-2 at Attachment H).

Additional facts for consideration are found in the Board's Certification of Bernardo J. Giuliana attached to its brief. It does not have an individual "attachment" letter of designation. Therefore, it will be referred to as Exhibit R-2 at Attachment I. The certification is dated March 31, 2005 and the affiant identifies himself as (Paragraph 1) "employed as the Board

Secretary/Business Administrator for the East Brunswick Township Board of Education, and have held that position since April of 1994." Giuliana stated that he was aware of the impact of the 1955 "unwritten" resolution upon the janitorial tenure issue within the District. "Consensus arose that if a policy had been adopted prior to 1969 and had not been codified at that time, and had not been recognized as an operational requirement by the Board for over 25 years, the better course of action would be to simply revoke any policies, rules or regulations which were not contained in the manual." (Paragraph 8). "The intent of this revised (1995) resolution was to add language to the previous adoption of the policies, by-laws, rules and regulations as contained in the printed manual to specifically revoke any policy, by-law, rule or regulation not contained within that written manual." (Paragraph 10). "Thus, the only policies, by-laws, rules or regulations which are in existence at the present time are contained in the current written policy manual, and nothing in that manual awards tenure to custodial/janitorial employees." (Paragraph 12).

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5(b) provides that summary decision should 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." This language is substantially similar to the guidelines for summary judgment under New Jersey Court Rule 4:46-2(c).[2]

The OAL's standard for summary decision is set forth by the New Jersey Supreme Court. Thus, summary decision should be granted if, after considering the evidence presented in the light most favorable to the nonmoving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require (a hearing) or whether it is so one-sided that the one party must prevail as a matter of law." *Id.* at 533 quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S.Ct.* 2505, 2512, 91 *L.Ed.*2d 202, 214 (1986).

[2] *R.* 4:46-2(c) provides in part: The judgment or order sought shall be rendered forthwith if the pleadings, dispositions, 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.

The court in *Brill* recognized that this necessarily involves the judge in the process of weighing of evidence presented. Accordingly, when determining whether a genuine issue of material fact exists, "the court (should) be guided by the same evidentiary standard of proof...that would apply" at a hearing. *Ibid.* This differs from the weighing the judge would perform after a hearing in that "(o)n a motion for summary (decision) the court must grant all the favorable inferences to the nonmovant." *Id.* at 536.

In the instant case, there are cross motions for summary decision. Therefore, each party is a movant. With one exception[3], each asserts similar facts as to which there exists no genuine issue of material fact. That factual agreement removes the obligation of determining whether there is any favorable inference to be granted to either party. What remains is that there be a determination that the proffered facts are relevant and not inconsequential to the resolution of the case. Such determination is found.

At the heart of this case is whether the Board's 1955 resolution granting tenure to janitors after three years of employment remains binding. Giuliana's affidavit clearly sets forth the Board's efforts to avoid that resolution playing any role in its employment relationship with petitioner and to void the resolution in its entirety. Petitioner claims that he acquired tenure in his employment by virtue of the 1955 resolution urging that, notwithstanding the Board's efforts to nullify, it remains binding because the Board's nullification efforts fell short. In *Smith v. East Brunswick Board of Education*, OAL Docket No. EDU 5654-81 (June 11, 1983, unreported), decided by the Commissioner (August 15, 1983), affirmed State Board of Education (April 6, 1984), by virtue of the 1955 resolution, janitors who had received fixed term contracts were determined to have acquired tenure. *Speer v. Board of Education of the Township of East Brunswick*, OAL Docket No. EDU 4660-83, decided by Commissioner (June 19, 1984), affirmed State Board of Education (January 2, 1985), although addressing the Board's authority to withhold an increment from a tenured custodian, affirmed the holding in *Smith, supra*, regarding the attainment of tenure via the 1955 resolution because the Board had neither modified nor rescinded it. The issue in *Strincocski v. Board of Education of East Brunswick*, 93

[3] Petitioner's brief (Exhibit P-3) at paragraph 5 under subheading STATEMENT OF FACTS AS TO WHICH THERE IS NO ISSUE OF MATERIAL DIFFERENCE (sic) set forth, "Prior to his termination, petitioner acquired tenure with the Board." (*See* FACTUAL DISCUSSION at paragraph 2).

*N.J.A.R.*2d 333, reversed Commissioner at 335, reversed State Board 94 *N.J.A.R.*2d 37, affirmed Appellate Division 94 *N.J.A.R.*2d 527, was whether a 1969 policy manual which did not address janitorial tenure effectively abrogated or supplanted the 1955 resolution. There the petitioner had been afforded only one-year contracts throughout her employment. The ALJ found that petitioner had tenure, however, the Commissioner reversed noting that the Board practice since *Smith* and *Speer* of affording only fixed one-year contracts to janitors and the absence of any reference to the 1955 resolution in the written policy manual of the Board led to the conclusion that petitioner did not have tenure. The State Board found that the adoption of the manual in 1969 did not revoke the 1955 policy because both Smith and Speer had been provided with nonfixed term contracts after 1969 and the Board had taken no action to rescind its 1955 resolution. Dictum in *Strincocski* also queries whether affected employees were sufficiently placed on notice regarding the Board's intentions

The case of *Zielinski v. East Brunswick Board of Education*, 95 *N.J.A.R.*2d 161, affirmed Commissioner 94 *N.J.A.R.*2d ____, affirmed State Board 95 *N.J.A.R.*2d 164, affirmed Appellate Division *N.J.A.R.*2d 3, turned on the same factor, *i.e.*, the 1955 resolution granting automatic tenure and the Board's failure to modify, amend or revoke.

Finally, on April 24, 1995, the Board heard the Department of Education and the Appellate Division and took action to rescind the 1955 resolution which granted tenure after three years, as well as all other resolutions that were not addressed in the 1969 Policy Manual. Notwithstanding the Board's action six years prior to his employment, petitioner asserts that tenure nonetheless was acquired. He claims support for tenure is found in *Woolley v. Hoffman LaRoche*, 99 *N.J.* 284 (1984), modified 101 *N.J.* 10 (1985), asserting the existence and inviolability of implied contract, which is here rejected. More persuasive are cases cited by respondent, to wit, *Diane Swaim and Middletown Township Education Association v. Board of Education of the Township of Middletown, Monmouth County*, OAL Docket No. EDU 6705-98, Agency Docket No. 394-10/95, October 27, 2000; affirmed Commissioner January 26, 2001, and *Rall v. Board of Education of Bayonne*, 54 *N.J.* 373 (1969). In *Diane Swaim*, the Board was approved to have amended a resolution to shorten tenure requirements for principals and subsequently rescind that amendment to return to the original tenure resolution requiring three years of service. As to notice requirements of such actions, *Rall* held that where the resolutions

are adopted at a regularly scheduled meeting of the board of education, no further notice was necessary, as determined by the ALJ whose decision was adopted by the Commissioner.

To dissolve the reach and breathe of the 1955 resolution, the Board (finally) undertook all the actions necessary that were previously pointed out as its shortcomings in *Smith*, *Speer* and *Zielinski*, *supra*. By and because of the Board's corrective measures and expressed intent, petitioner did not acquire tenure upon completion of his three years of janitorial service for the Board.

CONCLUSIONS OF LAW

The April, 1995, revocation by the Board of the 1955 resolution is a substantial distinguishing factor to petitioner's reliance upon *Smith, Speer and Zielinski*. Each of those cases pointed to the Board's inaction with respect to the revocation of the earlier resolution. By the Board's 1995 action, the 1955 resolution is now a nonfactor with respect to janitorial tenure. There is no implied contract between petitioner and the Board that would allow a reliance on *Woolley*. Authority to make and rescind tenure related resolutions and the notice required to do so are supported by the holdings in *Diane Swaim* and *Rall, supra.*

ORDER

It is **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's motion for summary decision is **DENIED.** It is further **ORDERED** 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 (45) days and unless such time limit is

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

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

June 13, 2005
DATE

JAMES W. FAISON, III, ALJ

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

June 13, 2005
DATE

Mailed to Parties:

JUN 15 2005
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBITS IN EVIDENCE:

Court:

C-1 Case Management Order

C-2 Notice of Filing

C-3 Briefing Schedule

For Petitioner:

P-1 Petition

P-2 Letter dated December 9, 2004, requesting briefing schedule

P-3 Motion for Summary Decision

P-4 Letter dated March 29, 2005, re: settlement conference absence

P-5 Response Brief

For Respondent:

R-1 Answer

R-2 Motion for Summary "Judgment"

R-3 Response Brief

R-4 Letter dated January 25, 2005, re: telephone conference

261-05

D.F., on behalf of minor child, T.F., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner appealed the Board's refusal to permit T.F. to participate in cheerleading due to academic ineligibility. Parent claims denial of an exception is unreasonable under the circumstances, and suggests that accommodations have been made for other students. Subsequent to the filing of the petition, T.F. dropped out of Brick Township High School. Because petitioner's claims are based on T.F.'s status as a student in Brick schools, the Board filed a motion for summary judgment to dismiss the petition.

The ALJ concluded *inter alia* that: petitioner's claims are moot based on the fact that T.F. is now 18 years old, and has dropped out of school; petitioner has provided no reasonable basis for a finding that the instant matter is of compelling public importance such that this case should be decided despite its mootness; petitioner's allegations do not appear to provide a reasonable basis for a claim for damages; and the Board's motion for summary decision must be granted as there is no genuine issue of material fact that necessitates a hearing in this matter. The ALJ granted the motion for summary judgment and ordered the petition in this matter dismissed.

The Commissioner adopts the Initial Decision as his own for the reasons expressed therein, and dismisses 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.

July 22, 2005

OAL DKT. NO. EDU 12155-04
AGENCY DKT. NO. 331-9/04

D.F., on behalf of minor child, T.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the grant of the Board's motion dismissing the within petition as moot since T.F. has dropped out of Brick Township High School and petitioner's claims are based on T.F.'s status as a student of that school. Moreover, the Commissioner agrees with the Administrative Law Judge's conclusion that petitioner has provided no reasonable basis for a finding that this is a matter of compelling public importance capable of repetition such that this case should be decided despite its mootness.

Accordingly, the Initial Decision granting the Board's motion and dismissing the petition in this matter is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/05

Date of Mailing: 7/22/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12155-04
AGENCY DKT. NO. 331-9/04

D.F. o/b/o T.F.,

Petitioners,

v.

BOARD OF EDUCATION
OF THE TOWNSHIP OF BRICK,

Respondent.

D.F., petitioner *pro se*, for petitioners

Ben A. Montenegro, Esq., for respondent, **Adam J. Steurman,** Esq., on the Motion and Supporting Brief (Montenegro, Thompson, Montenegro & Genz, attorneys)

Record closed: June 27, 2005 Decided: June 28, 2005

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

STATEMENT OF THE CASE

Petitioner T.F., then a student in the respondent Township of Brick Board of Education's (BOE's) Brick Township High School (BTHS), failed several courses. Consistent with the BOE's policy requiring that students maintain a minimum number of credits to participate in athletic programs, school administrators determined that T.F. was ineligible for participation in

BTHS cheerleading and they dismissed her from the team. Petitioner D.F., petitioner T.F.'s mother, appealed from the dismissal and claimed that T.F. should be reinstated as a member of the team. T.F. has now dropped out of BTHS and the BOE moves for dismissal of the case as moot.

PROCEDURAL HISTORY

In D.F.'s September 13, 2004, letter (detailed below) to the Commissioner of Education, she wrote that she was appealing from the BOE administrator's determination that T.F. was ineligible for participation in BTHS cheerleading. *N.J.S.A.* 18A:6-9; P-5. Beginning on September 23, 2004, in several letters (detailed below), the director of the Department of Education's Bureau of Controversies and Disputes repeatedly advised D.F. of procedural and other requirements for the filing of a petition for relief. R-5; R-6; R-7. In D.F.'s November 2, 2004, letter (detailed below) to the Commissioner, she added details to her allegations against the BOE, reiterated that she was appealing from the disqualification of T.F., and wrote that the BOE should apply its rule in a manner that allowed students to make up for failed classes and participate in extracurricular activities. P-6. By letter dated November 8, 2004, the director again advised D.F. of procedural and other requirements for the filing of a petition for relief. R-8. On December 21, 2004, the BOE filed its answer and defenses. The Department transmitted the contested case to the Office of Administrative Law, where it was filed on December 30, 2004. *N.J.S.A.* 52:14B-2(c). The case was scheduled for a hearing on May 25, 2005, but at D.F.'s request, was adjourned. On June 9, 2005, D.F., the BOE attorney and I engaged in a conference; D.F. confirmed that T.F. had dropped out of BTHS; the BOE's attorney represented that he would file papers in support of a motion for an order dismissing the case; and I notified D.F. that she should file any paper in opposition to the motion by June 27, 2005. On June 17, 2005, the BOE filed its papers in support of its motion. (I have organized and identified exhibits not according to how the BOE identified them in its motion papers, but according to whether they relate to the petitioners' claims or the BOE's defenses and chronologically.) D.F. filed no response to the respondent's motion, and the record closed on June 27, 2005.

FINDINGS OF FACT

As a young girl, T.F., born October 4, 1986, enjoyed and was dedicated to cheerleading. T.F.'s family has been active and involved in community activities and, by way of cheerleading and otherwise, T.F. displayed community and school spirit. P-5; P-6.

During the 2001-02, 2002-03, and 2003-04 school years, T.F. was a freshman, sophomore, and junior at BTHS. R-1.

The BOE's policy requires that students maintain a minimum number of credits to participate in athletic programs. R-1; R-1A. However, during the 2003-04 school year, T.F. became unfocused and associated with troublesome people. T.F. failed to attend school regularly. She was cited for excessive unexcused absences, cutting classes, being late for classes, and missing detentions. Her academic performance was poor and she failed several courses. R-3; R-4.

D.F. met with Dennis Filippone, the BTHS principal, among other BOE officials, to discuss T.F.'s academic problems and, during the summer of 2004, by way of private tutoring, T.F. made up and passed two classes. Her teacher reported that she was a pleasure to teach. The BTHS also arranged T.F.'s 2004-05 schedule so that during the 2004-05 school year she could obtain sufficient credits to graduate with her class. (Although, D.F. alleged that the schedule prevented T.F. from having a lunch period.) However, consistent with the above-described Athletics Eligibility Regulation, during the 2004-05 school year T.F. was ineligible for participation in the BTHS cheerleading program. P-5; P-6.

In a letter dated August 10, 2004, D.F. thanked Mr. Filippone and his staff for arranging credit for T.F.'s two summer classes. However, D.F. also wrote the following: T.F. was participating in therapy sessions and with the family's support she was making efforts to overcome her behavioral changes. Unfortunately, under the BOE's rules, T.F. remained ineligible for participation in the BTHS's cheerleading team. Cheerleading provided structure and guidance for T.F. and, without it, she could fail in school and in life. Given the "extenuating circumstances," D.F. requested an exception to the school system's rule that resulted in T.F.'s

ineligibility. P-2.

In a letter dated August 16, 2004, George McDermott, a psychologist, wrote the following: Since June 2004 he had been seeing T.F. T.F.'s parents had been actively involved in her treatment and were totally supportive of T.F. T.F. was cooperative and punctual at her appointments, while working during the summer. T.F. was "committed to the process of self-examination," she had made tremendous strides in addressing and dealing with her issues, and her prognosis was good. However, disqualification from cheerleading, which was essential to T.F.'s academic progress, had had far-reaching consequences for T.F. and upset her. These circumstances also profoundly disturbed her parents. Given theses circumstances, he requested that T.F. be permitted to participate in the cheerleading program. P-3.

In D.F.'s August 24, 2004, letter to Thomas Seidenberg, the BOE's superintendent, she wrote that she and J.F., her husband, had met with BOE school administrators Filippone and Hrycenko. Since the administrators had not granted her request for exception to the BOE rule, allowing her to be considered eligible for cheerleading, she requested a meeting with Dr. Seidenberg. P-4.

In D.F.'s September 13, 2004, letter to the Commissioner of Education, she wrote (and/or essentially intended to state) the following: If the BOE officials had notified D.F that T.F. could make up a third class, she would have done so, so that she could be considered eligible for cheerleading. At the start of the 2004-05 school year, T.F. participated in the preliminary activities for cheerleading. However, since she had not made up all of the credits required by BOE policy for participation, BOE administrators dismissed her from the team. This caused T.F. embarrassment and anguish. During a telephone conversation (on a date not identified), Superintendent Seidenberg, thinking that he was speaking with a BOE secretary (whose first name is the same as D.F.'s), but actually speaking with D.F., insensitively stated that T.F.'s "case was closed" and that he did not know what D.F. wanted. In October 2004 T.F. would attain the age of eighteen years, when she could "make her own decisions," but without cheerleading to occupy her time, she might make unwise decisions. T.F. and her family were participating in therapy and it was imperative that she not have much free time on her hands. Given all these circumstances, D.F. was appealing Superintendent Seidenberg's determination that T.F. was

ineligible for the cheerleading program. P-5.

By letter dated September 23, 2004, M. Kathleen Duncan, director of the Department's Bureau of Controversies and Disputes, notified D.F. of the following: Based on D.F.'s letter dated September 13, 2004, it appeared that she wished to appeal the determination that T.F. was ineligible for cheerleading. However, additional information and submissions were necessary for a proper petition of appeal. For example, as the petitioner, D.F. must verify statements on which she would rely. Also, D.F. must serve her letter/petition and all attachments on the BOE secretary. Also, D.F. must submit to the Bureau proof of such service by several forms (identified in Director Duncan's letter). Also, if D.F. wanted the case considered on an expedited basis, she must file a notice of motion with supporting papers (identified in Director Duncan's letter). Finally, the matter would not be processed unless and until D.F. complied with the above-described requirements. R-5.

By letter dated October 18, 2004, Director Duncan notified D.F. of the following: Her office had not received from D.F. the notarized verification and proper proof of service, etc., identified in the September 23, 2004, letter (a copy of which Director Duncan transmitted to D.F. with the October 18, 2004, letter). **"Please be advised that unless such documentation is received on or before November 1, 2004, your petition will be dismissed, pursuant to *N.J.A.C.* 6A:3-1.10."** R-6.

By letter to D.F. dated November 1, 2004, Director Duncan confirmed their conversation during which they discussed the following: D.F. should have served a copy of her petition and all attachments on the BOE (by way of its secretary) and proof of such service must be submitted to the Bureau in one of several forms (identified in the letter). By November 5, 2004, D.F. should submit a notarized verification and proof of service of her petition on the BOE. **"Once again, please be advised that unless such documentation is received on or before November 5, 2004, your petition will be dismissed, pursuant to *N.J.A.C.* 6A:3-1.10."** R-7.

In D.F.'s November 2, 2004, letter to the Commissioner of Education, she wrote (or essentially stated) the following: She was appealing from the dismissal of T.F. from cheerleading. T.F. was dedicated to cheerleading, for which she was always well prepared and

attended camps. Cheerleading helped her stay focused and disciplined. She (D.F.) was "an involved parent [and] always followed School procedures when it came to absences." Consequently, during the 2003-04 school year, "[w]hen [T.F.] began making poor choices involving school attendance," she refused to make telephone calls or write notes justifying T.F.'s absences, leaving T.F. no choice but to admit her misconduct to the BOE administrators, so that T.F. would "learn a valuable lesson." As a result of T.F.'s many absences and poor scores, she failed three courses. Because of T.F.'s lack of sufficient credits, she was dismissed from the cheerleading squad. This caused T.F. to experience "mental stress and depression." The high school guidance counselor had referred T.F. to the family crisis center. The BOE's rule, providing that a student whose final grade score was less than 60 was disqualified from certain activities, was "ridiculous." Limiting a student to making up only two subjects (that the student had failed) deprived a student of the opportunity to "make up the work or at least try to get back on track." The BOE should allow a student to make up a third class. P-6.

By letter dated November 8, 2004, Director Duncan notified D.F. of the following: The Department had received her letter dated November 2, 2004. Assuming that D.F. wanted the letter to be considered part of her petition for relief, she should serve it and any other paper (such as her letter dated September 13, 2004) that she had previously filed with the Department on the BOE secretary. D.F. should also prepare and file with the Bureau documentation showing that she had properly served the BOE. R-5.

By letter dated November 12, 2004, D.F. forwarded copies of her letters (petition), etc., to the BOE's secretary. P-7.

By letter dated November 18, 2004, Director Duncan notified D.F. of the following: As the Department had repeatedly instructed her in writing, she was required to submit proof of service of her petition, etc., in one of several forms the Department had identified. Despite this instruction, the Department had not received the required proof of service of her petition, etc. **"Pleased be advised that this matter will be dismissed if proper proof of service is not received on or before the close of business Tuesday, November 30, 2004. No further extensions will be granted."** R-8.

On June 9, 2005, D.F., the BOE's attorney and I conferred by telephone and we reviewed the facts. D.F. confirmed that T.F. (now eighteen years of age) had dropped out of BTHS and the BOE's attorney represented that he would move for summary decision of the case as moot. No record has been made here that, *e.g.*, T.F. has reenrolled as a student in BTHS.

CONCLUSIONS OF LAW

New Jersey's Constitution requires the Legislature to provide for a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years. *N.J. Const.* art VIII, §4, ¶1. Consistent with the constitutional requirement, the Legislature has authorized boards of education to operate local school districts. *See, e.g., N.J.S.A.* 18A:8-1 to -41.

The Legislature has granted local public bodies wide latitude in the exercise of delegated discretion and such a body is presumed to act fairly, with proper motives and for valid reasons. *Kramer v. Sea Girt Bd. of Adjustment*, 45 *N.J.* 268, 296-97 (1965). Consistent with these principles, it is well established that actions of local boards of education within their discretionary powers may not be upset unless the complaining party shows that the board's action was patently arbitrary, without rational basis, or that it was induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960), citations omitted.

The BOE's policy that students maintain minimal credits for participation in athletic programs appears reasonably consistent with the constitutional and statutory intent to provide a thorough and efficient system of public education. In any event, T.F., who is now eighteen years of age, has dropped out of BTHS and, since petitioners' claims are based on T.F.'s status as a student of BTHS, the claims appear to be moot. *Oxfeld v. New Jersey State Bd. of Educ.*, 68 *N.J.* 301, 303-04 (1975).

In response to the BOE's motion, D.F. has provided no reasonable basis for a finding that there is, *e.g.*, some matter of compelling public importance capable of repetition such that this case should be decided despite its mootness. *See In re J.I.S. Indus. Serv. Co. Landfill*, 110 *N.J.*

101, 104-05 (1988) (citing *Matter of Conroy*, 98 *N.J.* 321, 342 (1985); *Guttenberg Sav. & Loan Ass'n v. Rivera*, 85 *N.J.* 617, 622-23 (1981); *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 64 *N.J.* 17, 22 (1973)).

D.F.'s allegations do not appear to provide a reasonable basis for a claim for damages and, in any event, there is no jurisdiction in this administrative forum for the granting of such a claim. *N.J.S.A.* 18A:6-9; *N.J.S.A.* 52:14B-1 *et seq.*; *see also J.A. v. Bd. of Educ. for S. Orange*, 318 *N.J. Super.* 512, 526 (App. Div. 1999).

The motion for summary decision is an efficient means of resolving a contested case, available where there is no genuine issue of material fact that necessitates a trial-type hearing. The movant bears the burden of persuasion that there is no such genuine issue of material fact and, in making such a determination, reasonable inferences are drawn in favor of the objector. *N.J.A.C.* 1:1-12.5; *R.* 4:46-1; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 528-40 (1995); *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954). Even where a statute calls for a hearing, where the objector submits no evidence to demonstrate such a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. *South Brunswick Asphalt v. Dep't of Envtl. Protection*, No. A-693-98T5 (App. Div. April 10, 2000) (citing *Contini v. Newark Bd. of Educ.*, 286 *N.J. Super.* 106, 120-21 (App. Div. 1995), *certif. denied*, 145 *N.J.* 372 (1996)), *certif. denied*, 165 *N.J.* 487 (2000).

There is no issue that requires a trial-type proceeding here. The BOE's motion must be granted and the petition dismissed. *See A.K. obo R.K. v. Smith, Superintendent, & Rumson-Fair Haven Reg'l BOE*, EDU 107-03, Initial Decision (July 17, 2003), *adopted*, Comm'r (August 19, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>.

This result does not mean that the BOE or BTHS educators have any ill will towards T.F. To the contrary, I assume that they hope that T.F. will complete her education somewhere and that she will have a productive life.

ORDER

I **GRANT** the respondent's motion and I **ORDER** the petition **DISMISSED.**

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

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

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

June 28, 2005
DATE

John R Tassini
JOHN R. TASSINI, ALJ

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

June 28, 2005
DATE

Mailed to Parties:

JUL 1 2005

Laura Anderson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

EXHIBITS

For Petitioners:

P-1 English Grades, July-August 2004

P-2 Letter from D.F., August 10, 2004

P-3 Letter from George McDermott, August 16, 2004

P-4 Letter from D.F., August 24, 2004

P-5 Letter from D.F., September 13, 2004

P-6 Letter from D.F., November 2, 2004

P-7 Letter from D.F., November 12, 2004

For Respondent:

R-1 Certification of principal Dennis Filippone

R-1A BOE policy: BTHS Athletics Eligibility Regulation

R-2 Certification of Counsel

R-3 4th Quarter Grade Report, April 13-June 23, 2004

R-4 Period Attendance, T.F., August 24, 2004

R-5 Letter from Department of Education (Director Duncan), September 23, 2004

R-6 Letter from Department of Education (Director Duncan), October 18, 2004

R-7 Letter from Department of Education (Director Duncan), November 1, 2004

R-8 Letter from Department of Education (Director Duncan), November 8, 2004

262-05

ROSEANN E. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, who was formerly employed by the Board under a fixed-term contract in the non-certificated title of public information officer, asserted that the Board: 1) did not follow proper procedures for non-renewal of her employment contract; and 2) denied her retroactive pay which was paid to other non-bargaining unit employees.

The ALJ concluded *inter alia* that: non-certificated employees of local school boards under fixed-term contracts have no right to continued employment by such boards other than the protections provided by *N.J.S.A.* 18A:27-4.1; petitioner has had due process by way of this case and has not shown that the Board's nonrenewal of her employment was arbitrary and capricious or otherwise unlawful; the Board should not be ordered to renew petitioner's employment; and the Board should not be ordered to pay the petitioner retroactive raises. The ALJ ordered the petitioner's claims dismissed with prejudice.

The Commissioner concurs with the ALJ that the petitioner failed in her burden of proving that the Board acted unlawfully when it: 1) did not renew her contract for the 2003-2004 school year; and 2) denied her claim for retroactive pay increases. Accordingly, the Initial Decision is adopted for the reasons expressed therein, and the petition is hereby 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 25, 2005

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8563-03
AGENCY DKT. NO. 350-9/03

ROSEANN E. BROWN,

Petitioner,

v.

CITY OF CAMDEN BOARD OF EDUCATION AND ANNETTE D. KNOX, SUPERINTENDENT OF THE CITY OF CAMDEN SCHOOLS,

Respondents.

Roseann E. Brown, petitioner *pro se*

Harold George, Esq., for respondents (Sumners, George, attorneys)

Record closed: June 15, 2005 Decided: June 28, 2005

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

STATEMENT OF THE CASE

Petitioner Roseann E. Brown brings claims against respondent City of Camden Board of Education (BOE) and respondent Annette D. Knox, superintendent of the BOE's school system. Pursuant to a fixed-term contract, the BOE employed the petitioner as a public information officer (PIO), a title which was not certificated, and in 2003 the BOE did not renew her

employment.

The petitioner's claims and the respondents' defenses can be summarized. (1) The petitioner demands an order requiring the BOE to renew her employment. The petitioner alleges that she performed her assignments satisfactorily. She also alleges that the BOE failed to provide her with timely notice of its determination, that it failed to provide her with a timely statement of reasons for its determination, and that it failed to provide her with documentation related to its determination. The respondents deny any wrongful conduct. The superintendent notified the petitioner that she had determined that the petitioner's performance was unsatisfactory. By letters served at the end of the 2002-2003 school year, the superintendent notified the petitioner that she would not recommend to the BOE that it renew the petitioner's employment, and the BOE did not renew her employment (so that it ended June 30, 2003). Respondents submit that the petitioner has not shown that their actions were arbitrary and capricious or otherwise unlawful, and they submit that petitioner's claim for reinstatement should be dismissed. *See N.J.S.A.* 18A:17-20; *N.J.S.A.* 18A:27-4.1; *N.J.A.C.* 6:3-2.1. (2) The petitioner also demands (retroactive) salary increases for school years 1999-2000, 2000-2001, and 2001-2002. She alleges that she attempted to negotiate salary increases for those school years, but that the BOE refused to negotiate with her in good faith. The respondents' responses are as follows: Consistent with past practice, a BOE administrator invited the petitioner to meet and negotiate a salary raise, but she refused and/or failed to do so. Thereafter, consistent with past practice, the BOE adopted a resolution governing salaries of employees in the same titles, including PIOs, and the BOE paid the employees, including the petitioner, consistent with the resolution. Relative to this claim also, respondents submit that the petitioner has not shown that their actions were arbitrary and capricious or otherwise unlawful, and they submit that the claim should be dismissed.

PROCEDURAL HISTORY

On September 23, 2003, the petitioner's former attorney filed her petition with the Department of Education and on October 21, 2003, the BOE's former attorney filed the respondents' answer and defenses with the Department. *See N.J.S.A.* 18A:6-9; *N.J.A.C.* 6A:3-1.1 to -1.17. The Department transmitted the contested case to the Office of Administrative Law

(OAL), where it was filed on November 17, 2003. *See N.J.S.A.* 52:14B-2(b). In 2004 respondents' present attorney entered his appearance, the petitioner's attorney withdrew from the case, and I conducted conferences relative to discovery, etc. On February 8 and June 2, 2005, I heard the case in the OAL, Trenton. The parties' joint exhibits were admitted into evidence. I sustained the respondents' objections to most of the petitioner's exhibits as irrelevant or because they should have been but were not provided in response to respondents' discovery requests. (Admission of petitioner's exhibits referred to in the findings of fact will not prejudice the respondents, so the objections to those exhibits are not sustained.) After the petitioner rested her case, the respondents moved for dismissal for failure to prove a *prima facie* case. *See N.J.A.C.* 1:1-1.3(a); *R.* 4:37-2(b). However, to allow for development of a full record and to allow the (*pro se*) petitioner a full opportunity for due process, I denied the motion. At the petitioner's request, written summations were allowed and the record closed with the receipt of the last submission.

FINDINGS OF FACT

The BOE's school system includes over thirty schools that provide educational services for 18,000 children from prekindergarten to high school. The BOE employs about 3,800 people, of which about 150 are administrators. The BOE's annual budget is about $325 million.

For a number of years before 2003, pursuant to a series of contracts, the BOE employed the petitioner. No contract between the BOE and the petitioner was for a period of employment of more than one year. During the 2002-2003 school year, the BOE employed the petitioner and Barton Leff as PIOs. The PIO title was not tenured and the PIOs were not part of a collective bargaining unit.

PIOs, who were part of the superintendent's staff, were responsible for press and media relations. PIOs' duties included keeping abreast of significant events and developments that affected the school system, and preparation and distribution of publications to notify the BOE's district's school children, parents, residents, and the general public of such events and developments and to promote school events. These publications included calendars, news releases, newsletters, press releases, and staff bulletins. PIOs were also to perform other duties

related to internal and external matters, as assigned by the superintendent.

The petitioner testified that (in addition to the above-described duties) her PIO duties included managing crisis media relations, and responding to and attempting to resolve parental complaints that could not be resolved at the building level. Mr. Leff testified that (in addition to the above-described duties) his PIO duties also included responding to fire calls related to the school system and going to sites where fires occurred.

Camden is an Abbott district and the BOE's school system was subject to a State-approved Corrective Action Plan. *N.J.S.A.* 18A:7F-3 "Abbott district." Over the years, the BOE made changes in the school system's administration. For example, the petitioner testified that in the 1990s the BOE abolished the PIO title and, at a BOE meeting, she described the history and accomplishments of the PIOs. As a result of the abolition of the PIO title, Mr. Leff, a tenured teacher, returned to teaching, but the petitioner was out of a job for a while. Later, the BOE resumed employment of Mr. Leff and the petitioner as PIOs. The petitioner also testified that, over time, the PIOs' responsibilities changed, *e.g.*, at one time she had responsibility for all the BOE's schools, and then responsibility for schools was divided between her and Mr. Leff.

Leon Freeman, the BOE's school business administrator/BOE secretary, testified that for employees (such as PIOs) who had the same title and responsibilities, but who were not part of a bargaining unit, the BOE's practice was to negotiate with them as a group and to make the same offer to those in the same title. After such negotiations, the BOE would pass a resolution providing for salaries, raises, etc.

Consistent with the above-described practice, on August 17, 2000, Mr. Freeman requested that on August 18, 2000, the petitioner and Mr. Leff meet with him relative to their salaries. The petitioner first agreed to meet as Mr. Freeman requested. However, in a memorandum to Mr. Freeman dated September 28, 2000, the petitioner wrote the following: Although she had agreed to the meeting, she had changed her mind. She requested that she negotiate as a "sole negotiator" and, if Mr. Freeman objected to her request, she requested that he set forth his objection in writing. She had visited Mr. Freeman's office, "seeking answers to questions in preparation for the 'negotiation' the following day." However, thereafter, she called

Mr. Freeman and stated that she was not prepared to meet and negotiate the next day. Also, she might want to retain labor relations counsel to assist her, and she required at least thirty days to prepare for a meeting. She remained "in the preparation process" and wanted "at least two (2) weeks prior notice" of a date on which she and the BOE could negotiate. J-27.

Relative to the petitioner's claim for retroactive pay raises, Mr. Freeman testified that the BOE's position was that it had offered the petitioner an opportunity to negotiate, but she rejected the opportunity.

On September 27, 2000, the BOE adopted a resolution that provided for an increase in the base salaries for certain BOE employees, including PIOs, and the increases were as follows: effective July 1, 1999 – June 30, 2000: 4.5 percent, inclusive of increment; effective July 1, 2000 – June 30, 2001: 4.75 percent, inclusive of increment; and effective July 1, 2001 – June 30, 2002: 5.00 percent, inclusive of increment. J-18. The petitioner made no record here that she ever timely challenged that action by the BOE. *See N.J.A.C.* 6A:3-1.3(i).

In January 2001 respondent Knox began as superintendent of the BOE's school system. In an effort to provide a thorough and efficient system of education, the superintendent began to reorganize the BOE's school system.

The superintendent directed the petitioner to produce publications including a newsletter at least every quarter and a school system travel directory, giving directions to the system's buildings. The petitioner was late with her production of the travel directory. However, she testified that difficulties obtaining photographs and directions caused the lateness.

In the spring of 2001 the superintendent collaborated with the petitioner on production (in English and Spanish), publication, and distribution of a vision statement for the school system, and this went fairly well.

In a memorandum dated August 23, 2001, to Daniel Bevilacqua, of the BOE's human resources office, the petitioner wrote the following: Her salary as of the 1997-1998 school year was $68,186. In August 2000 most administrators in this category entered negotiations with

Theodore B. Johnson, the interim superintendent, and Mr. Freeman to negotiate salary percentage increases for the 1999-2000, 2000-2001, and 2001-2002 school years. However, she had not negotiated salary percentage increases for those years. Her salary as of June 30, 2001, was (still) $68,186. The August 27, 2001, Preliminary Report of the superintendent showed her salary as $76,417, which was "incorrect." She was prepared to enter salary negotiations "so that a correct salary [could] be posted." J-27.

The petitioner testified that during the superintendent's first year their relationship was good and that the superintendent rated her performance as "satisfactory" for the first year. However, the petitioner also acknowledged that in 2001 the superintendent notified her that she was concerned about her attendance.

The superintendent's Official Report, dated August 27, 2001, which listed reappointed BOE employees and their salaries, showed the PIOs' salary as $80,380. J-28.

The superintendent testified that, from the start, the petitioner's attendance was erratic. The school system's administrative staff's regular day was from 8:30 a.m. to 4:30 p.m. However, on many occasions during the regular office day the superintendent could not locate the petitioner, and many mornings when she called the petitioner's office there was no answer or she was unavailable. On a number of occasions she observed the petitioner sitting in her car in front of the school building. Such circumstances interfered with her communication with the petitioner. Once, when she requested an opportunity to see how the petitioner was progressing on an assignment, the petitioner told her she could see it at 9 p.m., *i.e.*, well after the administrative staff's regular day. Further, at 9 p.m., when she came to see the project, the petitioner told her that she should return at 11 p.m. to see it. The superintendent repeatedly told the petitioner that her attendance was a problem. The sign-in sheet was in the superintendent's office and, while Mr. Leff signed in, on many occasions the petitioner continued to be unaccountable. However, the superintendent admitted that she had not personally studied the sign-in sheets to confirm that the petitioner had not signed in. The petitioner testified that she purchased a cellular phone and gave its number to Helen Hammond, the superintendent's secretary, as a way for the superintendent to contact her.

Before the start of the 2001-2002 school year, among the assignments the superintendent gave the petitioner was production of a newsletter for parents to be distributed and mailed in August 2001, *i.e.*, before the start of the school year. However, the superintendent testified that the petitioner failed to perform that assignment.

Mr. Leff testified that he had responsibility for oversight of the BOE's cable television programming, involving taping of panel discussions, BOE meetings, etc. The superintendent also assigned special projects to him. In addition to producing press releases, he also responded to press inquiries. Production of calendars involved the following: The calendar committee met. He and his staff obtained information to be entered into the calendar and reviewed photographs to determine whether they should be entered into the calendar. Photographs were scanned and cropped for use in the calendar. He supervised a secretary who used a desktop publishing computer program to print a dummy calendar which was constructed and laid out preliminarily and he reviewed and approved drafts for publication. The superintendent testified that the petitioner and Mr. Leff had conflicts on many projects, and Mr. Leff testified that the superintendent began to reassign responsibilities from the petitioner to him, to assure that activities involving the school system and school children were appropriately covered.

During the 2001-2002 school year, among the assignments the superintendent gave the petitioner was production of a newsletter that was to describe the goals and accomplishments of the superintendent's first year in office, to be distributed in early 2002. The superintendent explained to the petitioner that the newsletter should show the superintendent's six strategic goals, with details showing what had been accomplished. The superintendent handwrote how she wanted the newsletter's text and graphics laid out for printing and folding in newsletter form. She instructed the petitioner to type the text and to provide the layout for the printer so that it could be handed out in the BOE's schools and mailed to city residences.

The petitioner did produce a "Camden Schools Today, March/April 2002" edition of the newsletter. This edition had eight pages and included articles about the superintendent's first-year accomplishments, recognition of students and staff recognition, and the Department of Education's approval of the BOE's Facilities Management Plan, and had notice of the superintendent's upcoming meeting with the community, notice of the BOE's Creative Arts High

School's upcoming performances, and notice that on April 16, 2002, a school election would be held and polls would be open from 2 p.m. to 9 p.m. J-3(18). The superintendent acknowledged that this newsletter was mailed to every residence of record in the city and acknowledged that (with supervision) the petitioner performed this assignment fairly well.

However, the superintendent testified, as time went on, the petitioner's performance deteriorated. The newsletters the petitioner was to produce were to have themes, *e.g.*, compliance with the "No Child Left Behind" and "Safe Corridors" policies and, as PIO, the petitioner was to draft a newsletter bringing the themes into focus. The petitioner was to collect information and conduct interviews, to write articles, to obtain and present pictures and to lay out a draft, consistent with the theme, for the superintendent's review. However, the petitioner did not timely complete projects assigned to her and her work on newsletters was disappointing. The petitioner acknowledged that, in 2002, the superintendent told her she was out of her building an inordinate amount of time.

The petitioner produced news releases related to the BOE's Creative Arts High School, which her child attended. However, she failed to perform major assignments, including the newsletters to be produced at least every quarter. The superintendent testified that, instead of dedicating her time to her assignments, the petitioner inundated the superintendent with memoranda (detailed below).

The petitioner issued a memorandum entitled "A Plea for Assistance" dated April 11, 2002. This was one page, addressed to all central administrators and directors, and in it, petitioner requested that they provide any available clerks on April 12, 2002, to assist in preparing 25,000 "distributions" to be mailed to all homes in the city and "several thousand flyers to be sent home with the students." J-3(29). The petitioner also made a list of seven BOE staffers who helped prepare the newsletter mailing. J-3(32).

On April 12, 2002, the petitioner delivered 28,709 copies of the Camden Schools Today, March/April 2002 newsletter for mailing. J-3(26).

The petitioner produced the "Camden Schools Today, April 2002, School Election Issue"

newsletter. This newsletter was one page, on which the following appeared: the total amount for the BOE's 2002-03 budget, a list of eleven "major expenditures," a list of the candidates for the BOE, the tax rate, and notice that the school election would be April 16, 2002. (Polling places and times were not shown.) J-3(34).

In a memorandum dated June 13, 2002, to the superintendent, the petitioner wrote, in part, the following:

> Madam Superintendent, this memorandum must necessarily be my last memo requesting that I receive immediately the retroactive pay for the years listed above [1999-2000, 2000-2001, 2001-2002]. Accomplishing this is a matter of "sitting down with me" to negotiate percentage increases for each year of the 3-year period listed above. I wish to be paid for the services already rendered to the [BOE] as everyone has been.
>
> [J-24.]

On a Supplemental Requisition for publication dated July 1, 2002, petitioner wrote that on July 25, 2002, she had received the requisition signed by the superintendent. J-3(6).

By letter dated July 3, 2002, Laurette Asante, Esq., of Murray & Murray (the BOE's former law firm) notified petitioner that, at the BOE's direction, on July 10, 2002, she would meet with the petitioner to discuss her June 13, 2002, memorandum to the superintendent. J-22.

In a letter dated July 8, 2002, the petitioner wrote to Ms. Asante that she had requested and Ms. Asante had agreed to provide a list of specific questions to be discussed relative to her June 13, 2002, memorandum to the superintendent. J-21.

In a letter to the petitioner dated July 9, 2002, Ms. Asante wrote the following: The petitioner had canceled their meeting scheduled for July 10, 2002. Contrary to the petitioner's assertion in her July 8, 2002, letter, Ms. Asante did not agree to send her a list of specific questions to be discussed during the July 10, 2002, meeting. Further discussion relative to petitioner's claims regarding salary increases would be between the petitioner, Karen Murray, Esq., of Murray & Murray, and the superintendent. J-20.

In a letter to Ms. Asante dated July 22, 2002, the petitioner made the following statements: The meeting between her and the attorney scheduled for July 10, 2002, had been cancelled at their mutual agreement. She did not know of a past practice wherein a sole non-bargaining unit administrator bargained directly with the BOE's labor attorney. If the BOE had instituted a new practice relative to bargaining with administrators and staff who were not represented by a bargaining unit, she requested that the BOE state that practice in writing. Her claim for retroactive pay for services rendered to the BOE for the years 1999-2000, 2000-2001 and 2001-2002 was "a simple matter" which could be resolved if she and the superintendent could sit down and reach an agreement, and if, thereafter, the BOE's labor attorney would draft an appropriate resolution. The attorney had stated that petitioner should communicate with the superintendent and, by way of her June 13, 2002, memorandum, she did so, but the superintendent referred the matter to Ms. Murray. J-19.

In petitioner's memorandum to the superintendent dated August 14, 2002, she wrote that she would submit a draft of a newsletter by the close of that day. J-3(9).

On a note attached to a Hardware Service Request Form, dated August 14, 2002, the petitioner wrote that she was in the process of completing a newsletter for the superintendent, but that a computer was not printing 11 x 17 size paper to the Canon color copier (apparently needed to produce the newsletter). J-3(11).

In a memorandum to the superintendent dated August 29, 2002, the petitioner wrote the following: Since August 14, 2002, she had experienced computer difficulties. The technology department had worked on her computer system and the newsletter was printed, but with incorrect spacing. The staff delivered a loaned computer and set it up, but a floppy disk and the original newsletter fonts needed to be installed. If the floppy disk and the original newsletter fonts were installed a newsletter could go to the printer by September 3, 2002. J-3(14).

In a memorandum to the superintendent dated September 18, 2002, petitioner wrote the following: Since 1986, when the BOE established a second PIO position, each of the two PIOs had submitted requisitions for service from Largmoor Film Service and both requisitions were

approved. In 2002, although Barton Neff and she, both serving as PIOs, had both submitted requisitions for Largmoor, the superintendent had approved only Mr. Neff's requisition. The superintendent's declining to approve her requisition had prevented her from performing the photography/processing part of her duties. J-1.

In a memorandum to the petitioner dated October 17, 2002, the superintendent wrote the following: The (BOE's) district was of a size that it should have one newsletter each month and have a quarterly magazine. Prior to the opening of school, the superintendent had assigned to the petitioner the task of completing a newsletter (to be distributed in September 2002 for the opening of school). However, the petitioner failed to perform the assignment and, since January 2001, when the superintendent came to the district, the petitioner had produced only one newsletter and it was rushed and of poor quality. The petitioner had sent a letter, a copy of which she also sent to BOE members, representing that her computer had crashed, so that she was unable to send a newsletter to the printer. Thereafter, the computer was serviced and replaced. Nonetheless, the petitioner failed to complete a district newsletter. As a PIO, the petitioner had not completed assignments to enhance the image of the district. Additionally, the petitioner was often absent from her office and her location was unknown and there was no documented work to show whether her movements were work-related. J-2.

The superintendent notified the petitioner that she believed her performance was unsatisfactory. For example, the petitioner acknowledged that the superintendent advised the petitioner of her concern about the petitioner not being present in her building; that the superintendent advised the petitioner of her concern about the petitioner not producing a newsletter to be distributed in 2002; and that the superintendent advised the petitioner that in her opinion the quality of the petitioner's work was poor. However, the petitioner testified that computer problems and inadequate staff support and inadequate resources necessary for drafting, layout, etc., prevented her from producing a newsletter. The petitioner also testified that she purchased supplies for which she did not even request reimbursement. The petitioner also disagreed with the superintendent's opinion relative to a newsletter's quality.

The petitioner testified that the superintendent's (above-described) concerns left her bewildered and that, in an attempt to explain herself to the superintendent, she submitted a

memorandum dated November 13, 2002, wherein she wrote the following: In July 2002 she found that her requisitions for the newsletter (to be distributed in September 2002 for the opening of school) were left unsigned in the superintendent's office. In August 2002 the superintendent requested and the petitioner delivered a draft of the newsletter, but that same day computer problems occurred. The computer problems prevented her from printing an 11" x 17" tabloid size newsletter for a color copier, but she printed an 8½" x 11" size and pasted pages together to submit a temporary draft. She denied that she arbitrarily neglected the newsletter to be distributed in September 2002. On April 12, 2002, an eight-page Camden Schools Today newsletter was mailed to every residence (28,709 pieces). At the superintendent's request, on April 24, 2002, a one-sheet school district newsletter, broadside, or flyer was produced and mailed to city residents, but the petitioner could not determine its distribution. J-3(2). In response to the superintendent's request that she put everything that she had done together, in December 2001 she placed materials in large boxes which the superintendent was presenting to the BOE members as evidence for her upcoming evaluation. The superintendent's reliance on the petitioner's work shows it to be satisfactory. The petitioner denied the superintendent's allegation that she was absent from her office. J-3(2).

In a memorandum to the superintendent dated November 15, 2002, the petitioner responded to the superintendent's above-described memorandum dated October 17, 2002, and with the memorandum, in an effort to show her performance, the petitioner transmitted copies of the following:

A certification of publication of notice of a BOE retreat, appearing in the *Courier-Post* on December 14, 2001. J-3(36).

The above-described Camden Schools Today, March/April 2002 newsletter. J-3(18).

Her above-described "A Plea for Assistance," dated April 11, 2002, and list of seven BOE staffers who helped prepare the newsletter mailing. J-3(29); J-3(32).

A Postage Statement, showing that, on April 12, 2002, the petitioner, as mailing agent for the BOE, had delivered the Camden Schools Today, March/April 2002 newsletter for

mailing. J-3(26).

The above-described Camden Schools Today, April 2002 "School Election Issue" newsletter. J-3(34).

The above-described Supplemental Requisition for publication dated July 1, 2002. J-3(6).

Her above-described memorandum to the superintendent dated August 14, 2002. J-3(9).

Her note attached to the Hardware Service Request Form, dated August 14, 2002. J-3(11).

Her above-described memorandum to the superintendent dated August 29, 2002. J-3(14).

A list of dates between August 15 and October 18, 2002, on which the computer crashed and technology staff worked on it. J-3(16).

Her above-described memorandum to the superintendent dated November 13, 2002. J-3(2).

A one-page printed statement: "Public Relations . . . A Social Science. Public relations is a social science. It is responsibility and responsiveness in policy and information to the best interests of the institution and its publics." (The statement was undated and shows no reference to any person or purpose.) J-3(38).

A number of letters from 2002 wherein public officials commended her for school system publications, including the school system travel directory and "Significant First-Year Accomplishments" and a 2001 award for the Camden City School District's Annual Workshop School Communications Competition. J-3(40-47).

In a memorandum to the superintendent dated January 8, 2003, petitioner described her

actions relative to a *New York Times* representative's inquiry about the condition of the Camden High School gymnasium floor. J-4.

The superintendent testified that the petitioner continued her failure to properly or timely perform assignments and, on January 8, 2003, she prepared a letter to the petitioner to document her mid-year evaluation of the petitioner's performance, wherein she wrote the following:

> Your continued failure to provide evidence through requested projects, *i.e.*, monthly newsletters and other creative projects that your office is supportive of the goals and objectives set forth by the [BOE] and the district's Corrective Action Plans;
>
> Your continued failure to document your presence and absence from the building by the submission of a substantive body of work;
>
> Your continued failure to provide a list of creative projects to enhance the district's image;
>
> Submission of numerous letters and other written information to substantiate your failure to produce according to your job description.
>
> Your job performance at this time is a study in insubordination and is also indicative of either a refusal to produce as required according to job description and title, or failure of understanding of such. Therefore, in my judgment, you have achieved an "unsatisfactory" evaluation rating.
>
> If you wish to meet with me to discuss your evaluation, please make an appointment with Ms. Helen Hammond.
>
> [J-5.]

The petitioner signed an acknowledgement of receipt of the letter, but she refused to sit for a reading of the letter.

Mr. Leff prepared a BOE news release, for release by January 15, 2003, which described the award of an American Field Service Intercultural Programs (AFS) scholarship for study abroad to a Camden High School student who planned to travel to Japan. After learning of the

news release, by way of a note dated January 21, 2003, the petitioner notified Mr. Leff that *she* was assigned to the Camden High School. By way of a memorandum dated January 16, 2003, Mr. Leff responded, writing that the superintendent had asked *him* to obtain media coverage for the AFS scholarship, etc. J-6.

By letter to the superintendent dated February 10, 2003, the petitioner acknowledged the above-described January 8, 2003, mid-year performance evaluation letter and she wrote that she was exercising her right to respond. Transmitted with the petitioner's February 10, 2003, letter was the petitioner's memorandum, wherein she made statements including the following: On January 13, 2003, she appeared at the superintendent's office to receive the performance evaluation letter. When she entered the superintendent's conference room, the superintendent and Jan Gillespie-Walton, an assistant superintendent, were present. The superintendent stated that, consistent with a practice she had established, Ms. Gillespie-Walton was present as a witness. Petitioner requested the opportunity to have a witness of her choice present, but the superintendent denied her request. The superintendent's denial of her request for a witness "stalled the meeting." No notations were made on the letter in her presence. The superintendent stated that the petitioner was not represented by a bargaining unit, but the petitioner stated that she had a right to due process. The superintendent then left the room. J-7.

Mr. Leff testified that as a result of circumstances including requests from school principals and other administrators, in 2002 and 2003 the superintendent reassigned additional responsibilities from the petitioner to him, including responsibility for coverage of events at some of the BOE's schools. For example, by memorandum dated February 10, 2003, Mr. Leff notified the petitioner of the following: The superintendent had assigned to him responsibility for coverage of the following Camden High School events: Oceola Davis Day, the Rutgers Law School/IPLE Connection, and the Hall of Justice concert for Black History Month. He was developing press releases for the events, copies of which he would forward to her. J-8. He testified that he completed the assignments, the events were appropriately covered in the media, and the events were successful.

The superintendent testified that because of the petitioner's failure to timely perform a number of assignments, in 2002 and 2003 she reassigned the job of production of the newsletters

from the petitioner to Marlene Coleman, another staff member, who performed the assignment appropriately. Ms. Coleman testified that in the 1990s, under the petitioner, who was her immediate supervisor, she learned about layout, design and desktop publishing of newsletters. Ms. Coleman also testified that, when the superintendent reassigned the petitioner's duties to her, she said she was doing that because the petitioner was not performing according to her assignments.

The petitioner acknowledged that in January 2003 the superintendent rated her performance as "unsatisfactory."

In a memorandum to the superintendent dated February 12, 2003, the petitioner wrote the following: She had received Mr. Leff's above-described memorandum dated February 10, 2003, which showed "Public Relations Assignments" as the reference, but, since she was the PIO for Camden High School, should have showed, "Public Relations Reassignments" as the reference. She requested that, "as a matter of professional courtesy," in the future, the superintendent notify her "first hand." She was attaching lists of her PIO assignments and Mr. Leff's PIO assignments. J-9.

In March and April 2003 the petitioner did produce news releases, which described the BOE's Creative Arts High School's Select Concert Choir's trip to Italy to participate in an international music program. The news release included photographs of student participants and interviews with student participants, and described an award the students won, and the news releases resulted in a complimentary article in a local newspaper. P-8; P-9.

The school system's newsletter for the school election was a significant project. The superintendent and petitioner exchanged a number of memoranda relative to the newsletter petitioner was to prepare and mail for the April 2003 school election: By memorandum dated March 6, 2003, the superintendent notified the petitioner that she should prepare a draft of the annual school board election newsletter and by March 14, 2003, at 9:30 a.m., submit it to the superintendent's office for review. J-10. In a memorandum dated April 2, 2003, the petitioner wrote that Alesi Graphics had revised the schedule for delivery to April 7, 2003, and that she was requesting permission for a committee of six named BOE employees to assist with mailing the

newsletter on April 7 and 8, 2003. J-11. In a responding memorandum dated April 3, 2003, the superintendent notified the petitioner that she was directing five other employees, including Mr. Neff, to assist, instead of the six employees the petitioner had requested. J-12. In a responding memorandum dated April 4, 2003, the petitioner wrote that the five employees the superintendent had directed to assist were not familiar with the mailing process, and "[m]ost assuredly using unfamiliar personnel will slow the mailing process." J-13. In a memorandum dated April 9, 2003, the petitioner wrote to the superintendent that, "despite the possible recommendation [the superintendent] may have received from a reportedly close advisor," she was "very pleased to report that on Tuesday, April 8, 2003, twenty seven thousand four hundred thirty seven (27,437) School election 'Camden Schools Today' newsletters have been delivered to the United States Postal Service" and that the "Postal Service deliveries to every residence of record (with the Postmaster) in the City of Camden begin on Wednesday, April 9, 2003." J-14.

The petitioner did produce a School Election Issue April 2003 newsletter of several pages which included the date of the school election, the locations of city wards, a description of the BOE's budget's income and expenditures, and an explanation of property tax rates. P-7. The superintendent acknowledged that this newsletter was mailed out.

The superintendent testified that the petitioner was less and less productive. The petitioner took time to prepare and forward a number of letters and/or memoranda to the superintendent and others, but she did not perform her assignments. Ms. Coleman, to whom some of the petitioner's assignments were reassigned, testified that after the superintendent gave her the assignment of producing newsletters, she produced the "District Highlights" newsletter, consisting of six pages, with about ten articles, which she wrote, based on information she gathered in the school system, among other features. Presently, Ms. Coleman produces several newsletters during the school year and sometimes a newsletter during July and August. She also produces numerous brochures, flyers, and reports. (Consequently, it appears that the tasks assigned to the petitioner were not impossible to perform.)

The petitioner testified that lack of resources, caused in part by the superintendent's failure to authorize requisitions, etc., prevented her from timely performance of at least some of her assignments.

The superintendent determined that the BOE should not renew its employment of petitioner. In letters to the petitioner served on the petitioner on June 25, 2003, the superintendent wrote the following: "The District is in the process of reorganizing numerous departments and positions in the Administration Building, including the Public Relations and Communications Offices." J-15. She would not recommend that the BOE renew its employment of the petitioner. The petitioner had the option to resign, but she should do so by the end of the day on June 25, 2003. She should gather her belongings and, if she had any keys, she should turn them in. The BOE would pay her until June 30, 2003. At the BOE's meetings on June 25 and 26, 2003, it would consider action affecting her employment. Pursuant to the Open Public Meetings Act, the BOE will go into private session to discuss her employment, but she had a right to have the discussion in public and she should return a form on one of the letters to request the discussion in public. A copy of the letter was forwarded to the BOE. J-15; J-16; *see N.J.S.A.* 18A:17-20; *N.J.S.A.* 18A:27-4.1; *N.J.A.C.* 6:3-2.1; *see also N.J.S.A.* 10:4-12.

The petitioner completed the above-described form to request that the BOE discuss her employment in public. However, during the hearing she stated that she believed that she could not be successful before the BOE, so she did not attend the BOE meetings to try to convince the BOE to renew her employment. J-16; J-17.

The BOE did not renew the petitioner's employment, so that it ended with the 2002-03 school year.

Thereafter, the parties' former attorneys exchanged several letters: In a letter dated June 26, 2003, petitioner's former attorney cited *N.J.S.A.* 18A:27-10 (which appears to apply to teaching staff members and therefore not to the petitioner), contended that the notice of no recommendation was untimely, objected to the BOE's consideration of the petitioner's employment, and demanded a statement of reasons for the nonrenewal. By letter dated August 4, 2003, the BOE's former attorney responded and wrote that the nonrenewal was based on the petitioner's poor work performance and failure to operate in cooperation with the goals and objectives of the BOE and the district's corrective action plan. By letter dated October 8, 2003, petitioner's former attorney submitted information for consideration by the BOE and described

her many years of employment with the BOE and alleged that the nonrenewal of her employment was unwarranted. P-3; P-4; P-5; P-6. This exchange did not lead to resumption of the BOE's employment of the petitioner.

The superintendent testified that since the petitioner's departure, the office of public information was been much more productive. Now, she gives an assignment and the office performs it timely. That office produces booklets, major mailings, manuals, quarterly newsletters, and other documents and newsletters. That office produces manuals in house and has changed the BOE's television station's format. The superintendent testified that the BOE's mission and obligations are her guides in her determination of whether to recommend or not recommend renewal of employment of a BOE employee. The petitioner's age was not a factor in the recommendation not to renew her employment. The superintendent testified that she regrets not recommending renewal of any BOE employee because of the effects on the employee and the employee's family.

Summary of Findings of Fact

Pursuant to a series of fixed-term contracts, the BOE employed the petitioner in non-certified, non-tenured titles. In August 2000, when the BOE employed the petitioner and Mr. Leff as PIOs, consistent with past practice the BOE's business administrator/secretary requested that they meet with him to discuss their salaries. The petitioner first agreed to meet, but thereafter she refused to do so unless the BOE met a number of demands. In September 2000 the BOE adopted a resolution governing salaries of BOE employees, including the PIOs. There is no record here that the parties did meet to discuss the PIOs' salaries and the petitioner made no record here that she ever challenged that action by the BOE before she brought these claims, years after the BOE adopted the resolution and, consistent with it, paid her very substantial salaries for the relevant years. The petitioner accepted the very substantial salaries the BOE paid her and, not until September 2003, *i.e.*, years after notice of the BOE's action, did she file her petition bringing these claims. *See N.J.S.A.* 18A:6-9; *N.J.A.C.* 6A:3-1.3(i).

In 2001 respondent Knox became superintendent and she began to make changes, intending to improve the school system. She found the petitioner's attendance, accountability

and performance unsatisfactory. The superintendent repeatedly notified the petitioner of her determination that the petitioner's performance was unsatisfactory and she reassigned tasks from the petitioner to other BOE employees. The petitioner testified that lack of resources prevented her from timely performance of at least some of her assignments and, in an effort to show that she was productive, she submitted a series of memoranda and other documents to the superintendent. The superintendent remained dissatisfied with the petitioner's performance and repeatedly notified the petitioner of that dissatisfaction, *e.g.*, by way of the January 8, 2003, mid-year performance evaluation letter.

On June 25, 2003, the superintendent served the petitioner with letters wherein she stated that the district was "reorganizing" and that she would not recommend to the BOE that it renew the petitioner's employment, that the petitioner could resign from employment with the BOE, and that during the BOE's June 25 and 26, 2003, meetings it would consider whether to renew her employment. The petitioner believed that she could not be successful before the BOE, so she declined to attend the BOE meetings and try to convince the BOE to renew her employment. The BOE did not renew the petitioner's employment, so that it ended June 30, 2003. The parties' former attorneys exchanged letters and the BOE's former attorney's letter identified petitioner's poor performance among the reasons for the nonrenewal.

Having observed the witnesses and having considered all of the evidence, I find that the superintendent was a credible witness and I find that the petitioner was not credible in her allegations that she properly performed her duties. The superintendent's intent was to improve the school system and, based on the monitoring of the petitioner and her performance, the superintendent repeatedly notified the petitioner of her determination that the petitioner's performance was unsatisfactory. The petitioner has not shown that the superintendent's determination was arbitrary and capricious or otherwise unlawful.

The superintendent did not relish seeing the end of an employee's employment and, in her letter to the petitioner, she wrote that the district was "reorganizing" and that she would not recommend to the BOE that it renew the petitioner's employment. It appears that the superintendent euphemized the situation and that she avoided writing (again) that the petitioner's unsatisfactory performance and attendance were the "reason for nonrenewal." *N.J.S.A.* 18A:27-

4.1. However, from the superintendent's repeated notice of her determination that the petitioner's performance was unsatisfactory, the petitioner knew the reason for the superintendent's not recommending renewal of her employment. Since the superintendent did not recommend renewal, since the petitioner declined to appear before the BOE during its June 2003 meetings, and since the BOE did not renew the petitioner's employment, the employment could reasonably be "deemed nonrenewed" and ended June 30, 2003. *N.J.S.A.* 18A:27-4.1.

Communications between the parties' former attorneys resulted in a letter to the petitioner's attorney wherein the BOE's former attorney wrote that the petitioner's poor work performance was the reason that the superintendent did not recommend renewal and, thereafter, the BOE did not renew that employment.

CONCLUSIONS OF LAW

New Jersey's Constitution requires the Legislature to provide for a thorough and efficient system of free public schools. *N.J. Const.* art VIII, §4, ¶1. Consistent with the constitutional requirement, the Legislature has authorized boards of education to operate local school districts. *See, e.g., N.J.S.A.* 18A:8-1 to -41.

The Legislature has granted local public bodies wide latitude in the exercise of delegated discretion and such a body is presumed to act fairly, with proper motives and for valid reasons. *Kramer v. Sea Girt Bd. of Adjustment*, 45 *N.J.* 268, 296-97 (1965). Consistent with these principles, it is well established that actions of local boards of education within their discretionary powers may not be upset unless the complaining party shows that the board's action was patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

(1) Petitioner's Claim that the BOE Should Renew Her Employment

The Supreme Court has written that non-certificated persons employed by local school boards pursuant to fixed-term contracts have no right to continued employment by such boards

other than the protections provided by *N.J.S.A.* 18A:27-4.1. *Camden Bd. of Educ. v. Alexander*, 181 *N.J.* 187, 192 (2004).

N.J.S.A. 18A:27-4.1 states:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. *A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed.* Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. *An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of [N.J.S.A. 18A:27-3.2] and to an informal appearance before the board.* The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. The chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of [*N.J.S.A.* 18A:27-10].
>
> c. The provisions of this section shall not apply to the appointment, transfer, removal, renewal or nonrenewal of a person who is a treasurer of school moneys, election officer, board auditor, board attorney or board secretary, except a board secretary who performs business administration functions.
>
> [Emphasis added.]

The Appellate Division, construing *N.J.S.A.* 18A:6-27, -28, which provides a process for nontenured teachers that is similar to *N.J.S.A.* 18A:27-4.1, has described as "virtually unlimited" a local board's discretion in determining whether to renew or decline to renew employment of a nontenured teacher. *Dore v. Bedminster Township Bd. of Educ.*, 185 *N.J. Super.* 447, 453 (App. Div. 1982). The nontenured teacher denied reemployment has a right to comment during a local board's public meetings and, when such a teacher claims deprivation of a constitutional or statutory right, he or she states a substantive basis for contesting the board's determination. *Id.* at 454. However, otherwise, when a local board has declined to renew employment of a nontenured teacher, the teacher does not have a right to an evidentiary hearing to review the factual underpinnings of the board's determination. *Guerriero v. Bd. of Educ. of the Bor. of Glen Rock*, No. A-3316-85T6 (App. Div. December 17, 1986), citing *Donaldson v. Bd. of Educ. of No. Wildwood*, 65 *N.J.* 236, 245 (1974).

Here the superintendent (the chief school administrator) repeatedly notified the petitioner that she had determined that the petitioner's performance was unsatisfactory and the petitioner has not shown that this determination was unreasonable. *See N.J.S.A.* 18A:17-20; *N.J.A.C.* 6:3-2.1. Thereafter, the superintendent served on the petitioner letters, notifying her that renewal of her employment after June 30, 2003, would not be recommended. The superintendent's "reasons for nonrenewal" set forth in the letters were generalized at best. *N.J.S.A.* 18A:27-4.1(a). However, from the superintendent's repeated notice of her determination that the petitioner's performance was unsatisfactory, the petitioner knew the reason for the superintendent's not recommending renewal of her employment. The petitioner did not have "an informal appearance before the board" to convince it to renew her employment. *N.J.S.A.* 18A:27-4.1(b). During the hearing, she commented that she believed that she could not be successful before the BOE, so she declined to appear at the BOE's June 25 and 26, 2003, meetings.

A local board's lack of strict compliance with *N.J.S.A.* 18A:27-4.1 by failure to strictly comply with the requirement of providing a statement of reasons for nonrenewal of employment is not sufficient reason to order the board to renew employment of the employee or provide him or her with a financial reward. *Cf. Dore, supra,* 185 *N.J. Super.* at 455.

The petitioner has had due process by way of this case and she has not shown that the

BOE's nonrenewal of her employment was arbitrary and capricious or otherwise unlawful. It appears impractical to, *e.g.*, remand the matter to the BOE to allow the petitioner an opportunity to convince the BOE to offer reemployment.

Given all the circumstances, the petitioner's employment was "deemed nonrenewed" after June 30, 2003, and I conclude that the BOE should not be ordered to renew the petitioner's employment. *N.J.S.A.* 18A:27-4.1(b).

(2) Petitioner's Claim for Retroactive Pay Increases

In August 2000, when the BOE employed the petitioner and Mr. Leff as PIOs, consistent with past practice the BOE's business administrator/secretary requested that they meet with him to discuss their salaries. The petitioner first agreed to meet, but thereafter she refused to do so unless the BOE met a number of demands. In September 2000 the BOE adopted a resolution governing salaries of BOE employees, including the petitioner, from July 1, 1999, to June 30, 2002. The petitioner accepted the salary the BOE paid her, and not until September 2003 did she file her petition bringing a claim related to her salary. Procedurally, the claim may well be said to be out of time. *See N.J.S.A.* 18A:6-9; *N.J.A.C.* 6A:3-1.3(i).

Substantively, consistent with the above-cited law, the BOE is presumed to have acted lawfully, unless the petitioner proves that it acted arbitrarily, unlawfully, etc., and the petitioner has not shown sufficient, competent and credible evidence that the BOE acted arbitrarily, unlawfully, etc., and I conclude that the BOE should not be ordered to pay the petitioner retroactive raises, etc.

ORDER

Consistent with the above, I **ORDER** the petitioner's claims **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, 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 28, 2005
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

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

June 28, 2005
DATE

JUL 1 2005
DATE

Mailed to Parties:
Laura Pendino
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint:

J-1	Memorandum from petitioner to superintendent, September 18, 2002
J-2	Memorandum from superintendent to petitioner, October 17, 2002
J-3(1)	Interdepartmental Memorandum Cover Page, November 15, 2002
J-3(2)	Interdepartmental Memorandum, November 13, 2002
J-3(6)	Supplemental Requisition, July 1, 2002
J-3(7)	Specifications for Camden Schools Today
J-3(9)	Interdepartmental Memorandum from petitioner to superintendent, August 14, 2002
J-3(9)	Interdepartmental Memorandum from petitioner to superintendent, August 14, 2002
J-3(11)	Hardware Service Request Form, August 14, 2002; note from petitioner
J-3(14)	Interdepartmental Memorandum from petitioner to superintendent, September, 2002
J-3(16)	Computer Problem/Repair Visits, August-October 2002
J-3(18)	Camden Schools Today, March/April 2002
J-3(26)	Postage Statement – Nonprofit Standard Mail Letters and Flats, Permit Imprint April 12, 2002
J-3(29)	Notice "A Pleas for Assistance" from petitioner, April 11, 2002; list of names
J-3(32)	Record of Staffers who helped prepare Newsletter Mailing
J-3(34)	Camden Schools Today, School Election Issue April 2002
J-3(36)	*Courier-Post*, Legal Notices certification, December 14, 2001
J-3(37)	"Public Relations . . . A Social Issue"
J-3(40)	Letter from Superior Court of New Jersey, Camden Vicinage, Gilberto Velasquez, principal probation officer, May 15, 2002
J-3(41)	Letter from State of New Jersey, Office of the Public Defender, May 101, 2002
J-3(42)	Letter from Office of the Surrogate, Camden County, April 30, 2002
J-3(43)	Memorandum from assistant superintendent, April 25, 2002
J-3(44)	Letter from Camden County Board of Chosen Freeholders, March 25, 2002
J-3(45)	Letter from Workshop, Josephine A. Kane, director, November 1, 2001

J-3(46) New Jersey School Boards Association, New Jersey Association of School Administrators, New Jersey Association of School Business Officials, Award of Merit, October 26, 2001

J-3(47) Letter from Camden County Board of Chosen Freeholders, June 8, 2001

J-4 Interdepartmental Memorandum from petitioner to superintendent, January 8, 2003

J-5 Letter (mid-year performance evaluation) from superintendent, January 8, 2002 (sic)

J-6(1) Note from petitioner, January 21, 2003

J-6(2) BOE News, January 15, 2003

J-6(3) Memorandum from Leff to petitioner, January 16, 2003

J-6(4) Interdepartmental Memorandum from petitioner to Leff, January 21, 2003

J-6(5) Letter from petitioner to superintendent, February 10, 2003

J-7(1) "Recount of January 13, 2003" (memorandum) by petitioner

J-7(4) Letter (mid-year performance evaluation) from superintendent, January 8, 2003 (same as J-5)

J-8 Memorandum from Leff to petitioner, February 10, 2003

J-9 Interdepartmental Memorandum from petitioner to superintendent, February 12, 2003; Public information officer Ms. Roseann E. Brown, Assignments as of July 17, 1998; Memorandum from Leff to petitioner, February 10, 2003

J-10 Memorandum from superintendent to petitioner, March 6, 2003

J-11 Interdepartmental Memorandum from petitioner to superintendent, April 2, 2003

J-12 Memorandum from superintendent to petitioner, April 3, 2003

J-13 Interdepartmental Memorandum from petitioner to superintendent, April 4, 2003

J-14 Interdepartmental Memorandum from petitioner to superintendent, April 9, 2003

J-15 Letter (notice of recommendation that contract not be renewed) from superintendent to petitioner, June 25, 2003

J-16 Letter (notice of BOE action) from superintendent to petitioner, June 25, 2003

J-17 Receipt of superintendent letters, dated June 25, 2003

J-18 BOE Resolution #6, Non-Bargaining Unit Titles, 1992-93, November 27, 2000

J-19 Letter from petitioner, July 22, 2002

J-20 Letter from BOE's attorney (Murray & Murray), July 9, 2002

J-21 Letter from petitioner, July 8, 2002

J-22 Letter from BOE's attorney (Murray & Murray), July 3, 2002

J-23 Letter from petitioner, July 8, 2002 (same as P-21)

J-24 Interdepartmental Memorandum from petitioner to superintendent, June 13, 2002

J-25 Handwritten receipt

J-26 Printout payroll & salary

J-27 Interdepartmental Memorandum from petitioner to public information officer, August 23, 2001; Interdepartmental Memorandum from petitioner to school business administrator, September 28, 2000

J-28 BOE Official Report August 27, 2001

For Petitioner:

P-1 Letter from petitioner's attorney (Zeller & Bryant, LLP), June 23, 2003

P-2 Letter from superintendent, June 25, 2003

P-3 Letter from petitioner's attorney (Zeller & Bryant, LLC), June 26, 2003

P-4 Letter from petitioner's attorney (Zeller & Bryant, LLC), July 18, 2003

P-5 Letter from BOE's attorney (Murray Law Firm, LLC), August 4, 2003

P-6 Letter from petitioner's attorney (Zeller & Bryant, LLC), October 8, 2003

P-7 Camden Schools Today, School Election Issue, April 2003

P-8 BOE News (newsletters relative to Camden's Creative Arts High School Select Concert Choir's travel to Italy), March 14 and April 7, 2003

P-9 Courier-Post article relative to Camden's Creative Arts High School, April 14, 2003; newspaper article (relative to Camden's Creative Arts High School Select Concert Choir's travel to Italy), newspaper (unidentified)

P-10 Bio Sheets Select Concert Choir (class of 2003 participants)

P-11 Office of Communications, Complaint Receipt, Tracking and Resolution Form(s); notes by petitioner relative to parent complaint, April 2003

For Respondents:

None

WITNESSES

For Petitioner:

Petitioner

Marlene V. Coleman

Leon Freeman

Barton Leff

For Respondents:

Annette D. Knox

264-05

L.H., on behalf of minor child, D.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's residency determination that her son, D.E., was not eligible for a free education in the Township of Belleville School District during the 2003-2004 and 2004-2005 school years, contending that she is homeless and that her son is entitled to attend school in respondent's district because Belleville is the town in which petitioner last resided. A hearing was held on June 21, 2005.

Based upon the fact that the petitioner did not appear at hearing and offered no acceptable explanation for her absence as required pursuant to N.J.A.C. 1:1-14.4(a), the ALJ determined that L.H. had abandoned her appeal. Based on the record in this matter, and the testimony and certification of the respondent Board, the ALJ found that petitioner failed to carry her burden of proof that D.E. was entitled to a free public education in the Township of Belleville during the relevant time periods, and concluded that L.H. owes the District total tuition of $11,229.60. The ALJ ordered petitioner to pay respondent tuition in this amount, and further ordered that, without proof of current domicile/residency, D.E. may be excluded from further attending the Belleville public schools, at the District's discretion, unless tuition is paid for his continued attendance.

The Commissioner concurs with the findings and conclusions of the ALJ in this matter. Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed.

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

July 26, 2005

OAL DKT. NO. EDU 1350-05
AGENCY DKT. NO. 391-10/04

L.H., on behalf of minor child, D.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry her burden of proof that D.E. was entitled to a free public education in the Belleville School District (District) during the relevant time periods. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $11,229.60 for the period of D.E.'s ineligible attendance in the District's schools during the 2003-2004 and 2004-2005 school years.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/05

Date of Mailing: 7/26/05

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1350-05

AGENCY DKT. NO. 391-10/04

L.H. ON BEHALF OF MINOR CHILD, D.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

Respondent.

No appearance by or on behalf of petitioner.

Mark A. Wenzcel, Esq., for respondent (Gaccione, Pomono & Malanga, attorneys)

Record Closed: June 30, 2005 Decided: June 30, 2005

BEFORE **EDITH KLINGER**, ALJ:

On November 4, 2004, petitioner, L.H., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of Belleville (Board), to provide her child, D.E., with a free public education in the Township schools pursuant to *N.J.S.A.* 18A:38-1b. The two periods in dispute were during the 2003-2004 and 2004-2005 school years.

On December 11, 2004, the school district (District) filed its answer to the petition and its counterclaim for tuition and, on January 21, 2005, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was scheduled for June 21, 2005.

During the afternoon of June 20, 2005, petitioner, L.H., called the Office of Administrative Law and spoke to the secretary to the undersigned. She sought an adjournment of the scheduled hearing solely on the grounds that she had laryngitis. She was told that no adjournment would be granted for that reason unless she obtained the consent of her adversary. She did not contact the office of the undersigned again and, consequently, the hearing was not adjourned.

On June 21, 2005, the morning of the scheduled hearing, L.H. did not appear. Counsel for the respondent did appear and verified that L.H. never contacted his office to request his consent to an adjournment. The circumstances surrounding her non-appearance were placed on the record.

Pursuant to *N.J.A.C.* 1:1-14.4(a), if a party receiving appropriate notice of the hearing fails to appear at any scheduled proceeding, the Administrative Law Judge shall hold the matter for twenty-four hours before taking any action. If no acceptable explanation is received in that time, the judge may direct that the matter be returned to the transmitting agency for appropriate disposition. After the passage of more than twenty-four hours, L.H. was determined to have abandoned her appeal.

However, the District did appear and asserted its counterclaim for tuition against L.H. It was directed to submit a certification setting forth in detail the exact amount of its counterclaim and the manner in which it was calculated. The record closed in this matter on June 30, 2005, upon receipt of the District's certification and attachments.

According to the Certification of Joseph Kraemer (R-1), Director of Curriculum and former interim Superintendent of the District, petitioner's children, D.E. and S.H.,

attended the Belleville schools during the 2003-2004 school year. D.E. attended the Belleville Middle School.

On November 17, 2003, the District served petitioner with a Notice of Defect in Application/Potential Ineligibility requiring her to submit additional documentation regarding the domicile/residency of herself and her child, D.E. L.H. never responded to the Notice. On November 17, 2003, the District served L.H. with a Notice of Initial Determination of Ineligibility advising her to remove her child from the Belleville school system and informing her of her right to appear before the Belleville Board of Education (Board) to appeal the Determination. She failed to appear.

L.H. withdrew D.E. from the District and apparently contacted the New Jersey Department of Education (DOE) to protest the Determination. In February 2004, the DOE directed the District to reenroll D.E. pending the outcome of a potential appeal. Although the Disrict waited, L.H. never filed an appeal and D.E. remained in the Belleville school system for the remainder of the 2003-2004 school year.

L.H. reenrolled D.E. in the District for the 2004-2005 school year. Upon receiving information that L.H. and D.E. were actually living with her mother in Newark, the District again determined D.E. to be ineligible and L.H. filed the appeal that is the subject of this Initial Decision. As a result, D.E. remained enrolled in the District for the entire school year.

If a parent or guardian fails to carry the burden of proof of domicile, *N.J.S.A.* 18A:38-1(b)(2) provides that the district can remove the child from school and assess tuition for the student prorated to the period of ineligible attendance in district schools

Based upon the circumstances surrounding this matter, I **CONCLUDE** that L.H. failed to carry her burden of proof that D.E. was entitled to a free public education in the Township of Belleville during the relevant time periods. Accordingly, I **CONCLUDE** that L.H. is liable to the District for D.E.'s tuition prorated to the period of D.E.'s ineligible

attendance and the District may immediately remove D.E. from the District schools pursuant to *N.J.S.A.* 18A:38-b(2).

In this case, the District seeks tuition for D.E.'s attendance in the Belleville School District from March 1, 2003 through the end of the 2003-2004 school year, a total of seventy-nine (76) days. The per diem tuition rate for the 2003-2004 school year was $37.60. The District seeks tuition of $2,857.60 for this period of ineligible attendance. The District seeks further tuition of $8,372.00 for D.E.'s ineligible attendance in the District for the entire 2004-2005 school year. (R-1)

I **FIND** that these amounts are consistent with the Board-approved school calendars for the two school years in question and they are further consistent with its estimated tuition rates for these years. (R-1, Exhibit F) Therefore, I **CONCLUDE** that L.H. owes the District the total tuition of $11,229.60 for the ineligible attendance of D.E. in the District during the 2003-2004 and 2004-2005 school years.

ORDER

It is, therefore, **ORDERED** that L.H. pay respondent tuition in the total amount of $11,229.60 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that, without proof of current domicile/residency, D.E. may be excluded from further attending the Belleville public schools, at the discretion of the District, unless tuition is paid for his continued attendance.

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

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

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

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

June 30, 2005
DATE

EDITH KLINGER, ALJ

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

June 30, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 5 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Exhibits:

R-1 Certification of Joseph Kraemer, with attachments

276-05

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
PAUL ULLRICH, BOARD OF EDUCATION :
OF THE TOWNSHIP OF PEQUANNOCK, :
MORRIS COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board filed a Motion for an Order to Show Cause, seeking suspension of respondent's instructional certificate for unprofessional conduct stemming from his failure to provide adequate notice of resignation pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9.

The Commissioner issued an Order directing respondent to show cause why further order should not be entered suspending his certificate for unprofessional conduct. The respondent filed an answer to the show cause, explaining that personal reasons necessitated his relocation to California during the school year, and that he did not feel that any hardship had resulted from his resignation because a replacement was found "immediately after" respondent's departure. Respondent, however, failed to provide information necessary to transmit the matter to the OAL for adjudication and the Board's allegations against respondent were thus deemed to be admitted.

Therefore, the Commissioner orders that respondent's instructional certificate be suspended for a period of one year commencing as of the date of this decision, and forwards the matter to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it may deem appropriate.

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

August 3, 2005

AGENCY DKT. NO. 83-4/05

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
PAUL ULLRICH, BOARD OF EDUCATION :
OF THE TOWNSHIP OF PEQUANNOCK, :
MORRIS COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioning Board, Anthony P. Sciarrillo, Esq. (Lindabury, McCormick & Estabrook)

This matter having been opened by way of Motion for an Order to Show Cause before the Commissioner of Education by the Board of Education of the Township of Pequannock, seeking suspension of the instructional certificate of Paul Ullrich for resigning from employment on inadequate notice; and

The Commissioner having issued, on March 30, 2005, an Order directing Mr. Ullrich to show cause why further order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9; and

The Order and accompanying petition/Affidavit of Dr. Jacqueline Cusack, Superintendent of Schools of the Pequannock Township Board of Education, having been sent by the Board via certified and regular mail to Paul Ullrich; and

The Commissioner having directed respondent, by notice dated April 7, 2005, to submit an answer within 20 days of receipt of the Order; and

There being no Answer filed in that time, the Commissioner provided respondent, by notice dated May 2, 2005, sent via certified and regular mail,[1] an additional 10 days to file an Answer,

[1] The green card indicating receipt of the certified letter by "P. Ullrich" was received by the Bureau of Controversies and Disputes on May 16, 2005.

pursuant to *N.J.A.C.* 6A:3-1.3(e), or else allegations raised by the Board would be deemed true and this matter would be resolved in summary fashion by the Commissioner of Education; and

By letter dated May 11, 2005, filed with the Bureau of Controversies and Disputes on May 18, 2005, respondent provided the following response to the Show Cause Order:

> For personal reasons, it was necessary for me to relocate to California during the school year. I do not feel this created a particular hardship for the Pequannock Township BOE, as they were able to find a replacement immediately after my departure. Therefore I am troubled as to their motivations for taking this action. I spent a great deal of time and effort in getting certified just to have it stripped away like this. In addition, given the state of the education system, there should be more effort in trying to retain teachers instead of losing them.
>
> Although I am not planning to return to New Jersey in the near future, I may decide to become certified here, and would rather not have to explain having a suspended license. I hope you will take these matters into account when making your final decision. If you need any other details, I will be happy to provide them.

The Director of the Bureau of Controversies and Disputes, by letter dated May 23, 2005, mailed by certified mail, return receipt requested, and regular mail, advised respondent that the next step in the processing of this matter was transmission to the Office of Administrative Law for adjudication and respondent was directed to submit his current telephone number, a necessary requisite for transmission, within 10 days of his receipt of the letter.[2] Respondent was further advised that failure to submit this essential information would be deemed a determination that respondent did not wish to proceed in his defense of the board's charge against him; and

As of this date, respondent has not provided the information which would allow this matter to proceed and, therefore, the board's allegations against respondent are deemed to be admitted; and

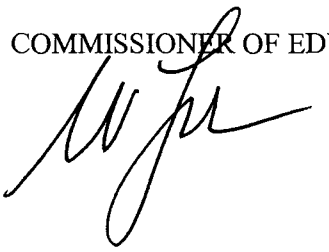
Respondent having ceased to perform his duties as a high school mathematics teacher in the Pequannock Township School District before the expiration of the term of his employment, without the Board's consent, and under the circumstances set forth in the petition/Affidavit of

[2] Although the green card has not yet been returned, neither has the regular mail envelope and it is, therefore, presumed delivered.

Dr. Jacqueline Cusack, Superintendent of Schools of the Pequannock Township Board of Education and, thereby Paul Ullrich being deemed to have engaged in unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9; now therefore

IT IS ORDERED on this _____ day of July 2005, that Paul Ullrich's instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it deems appropriate.[3]

COMMISSIONER OF EDUCATION



Date of Decision: 8/3/05

Date of Mailing: 8/3/05

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

277-05

DIANE M. TUCKER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner contended that the respondent Board improperly reduced her salary in violation of her tenure rights when they adjusted her regular semi-monthly paycheck to compensate only for the days she actually worked during the pay period in which she returned to work after an approved maternity disability leave; this pay period coincided in part with the district's spring break.

The ALJ found that the Board's recalculation of petitioner's semi-monthly salary on a *per diem* basis constituted an improper reduction in compensation in violation of *N.J.S.A.* 18A:28-5, and ordered the Board to compensate petitioner in the amount of $1,310.40, and to pay such pension credits as it would otherwise have been required to make.

The Commissioner adopts the Initial Decision as the final decision in this matter, concurring with the petitioner and the ALJ that the applicable statute and the case law interpreting it require that teacher salaries, including those of tenured teachers and teachers who work less than a full year, be calculated on the basis of monthly or semi-monthly pay periods. The Commissioner orders the Board to remit to the petitioner the sum of $1,310.40, which represents the difference between the salary payment she was owed and what she actually received, together with appropriate additional pension contributions.

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 3, 2005

OAL DKT. NO. EDU 6393-03
AGENCY DKT. NO. 234-7/03

DIANE M. TUCKER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the Board of Education's (Board) exceptions filed pursuant to *N.J.A.C.* 1:1-18.4. Petitioner did not file reply exceptions.

In its exceptions, the Board urges that additional findings of fact be made, based upon the testimony of Associate School Business Administrator Rossi as contained in the transcript of hearing, with respect to the district's long-established manner of making payroll adjustments for days off and leaves without pay. (Board's Exceptions at 2-4) The ALJ's failure to make such findings, according to the Board, is indicative of his misunderstanding of the issues involved in this matter:

> The ALJ never specifically discussed or challenged the [Board's] overall methodology. His conclusory analysis in the last full paragraph on page 11 of the Initial Decision is myopic in that it focuses solely on a single pay period (April 15 to 30), compares [petitioner] to employees who took *no* leave, and asks the Commissioner to put blinders on with respect to the rest of her work year and salary payments. This analysis ignores the inescapable reality that the semi-monthly check that other employees received for this period is *not really a payment for the four days of work in that pay period.* It is really an installment payment for the entire year's salary, and is based on an assumption that the employee will work the

> entire year. As [Associate School Business Administrator] Rossi testified, teachers do not receive any paid vacation. They are simply paid a salary for the total number of workdays in the year. Thus, no one is really paid for spring break days per se; rather, they are paid for the entire school year, and some of the regular payments happen to fall in periods when there are few school days. (*Id.* At 9-10, emphasis in text)

The Board again urges that, because statute does not specify how the salary of a teacher who does not work for the entire school year is to be adjusted, the appropriate standard of review in judging the present claim is whether the Board's methodology of payroll adjustment 1) is impermissible because it violates a statute or regulation or 2) constitutes an abuse of the Board's discretionary authority because it is arbitrary, capricious or unreasonable. The Board reiterates that if neither of these conditions applies, petitioner cannot be found—as she was by the ALJ—to have suffered a reduction in salary in violation of her tenure rights. (*Id.* at 5-6, 13)

The Board counters that, even granting, *arguendo*, that the statute cited by the ALJ and petitioner, *N.J.S.A.* 18A:27-6, applies to tenured teachers—who, since the advent of collective bargaining, are generally not issued individual contracts of employment—the Board pays its annual salaries in semimonthly installments on the dates specified, and nothing in the statute speaks to what is to be done when an employee works less than the full year necessary for straightforward application of a scheme based on equal installments; thus, no violation has occurred. (*Id.* at 6-8) With respect to arbitrariness, the Board points to the explanation of its Associate School Business Administrator for the rationale of each and every aspect of its method of calculating salary adjustments for payroll purposes and urges that—in the absence of a statewide mandate and given that no system is likely to yield consistently perfect results because the teacher work year is invariably less than the 200-day figure assumed by related statute

and used by school districts statewide[1]—the Board's methodology must be afforded a presumption of correctness, with modification, if any, left to the collective bargaining process. (*Id.* at 8-13)[2]

Reviewing the case law cited by the ALJ—as well as the other cases cited in the parties' post-hearing submissions at the OAL—the Board reiterates its argument that those cases are factually or legally distinguishable, do not address important arguments raised by the Board, or are not supportive of petitioner's position, and thus are neither determinative of the within matter nor clear in their establishment of a framework within which to analyze petitioner's claim.[3] (*Id.* At 13-19)

Upon careful and independent review, the Commissioner adopts the Initial Decision as the final decision in this matter.

In so doing, the Commissioner concurs with petitioner and the ALJ that *N.J.S.A.* 18A:27-6(3) and the case law interpreting it—regardless of differences in argument and circumstances—fundamentally require that teacher salaries, including those of tenured teachers and teachers who work less than a full year, be calculated on the basis of monthly or semi-monthly pay periods. While this certainly does not preclude receipt of an adjusted paycheck for any pay period during which a teacher does not have sufficient leave days to cover an absence occurring on a day when school is in session—

[1] The Board observes, for instance, that the ALJ's solution, according petitioner a total salary of $33,742.80 ($32,432.40 already paid + $1310.40 recommended relief) would result in petitioner being paid at a higher daily rate than employees who worked the entire year. (Board's Exceptions at 10)

[2] Clarifying its position with respect to jurisdiction, the Board notes that its contention is not—as stated in the Initial Decision at 8—that the Commissioner has no jurisdiction over this matter, but rather that his jurisdiction is limited to deciding whether the Board's payroll adjustment methodology is a violation of school law or an abuse of discretion, and does not extend to issues relating to terms and conditions of employment. (Board's Exceptions at 13, footnote 5)

[3] The Board also notes its abandonment of the argument that petitioner is estopped from claiming salary for days not worked because she had previously waived this right. The Board now finds it sufficient to note the lack of prior agreement between the parties as to the methodology of salary calculation to be used upon petitioner's return to work following leave. (Board's Exceptions at 2)

indeed, *N.J.S.A.* 18A:30-6 expressly contemplates such adjustment—it *does* preclude a board from adjusting the contracted salary installment for a teacher not on leave status who has worked each day during the period that teaching staff members were required to report to work. To the extent that, in the current situation, this preclusion produces a result deemed inequitable by the Board, such result could have been avoided—as noted by the ALJ—by the Board's exercising its undisputed authority to change the requested end date of petitioner's leave so as to prohibit her return to full status on the first day of a pay period encompassing a substantial number of days when school was not in session.[4]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Montgomery Township Board of Education is directed to compensate petitioner for the $1,310.40 difference between the salary payment she was owed for the second pay period of April 2003 and what she actually received, together with such additional pension contributions as are necessitated by this action.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 8/3/05

Date of Mailing: 8/4/05

[4] This holding makes it unnecessary to find additional facts with respect to the Board's method of payroll calculation and the qualifications of its Associate School Business Administrator, as requested by the Board. The Commissioner notes, however, that nothing in the record suggests that petitioner disputes the Board witness's recitation of the manner in which the Board calculates its payroll.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6393-03S
AGENCY DKT. NO. 234-7/03

DIANE M. TUCKER,
Petitioner,

v.

BOARD OF EDUCATION
OF MONTGOMERY TOWNSHIP,
SOMERSET COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., appeared for Petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

David W. Carroll, Esq., appeared for Respondent (Parker McCay, P.A., attorneys)

Record Closed: March 7, 2005 Decided: June 20, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ

On July 3, 2003, petitioner filed a Petition of Appeal with the Commissioner of Education alleging that respondent Board of Education of Montgomery Township recalculated her semi-monthly salary on a *per diem* basis for the period from April 16, 2003 through and including April 30, 2003, thereby causing her to suffer a reduction in compensation in violation of *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10 *et seq*. The Board filed its Answer to the Petition of

Appeal on August 5, 2003 and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on September 3, 2003. *N.J.S.A.* 52:14B-2(b) and *N.J.S.A.* 52:14F-15(o).

Following several adjournments, a prehearing conference was conducted by telephone on November 3, 2003, at which time the parties agreed that there were few contested facts. Therefore, with the addition of some limited testimony, the matter would be able to proceed on the parties' Stipulation of Facts and respective briefs. As a result of scheduling difficulties and adjournments, the hearing could not be held until January 25, 2005. The record closed upon receipt of the final reply briefs, which were contemporaneously filed on March 3, 2005.

The following Stipulation of Facts, copied verbatim from Exhibit J-9, has been accepted as comprising the record in this matter:

1. Petitioner Diane M. Tucker resides ... [in] Hillsborough, New Jersey, 08844.[1]
2. Respondent Board of Education of Montgomery Township, Somerset County, is a public school district with administrative offices located at 1014 Route 601, Skillman, New Jersey 08558.
3. Petitioner holds an Instructional Certificate issued by the State Board of Examiners with an endorsement as an elementary teacher.
4. Petitioner commenced employment with the respondent Board of Education of Montgomery Township on or about September 1, 1995 in the full-time position of teacher.
5. At all times pertinent, Petitioner held said certificate and held the proper endorsements for each of her assignments. As a consequence thereof, Petitioner acquired tenure with the respondent Board of Education of Montgomery Township.
6. Petitioner executed an employment contract with the respondent which provided for her to receive an annual salary of $43,680.00 for the 2002-03 school year, while employed on a ten (10) month basis (Exhibit J-1).

[1] Petitioner's street address has been deleted.

7. Petitioner's annual salary for the 2002-03 school year was payable in equal semi-monthly installments on the 15th and last work day of each month; more specifically, it was to be paid in twenty (20) equal semi-monthly installments of $2,184.00 (gross pay).

8. By letter to the Superintendent dated August 28, 2002 (Exhibit J-2). Petitioner advised the School District that she was expecting a child and that the expected due date was December 27, 2002. She requested a leave of absence for maternity purposes commencing January 2, 2002 [*sic*] and a return to work on April 16, 2003. She further requested paid leave from January 2nd through the end of February (based upon her calculation that she had 33 accumulated sick days, 3 personal days and 3 other comp leave days available) and an unpaid family leave (with benefits) for the remainder of her period of absence.

9. By letter dated September 12, 2002 (Exhibit J-3), Richard Hartz, respondent's Director of Human Resources, responded to Petitioner's request, setting forth an anticipated leave schedule in which Petitioner would commence her leave on January 2, 2003, use nineteen (19) days of accumulated paid leave time through January 29, 2003 and then take unpaid family leave (with benefits) from January 30, 2003 through April 15, 2003. In this letter Mr. Hartz also requested that Petitioner notify him of any disagreement with this schedule in advance of the Board meeting scheduled for September 24, 2002.

10. On September 19, 2002, Mr. Hartz met with Petitioner in the presence of Sandra Friedman, the Montgomery Township Education Association's grievance chair. The substance of this meeting is disputed and will be presented through testimony.

11. By letter dated September 19, 2002 (Exhibit J-4), and following the meeting with Hartz, Petitioner submitted a revised request for a leave to commence on December 9, 2002, in which she would use thirty-six (36) days of accumulated paid leave through February 7, 2003 and then take unpaid leave (with benefits) from February 10, 2003 through April 15, 2003. The handwritten notations on Exhibit J-4 are those of Mr. Hartz.

12. Further discussions took place regarding a dispute which remained as to the number of days of paid leave to which Petitioner was entitled, and this dispute

was ultimately resolved with a determination that she was entitled to 35.5 days of paid leave. Mr. Hartz confirmed this in a letter to Petitioner dated October 15, 2002 (Exhibit J-5).

13. At its meeting on October 22, 2002, the Board passed a resolution (Exhibit J-6) approving respondent's revised leave request in accordance with the following schedule, and petitioner was notified of such approval by letter dated October 23, 2002 (Exhibit J-7):

Paid Leave (Pre-temporary disability period) (10 days)	12/9/02-12/27/02
Paid Leave (Post temporary disability period) (20 days)	12/28/02-1/30-03
Paid Leave (personal and compensatory) (5.5 days)	1/31/03-2/7/03 (1/2 day on 2/7/03)
Unpaid Family Leave	2/7/03-4/15/03

14. Pursuant to Article VIII(A) of the collective bargaining agreement between respondent and the Montgomery Township Education Association for the period from July 1, 2000 to June 30, 2003, the teachers' work year was to be no more than one hundred eighty-six (186) days, including school days and staff development days. During the 2002-03 school year, the teachers' work year was one hundred eighty-six (186) days. [(]A copy of the proposed school calendar for the 2002-03 school year is attached as Exhibit J-8).

15. The only change to the calendar which occurred during the course of the 2002-03 school year was that school was cancelled on February 18, 2003 due to snow. None of the excess days scheduled for snow makeup were needed, and school ended on June 24, 2003. The month-by-month breakdown of teacher work days was as follows:

September	19
October	23
November	17
December	15
January	21
February	17
March	21
April	15

May	21
June	17
Total	186

16. Respondent paid Petitioner the following (gross) salary payments during the 2002-03 school year:

Working Days by Month		**Days Worked or Credited With Pay by District**	**Amount Paid**
September	19	19	$4,368.00
October	23	23	$4368.00
November	17	17	$4368.00
December	15	15	$4368.00
January	21	21	$4368.00
February	17	4.5	$ 982.80
March	21	0	$ 0.00
April	15	4	$ 873.60
May	21	21	$4368.00
June	17	17	$4368.00
Total	186	141.5	$32,432.40

17. Petitioner filed a Petition of Appeal with the Commissioner of Education on July 7, 2003.

18. Respondent filed an Answer to the Petition of Appeal on August 6, 2003.

19. The matter was transferred to the Office of Administrative Law as a contested case on September 9, 2003.

Testifying in her own behalf, petitioner stated that after several discussions with Richard Hartz, she'd requested and been granted a maternity leave beginning on December 9, 2002 and ending on April 16, 2003. At that time, it was her understanding that she would first exhaust her accumulated sick, personal and compensatory leave days before being placed on unpaid leave.[2] In this way, she would continue to receive a semi-monthly paycheck for at least part of her leave.

[2] The period of unpaid leave was granted in accordance with the Family Medical Leave Act, 29 *U.S.C.* § 2601 *et seq.*

Petitioner also stated that prior to submitting her leave request she had calculated the financial impact it would have by using the same formula she and the Board had utilized in calculating her first maternity leave. Using that formula, she calculated a paid leave of twenty work days, or four school calendar weeks, for January 2 – January 30, 2003, the first month school was back in session following the winter break.[3] Yet, she was "shocked" when she returned to work only to find that she had been paid for 16 days.[4] She attributed this discrepancy not only to a failure on the part of the Board to credit her with at least three days of compensatory time from an earlier grievance, but also to the difference between school work weeks and calendar weeks. Still, it had been her belief that the discrepancy had been satisfactorily resolved during her September 19, 2002 meeting with Mr. Hartz.

Petitioner concluded her testimony by providing two separate and distinct reasons for her decision to go back to work on April 16, 2003, the day before spring recess. First, "financially, it made sense." More specifically, had she not returned until the schools reopened on April 28, she would have sacrificed the regular semi-monthly salary payment encompassing that period of time. And second, she believed that returning to work one day before the break would make the transition from a substitute teacher back to her that much easier for the children.

Testifying on behalf of the Board, Richard Hartz allowed that petitioner's rationale for returning to work the day before spring break for the children's sake made sense. However, before agreeing to the April 16 return date, he advised her that his acceptance was conditioned upon her understanding that she would not be paid for any of the days school was not in session during the spring recess. To the best of his recollection, petitioner did not object, and Sandra Friedman "endorsed" his position, assisting him in explaining to petitioner that teachers were "not paid for school vacations, only for days worked."

---

[3] Petitioner utilized ten accumulated sick days to cover the days school was in session between December 9, 2002, the first day of her maternity leave, and December 27, 2002, her anticipated delivery date. She then utilized her twenty remaining sick days for the twenty days school was in session between December 28, 2002 and January 30, 2003. After using her remaining five and one-half days of accumulated personal and compensatory time for the days school was in session from January 31, 2003 through February 7, 2003, she took the balance of her maternity leave as unpaid family leave.

[4] A careful reading of Exhibit J-3 discloses that Mr. Hartz designated the sixteen days from January 2, 2003 through and including January 24, 2003 as "Paid Leave – Temporary Disability Period." However, he also recognized three

For her part, Ms. Friedman testified that most of the meeting with Mr. Hartz had been spent discussing the parties' disagreement over the total number of leave days petitioner had available for her use. Regarding petitioner's proposed return to work on April 16, she stated that she had simply advised petitioner that the Board had the right to change the beginning and end date of an employee's requested leave.

The final witness was Ronald Rossi, the Board's Associate School Business Administrator. According to Mr. Rossi, ten month employees such as petitioner are paid their annual salaries over twenty equal semi-monthly installments on the 15th and last days of each month. And this is so regardless of the actual number of work days in any given pay period. As he explained, if teachers were paid only for the days the schools were in session in any given month, their semi-monthly or monthly checks would vary from month to month. To avoid the "chaos" that would ensue, the Board elected to pay its teachers using equal semi-monthly payments.

However, while these salaries may be annual, they are actually based on a 200 day school year, which Mr. Rossi referred to as "the industry standard" established by *N.J.S.A.* 18A:30-6. Even though the school year may actually consist of 186 days, if an employee exceeds the annual allotment of sick days, that employee's salary will be reduced by 1/200th for each absence in excess of that number. Conversely, since employees are paid only for days the schools are actually in session, the Board paid petitioner on a *per diem* basis for the four days she was in school teaching between April 16 and April 30 by multiplying 1/200th of her annual salary by four.

As a tenured teacher, petitioner was protected by a statutory scheme, the purpose of which is to establish a competent and efficient school system by affording teachers and administrators "a measure of security in the ranks they hold after years of service." *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). This "measure of security" includes, among other things, protection against being "dismissed or *reduced in compensation* except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other

---

"Paid Leave" days from January 26, 2003 through and including January 29, 2003. Therefore, the total number of days designated as paid leave was nineteen, resulting in a discrepancy of one day. *See Stipulation of Facts*, ¶ 9.

just cause and then only in the manner prescribed by [*N.J.S.A.* 18A:6-10 *et seq.*]...." *N.J.S.A.* 18A:28-5 (emphasis added). The issue here is whether the methodology used by the Board in calculating petitioner's April salary payment caused her to suffer a reduction in compensation in violation of *N.J.S.A.* 18A:28-5.[5]

Compensation of teachers is addressed in a section of the education laws prescribing certain information that must be included in a teaching contract. Pursuant to *N.J.S.A.* 18A:27-6,

> Each such contract shall specify:
>
> 1. The date when the person shall begin such employment;
> 2. The kind and grade of certificate held by him and the date upon which the certificate will expire;
> 3. The salary at which he is employed, which shall be payable in equal semimonthly or monthly installments, as the board shall determine, not later than five days after the first and fifteenth day of each month in case of semimonthly installments and not later than five days after the close of the month in the case of monthly installments while the school is in session, a month being construed, unless otherwise specified in the contract, to be 20 school days or four weeks of five school days each; and
> 4. Such other matters as may be necessary to a full and complete understanding of the contract.

The Montgomery Township Board of Education uses the equal semimonthly payment method and pays its teachers who hold ten-month contracts twenty equal installments on the fifteenth and last days of each month.

Clearly, there is no direct correlation between the regular payroll schedule and the school calendar. As the Board characterized it, "[t]he equal installment payroll schedule is a mere convenience to spread actual payments out on a regular basis over time." *Respondent's Post Hearing Brief* (February 22, 2005), p. 13. Therefore, these equal installments are paid irrespective of the number of school days in a given month or the number of those days a teacher

[5] The Board has also asserted that this is a collective negotiations matter over which the Commissioner has no jurisdiction. However, it did not submit any authorities or advance any arguments in support of this assertion. Thus, this matter is being decided as a contested case pursuant to *N.J.S.A.* 18A:6-9 and *N.J.S.A.* 52:14F-1 *et seq.*

actually works. Still, as the Board argues, this method of payment is premised upon an assumption that the teacher will be working the entire year.

Unfortunately, the statutory scheme does not address how the salary of a teacher who is unable to work an entire year is to be adjusted.[6] And the reported cases that do touch upon the subject concern teachers and administrators who resigned their positions prior to the end of a school year. For example, in *Parker v. Board of Education of the Town of Hammonton*, 1980 *S.L.D.* 58 (EDU 1908-79), petitioner had been employed as a ten-month employee at an annual salary of $17,140. After certain negotiated adjustments, her contract called for her to receive bi-weekly checks in the amount of $799.09. Then, on December 14, 1978, she submitted her resignation effective January 1, 1979.

The Board adjusted petitioner's final salary in accordance with its policy that the final salary of a teacher who resigned prior to the expiration date of his or her contract was to be "adjusted and prorated on the basis of the total number of required attendance days school is scheduled for the term." *Id. at* 60. However, the Hon. Daniel McKeown, ALJ, not only took exception to the payment of salaries on a bi-weekly basis, but also determined that the Board's retroactive recalculation of petitioner's salary on a *per diem* basis had been improper. Specifically, he stated that he could find no grounds "upon which to conclude that it is permissible for a Board to pay its employees who are employed on an academic year basis less than once a month times ten months or more than twice a month for ten months." *Id. at 61*. He therefore ordered the Board to pay petitioner four full months (September – December), or two-fifths, of her total annual salary.

The Commissioner of Education in turn modified the initial decision, finding that the Board had violated its own policy by reverting to a *per diem* rate of compensation. However, he expressly adopted the ALJ's calculation of petitioner's final salary, which was based upon the payment schedule set forth in *N.J.S.A.* 18A:27-6(3).

---

[6] *N.J.S.A.* 18A:30-6 provides that a Board of Education may continue to pay such an employee "each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case." The statute does not, however, address adjustments in salary.

Similarly, in *Bruner v. Upper Freehold Regional Board of Education*, 1980 *SLD* 1093 (EDU 697-80), a school psychologist resigned her position shortly after the start of the school year. Her contract called for her to work a five-day work week eleven months per year, not to exceed 206 working days. Although she worked an eleven-month year, she was remunerated as a twelve-month employee and paid in twenty-six equal semi-monthly payments over a twelve-month period. Yet, upon tendering her resignation to be effective October 15, 1979, she was advised that her salary would be retroactively recalculated on a *per diem* basis.

Ruling in favor of petitioner, the Hon. Eric G. Errickson, ALJ, held:

> It is clear that petitioner worked on an annual contract salary basis, not a *per diem* basis. Since few school districts require their ten-month teaching staff members to be present for each of two hundred days, it must be concluded that boards generally, and this Board in particular, compensate their ten-month employees for some days on which school is not in session.
>
> An equitable principle as authorized in statute has been to pay employees over the ten-month period "***in equal semi-monthly or monthly installments *** while the school is in session, a month being construed, unless otherwise specified in the contract, to be twenty school days or four weeks of five school days each;***." *N.J.S.A.* 18A:27-6.
>
> [*Id.* at 1095.]

On the record before him, Judge Errickson found that petitioner had worked one month during the summer; the month of September; and one-half of October, for a total of two and one-half months. Consequently, he ordered the Board to pay petitioner the amount arrived at by multiplying her regular monthly salary entitlement by two and one-half months. Without passing judgment on the propriety of petitioner's eleven month status, the Commissioner of Education nevertheless adopted the formula utilized by Judge Errickson and calculated petitioner's salary by dividing her annual salary by eleven and then multiplying the result by 2.5.

Much the same result was obtained in *Leeb v. Board of Education of the Township of Holland*, 1988 *SLD* 2003 (EDU 7865-87). There, the teaching staff member was employed as a twelve-month employee whose annual salary was to be paid in twenty-six bi-weekly installments. She submitted a letter of resignation effective October 14, 1987 and, as in the preceding cases,

was informed that her salary would be adjusted on a *per diem* basis. After approving the payment of a teaching staff member's salary on a bi-weekly instead of semi-monthly basis, Administrative Law Judge Joseph Lavery relied on a Board policy authorizing the payment of twelve-month employees on a *per diem* basis of $1/260^{th}$ of the employee's annual salary and upheld the adjustment of her salary.

The Commission of Education modified the Initial Decision and found that

> the per diem calculation devised by the Board in determining what compensation may be due petitioner for the three days she worked during pay period 1, and the two she worked during pay period 9, is inappropriate for a salaried employee pursuant to *N.J.S.A.* 18A:27-6. Rather, the Commissioner adopts the system as illustrated in the case entitled *Gladys Bruner v. Board of Education of Upper Freehold Regional*, 1980 *SLD* 1097, 1098, which calculated salary due that petitioner by dividing the bimonthly salary entitlement by the proportion of the pay period for which she worked. In the instant matter petitioner worked three days in pay period 1 and also worked two days in pay period 9 which equals five days or one-half a bi-weekly pay module. [Petitioner's bi-weekly salary of] $1,647.31 divided by two equals $823.66. Additionally, petitioner worked seven biweekly pay periods which totals $11,531.17. Adding $11,531.17 and $823.66 brings the amount of compensation due petitioner for the period she was employed during the school year to $12, 354.83.
>
> [*Leeb v. Board of Education of the Township of Holland, supra*, 1988 *SLD* at 2017]

Here, following an unpaid maternity leave of approximately two and one-half months, petitioner came back to work on April 16, the first day of the second pay period that month. As it happens, it was also the last day school was in session prior to closing for Good Friday and the ensuing spring recess. She then returned when the schools reopened on April 28 and worked the last three days – April 28, 29 and 30 – of that pay period. Consequently, she worked every single day the schools were open for her to work.

Once she crossed the threshold her first day back at work, she should not have been treated any differently than any other teacher in the building. She worked no more and no less

than a teacher in an adjoining classroom and, all things being equal, should have received the same amount of salary. To treat her differently would be to penalize her for taking advantage of the statutory scheme and following the letter of the law.

What is more, this situation was entirely of the Board's own making. As Ms. Friedman testified, the Board had the right to change the beginning and ending dates of an employee's requested leave. And the record discloses that the Board had more than ample opportunity to deny petitioner's requested return date of April 16, but chose not to do so. Even if Mr. Hartz did in fact advise petitioner that she would not be paid for the week of spring recess, which petitioner has denied, he certainly did not reduce this to writing. In fact, his own October 15, 2002 letter (Exhibit J-5) containing the "revised anticipated leave schedule" and including the April 16 return date is silent on the matter. The same is true of the Board's October 22, 2002 resolution approving her leave of absence (Exhibit J-6),[7] and Superintendent Schnur's confirming letter of October 23, 2003.

Based upon the foregoing, I conclude that the Board's recalculation of petitioner's semi-monthly salary on a *per diem* basis constituted an improper reduction in compensation in violation of *N.J.S.A.* 18A:28-5 and must be overturned. Since petitioner was entitled to receive her full semi-monthly salary of $2184 but was paid only $873.60, respondent Board of Education of Montgomery Township must compensate her for the difference of $1,310.40 and pay such pension credits as it would otherwise have been required to make. It is so **ORDERED**.

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

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

[7] There is an asterisk next to the April 16, 2003 return to work date, but no corresponding legend explaining its meaning.

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

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

June 20, 2005
DATE

Israel D. Dubin
ISRAEL D. DUBIN, ALJ
By: Joseph A. Martone ALJ

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

DATE

JUN 23 2005
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

Diane M. Tucker, petitioner

Sandra Friedman

For Respondent:

Richard Hartz

Ronald Rossi

EXHIBITS

Joint Exhibits:

J-1	Letter of Contract Renewal – May 29, 2002
J-2	Tucker Letter Requesting Maternity Leave – August 28, 2002
J-3	Hartz's Reply to Leave Request – September 12, 2002
J-4	Tucker's Reply to Hartz – September 19, 2002
J-5	Hartz's Letter w/ Revised Leave Schedule – October 15, 2002
J-6	Board Resolution Approving Maternity Leave – October 22, 2002
J-7	Superintendent's Letter – October 23, 2002
J-8	Montgomery Township Schools Calendar 2002-2003
J-9	Stipulation of Facts

For Petitioner:

None

For Respondent:

R-1 Chart of *Per Diem* Compensation Rate 2002-2003

R-2 Salary Payment Calculations

280-05

OAL DKT. NO. EDU 968-05
AGENCY DKT. NO. 24-1/05

J.L., on behalf of minor child, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/9/05

Date of Mailing: 8/9/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 968-05

AGENCY DKT. NO. 24-1/05

J.L., ON BEHALF OF MINOR CHILD, L.P.,

Petitioner,

v.

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

Respondent.

J.L., petitioner, *pro se*

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: July 5, 2005 Decided: July 11, 2005

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 10, 2005 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

July 11, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

7-15-05
DATE

Karen Lemoley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

Agency Docket #
24-1/05

J.L. a/k/a/ Minor Child
LP vs
Hamilton Twp Board of ED

Stipulation of Settlement

(1) Jennifer Lawson shall pay to Hamilton Twp Board of ED. the sum of $974.00.

(2) Ms Lawson shall Commence Payments of $50.00 every two weeks Commencing Aug 26, 2005

(3) Payments shall be made to the Office of Destribants, Campbell, DeSantis, & Mayer at 247 Whitehorse Ave Hamilton N.J. 08610

(4) Checks shall be payable to the Hamilton Twp Board of Education.

(5) J.L. shall be permitted to Re-enroll in Hamilton Twp School District for the 2005-2006 School year.

Respondent

Dennis M. DeSantis, Esq.

7/5/05

Petitioner

Jennifer Lawson

281-05

OAL DKT. NO. EDU 4089-05
(EDU 6709-05 ON REMAND)
AGENCY DKT. NO. 335-8/03

BARBARA ANTHONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/9/05

Date of Mailing: 8/9/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-SETTLEMENT
OAL DKT. NO. EDU 4089-05
AGENCY DKT. NO. 335-8/03
(ON REMAND FROM EDU 6709-03)

BARBARA ANTHONY,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF HOLMDEL,
MONMOUTH COUNTY
Respondent.

Stephen B. Hunter, Esq, for petitioner (Klausner and Hunter, attorneys)
Martin M. Barger, Esq, for respondent (Reusille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: June 14, 2005 Decided: July 12, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a remand for a revision of a settlement agreement entered into by the parties in the above-captioned matter, under the previous Initial Decision - Settlement rendered under OAL docket number EDU 6709-03. The remand order was received at the Office of Administrative Law (hereinafter "OAL") on May 24, 2005. A telephone conference was conducted with counsel

as a result of which the parties submitted a revised copy of the joint exhibit, J-1, which contained the original signature of Martin M. Barger, board attorney. The record closed on June 14, 2005, upon receipt of that revision.

FACTUAL DISCUSSION

As indicated hereinabove, the Commissioner of Education remanded the above matter in order to obtain a revision of the settlement agreement to include either the board attorney's signature or the Board resolution approving the settlement and designating Maureen Flaherty to sign on its behalf. Mr. Martin Barger supplied his signature pursuant thereto. It is noted that Ms. Flaherty had previously affixed her title to that document, although the Board resolution approving the settlement and designating her to sign on its behalf was not so supplied, by way of alternative revision.

LEGAL DISCUSSION

The inclusion of Mr. Barger's signature, as the attorney for the school board, appears to satisfy the concerns raised by the Commissioner of Education in the Remand dated May 18, 2005.

CONCLUSION AND ORDER

Based upon all of the foregoing, 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** inasmuch as this matter is no longer a contested case before the Office of Administrative 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

July 12, 2005
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

July 15 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

mamf

APPENDIX

LIST OF WITNESSES:

For petitioner:

Barbara Anthony

Robert Anthony

For respondent:

Dr.Maureen Flaherty

Dr. Maryann Peifly

LIST OF EXHIBITS:

Jointly submitted:

J-1 Settlement Agreement with signature of Mr. Barger attached as attorney for the board of education.

2. PETITIONER SHALL BE PLACED AT STEP 10 OF THE MASTER'S plus 15 COLUMN OF THE NEGOTIATED TEACHERS' SALARY GUIDE FOR THE 2005-2006 SCHOOL YEAR.

3. ALL OPEN ISSUES, INCLUDING TAIP PENDING GRIEVANCE, ARE WITHDRAWN.

FOR BARBARA ANTHONY

Barbara M. Anthony

FOR THE HOLMDEL TOWNSHIP BOARD OF EDUCATION

Maureen E. Flaherty
Superintendent of Schools

Martin M. Barger
Board Attorney

RECEIVED
2005 JUN 14 A 10:57
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

J-1
August 4, 2005
ID Evidence

BARBARA ANTHONY
PETITIONER

AND

HOLMDEL TOWNSHIP
BOARD OF EDUCATION
RESPONDENT

DOCKET NO
OAL DOCKET NO.
EDUC-06709-
2003 S

AGENCY REFERENCE
NO. 335-8/03

THE PARTIES IN THE ABOVE CAPTIONED MATTER AGREE TO THE FOLLOWING IN FULL SETTLEMENT OF ALL OF THE ISSUES INVOLVED IN THIS PROCEEDING:

1. PETITIONER BARBARA ANTHONY SHALL BE REEMPLOYED BY THE HOLMDEL TOWNSHIP BOARD OF EDUCATION AS A TENURED SPEECH/LANGUAGE TEACHER EFFECTIVE SEPTEMBER 1, 2003.

285-05

OAL DKT. NO. EDU 9023-04
AGENCY DKT. NO. 234-7/04

WOODCLIFF LAKE EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN 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 settlement as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Ravenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/11/05

Date of Mailing: 8/11/05

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -

SETTLEMENT

OAL DKT. NO. EDU 9023-04

AGENCY DKT. NO. 234-7/04

WOODCLIFF LAKE EDUCATION ASSOCIATION,

Petitioner,

v.

WOODCLIFF LAKE BOARD OF EDUCATION,

Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorney)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: June 29, 2005 Decided: June 29, 2005

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

This matter was transmitted to the Office of Administrative Law on August 18, 2004 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

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

June 29, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

7-6-05
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 2005
DATE

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

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 JUN 29 P 1:59

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Respondent,
Woodcliff Lake Board of Education
Our File No. 128

WOODCLIFF LAKE EDUCATION ASSOCIATION Petitioner, vs. WOODCLIFF LAKE BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DKT. NO.: EDU 09023-2004 AGENCY REF. NO.: 234-7/04 **SETTLEMENT AGREEMENT**

WHEREAS, the Woodcliff Lake Board of Education (hereinafter referred to as the "Board") recognizes the Woodcliff Lake Education Association (hereinafter referred to as the "Association") as the sole bargaining representative for the Board's teaching staff members; and

WHEREAS, pursuant to N.J.A.C. 6:3-4.3, the Board is required to adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel; and

WHEREAS, pursuant to N.J.A.C. 6:3-4.3(f)(3), a certified supervisor, who has participated in the evaluation of a teaching staff member, must prepare an annual

written performance report that includes an individual professional improvement plan ("PIP") developed by the supervisor and the teaching staff member; and

WHEREAS, on or about, June 30, 2004, the Association filed a verified petition with the Commissioner of Education alleging that the format of the PIPs to be at the District's Dorchester School for tenured teaching staff members during the 2004-2005 school year violated N.J.A.C. 6:3-4.3; and

WHEREAS, in its petition, the Association sought an Order: (i) Declaring that the format for the PIPs constitutes a violation of N.J.A.C. 6:3-4.3; (ii) Directing the Board to cease and desist from requiring teaching staff members to prepare PIPs in said format; (iii) Directing that the Board require that the process for development of PIPs be redone in a format and manner consistent with N.J.A.C. 6:3-4.3; and (iv) Requiring the Board to expunge the PIPs from the personnel files of each affected teaching staff member; or, alternatively, directing that PIPs may not be used for any evaluative purposes or any other purposes that may impact on said teaching staff members terms and conditions of employment; and

WHEREAS, in response thereto, the Board filed an answer and separate defenses denying that the PIPs were in violation of N.J.A.C. 6:3-4.3, and sought an Order: (i) Dismissing, with prejudice, the Petition of Appeal; (ii) Declaring that the Board has complied with all applicable school laws; and (iii) Declaring that the Board's action in regard to the PIP format and preparation thereof was not in violation of N.J.A.C. 6:3-4.3; and

WHEREAS, the matter bearing Docket Number EDU 09023-2004N was assigned to the Honorable Kenneth R. Springer, A.L.J., and was scheduled for a plenary hearing on or about May 2, 2005; and

WHEREAS, the parties are desirous of resolving this matter without litigation, and have to come to a mutually agreeable resolution of this dispute.

NOW THEREFORE, based upon the foregoing premises and mutual promises and covenants contained herein, the parties hereby agree as follows:

1. The Board and the Association will engage in a collaborative effort to devise a mutually agreeable PIP form in full compliance with N.J.A.C. 6:3-4.3, which shall be used for the 2005-2006 school year and for school years thereafter.

2. Following the development of the aforementioned mutually agreeable PIP form, the parties agree that the appropriate District administrator(s) will meet with each teaching staff member individually to devise individual PIP goals in accordance with N.J.A.C. 6:3-4.3(f)(3). Each meeting with the individual teaching staff members will afford a meaningful opportunity to develop an individual PIP based upon a staff member's respective individual areas of performance, strengths and/or needs for improvement.

3. The PIP form that is mutually developed shall also include a delineation of the responsibilities of the District for implementing the PIP.

4. With respect to the PIP forms that were developed and used for the 2004-2005 school year, neither party admits any wrongdoing whatsoever, including, but not limited to, any allegations that the Board's administrators did not hold individual staff meetings pursuant to N.J.A.C. 6:3-4.3(f)(3). Both parties reserve all rights under the law to challenge and/or defend the use of the aforementioned PIPs in the event that an actual dispute arises involving adverse employment action taken by the Board against a teaching staff member. The Board specifically agrees to waive the defense of timeliness if the Association files an action as described above.

5. The Association agrees to withdraw its petition of appeal bearing Docket Number EDU 09023-2004N, with prejudice. Notwithstanding the withdrawal aforesaid, the Association does not release and reserves unto itself and its members, all rights of challenge as set forth in Paragraph 4, above. Furthermore, the

Association does not release, and reserves unto itself and its members, the right to assert any and all future claims that may arise out of the implementation of the terms of this Agreement or, the requirements imposed by N.J.A.C. 6:3-4.3 and its subparts.

6. The parties hereto affirm that each has been represented by legal counsel or a representative of their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

7. This Agreement is the compromise of disputed claims, and shall never be treated as or introduced into evidence in any proceeding whatsoever as an admission of liability by either party for any purpose, except as otherwise set forth in the reservation of rights contained in Paragraph 4.

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

WITNESS:

SHEILA P. CONROY
Board Secretary/Business Administrator

Dated:

WOODCLIFF LAKE BOARD OF EDUCATION

BY: _____
ROBERT NATHIN
Board President

Dated:

WITNESS:

MARSHA GORDON
Vice President

Dated: May 31, 2005

WOODCLIFF LAKE EDUCATION ASSOCIATION

JOSEPH CANCRO
President

Dated: May 31, 2005

RESOLUTION

BE IT RESOLVED, by the Woodcliff Lake Board of Education that the terms, stipulations and conditions as established in the Settlement Agreement, which is annexed to this resolution, are hereby adopted and approved by the Board of Education. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the attached Agreement and any other documents necessary to effectuate said Agreement.

ROLL CALL VOTE:

AYES: Mrs. Eichenlaub, Mrs. Eichner, Mrs. Foster, Mrs. Liebster, Mr. Nathin, Mrs. Abene

NAYS: None

ABSTENTIONS: None

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Woodcliff Lake Board of Education by a majority vote at its duly authorized meeting on June 16, 2005.

Sheila P. Conroy
Business Administrator/Board Secretary

Dated: 6/28/05

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 JUN 29 P 1:59

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Respondent,
Woodcliff Lake Board of Education
Our File No. 128

WOODCLIFF LAKE EDUCATION ASSOCIATION Petitioner, vs. WOODCLIFF LAKE BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DKT. NO.: EDU 09023-2004 AGENCY REF. NO.: 234-7/04 **SETTLEMENT AGREEMENT**

WHEREAS, the Woodcliff Lake Board of Education (hereinafter referred to as the "Board") recognizes the Woodcliff Lake Education Association (hereinafter referred to as the "Association") as the sole bargaining representative for the Board's teaching staff members; and

WHEREAS, pursuant to N.J.A.C. 6:3-4.3, the Board is required to adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel; and

WHEREAS, pursuant to N.J.A.C. 6:3-4.3(f)(3), a certified supervisor, who has participated in the evaluation of a teaching staff member, must prepare an annual

written performance report that includes an individual professional improvement plan ("PIP") developed by the supervisor and the teaching staff member; and

WHEREAS, on or about, June 30, 2004, the Association filed a verified petition with the Commissioner of Education alleging that the format of the PIPs to be at the District's Dorchester School for tenured teaching staff members during the 2004-2005 school year violated N.J.A.C. 6:3-4.3; and

WHEREAS, in its petition, the Association sought an Order: (i) Declaring that the format for the PIPs constitutes a violation of N.J.A.C. 6:3-4.3; (ii) Directing the Board to cease and desist from requiring teaching staff members to prepare PIPs in said format; (iii) Directing that the Board require that the process for development of PIPs be redone in a format and manner consistent with N.J.A.C. 6:3-4.3; and (iv) Requiring the Board to expunge the PIPs from the personnel files of each affected teaching staff member; or, alternatively, directing that PIPs may not be used for any evaluative purposes or any other purposes that may impact on said teaching staff members terms and conditions of employment; and

WHEREAS, in response thereto, the Board filed an answer and separate defenses denying that the PIPs were in violation of N.J.A.C. 6:3-4.3, and sought an Order: (i) Dismissing, with prejudice, the Petition of Appeal; (ii) Declaring that the Board has complied with all applicable school laws; and (iii) Declaring that the Board's action in regard to the PIP format and preparation thereof was not in violation of N.J.A.C. 6:3-4.3; and

WHEREAS, the matter bearing Docket Number EDU 09023-2004N was assigned to the Honorable Kenneth R. Springer, A.L.J., and was scheduled for a plenary hearing on or about May 2, 2005; and

WHEREAS, the parties are desirous of resolving this matter without litigation, and have to come to a mutually agreeable resolution of this dispute.

NOW THEREFORE, based upon the foregoing premises and mutual promises and covenants contained herein, the parties hereby agree as follows:

1. The Board and the Association will engage in a collaborative effort to devise a mutually agreeable PIP form in full compliance with N.J.A.C. 6:3-4.3, which shall be used for the 2005-2006 school year and for school years thereafter.

2. Following the development of the aforementioned mutually agreeable PIP form, the parties agree that the appropriate District administrator(s) will meet with each teaching staff member individually to devise individual PIP goals in accordance with N.J.A.C. 6:3-4.3(f)(3). Each meeting with the individual teaching staff members will afford a meaningful opportunity to develop an individual PIP based upon a staff member's respective individual areas of performance, strengths and/or needs for improvement.

3. The PIP form that is mutually developed shall also include a delineation of the responsibilities of the District for implementing the PIP.

4. With respect to the PIP forms that were developed and used for the 2004-2005 school year, neither party admits any wrongdoing whatsoever, including, but not limited to, any allegations that the Board's administrators did not hold individual staff meetings pursuant to N.J.A.C. 6:3-4.3(f)(3). Both parties reserve all rights under the law to challenge and/or defend the use of the aforementioned PIPs in the event that an actual dispute arises involving adverse employment action taken by the Board against a teaching staff member. The Board specifically agrees to waive the defense of timeliness if the Association files an action as described above.

5. The Association agrees to withdraw its petition of appeal bearing Docket Number EDU 09023-2004N, with prejudice. Notwithstanding the withdrawal aforesaid, the Association does not release and reserves unto itself and its members, all rights of challenge as set forth in Paragraph 4, above. Furthermore, the

Association does not release, and reserves unto itself and its members, the right to assert any and all future claims that may arise out of the implementation of the terms of this Agreement or, the requirements imposed by N.J.A.C. 6:3-4.3 and its subparts.

6. The parties hereto affirm that each has been represented by legal counsel or a representative of their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

7. This Agreement is the compromise of disputed claims, and shall never be treated as or introduced into evidence in any proceeding whatsoever as an admission of liability by either party for any purpose, except as otherwise set forth in the reservation of rights contained in Paragraph 4.

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

WITNESS:

SHEILA P. CONROY
Board Secretary/Business Administrator

Dated:

WOODCLIFF LAKE BOARD OF EDUCATION

BY: ROBERT NATHIN
Board President

Dated:

WITNESS:

MARSHA GORDON
Vice President

Dated: May 31, 2005

WOODCLIFF LAKE EDUCATION ASSOCIATION

JOSEPH CANCRO
President

Dated: May 31, 2005

286-05

286-05

OAL DKT. NO. EDU 9586-03
AGENCY DKT. NO. 283-8/03

ROBERT ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/11/05

Date of Mailing: 8/11/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9586-03
AGENCY DKT. NO. 283-8/03

ROBERT ALLEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,

Respondent.

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

Edward J. Glynn, Esq., for respondent (Winegar, Wilhelm, Glynn & Roemersma, attorneys)

Record Closed: July 8, 2005 Decided: July 13, 2005

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

On August 6, 2003, petitioner filed a Petition of Appeal alleging that the action of the Board of Education of the Warren County Technical School District (the Board), which charged him sick leave for work-related injury/illness, violates *N.J.S.A.* 18A:30-2.1. The Board filed an Answer to Petition of Appeal on September 8, 2003. Subsequently, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on October 10, 2003, it was filed for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was originally assigned to Thomas E. Clancy, Administrative Law Assignment Judge, who entered a letter order on November 13, 2003 placing the matter on the inactive list in view of a

pending claim before the Division of Workers' Compensation. By letter dated January 18, 2005, counsel for petitioner advised Judge Clancy that the matter should be removed from the inactive list and restored to active status. The matter was assigned to the undersigned on January 24, 2005 and scheduled for hearing on May 9, 2005. The hearing scheduled for May 9, 2005, and later rescheduled for June 7, 2005, was adjourned at the parties' joint request to provide the parties more time toward an amicable resolution of the matter. Under letter dated July 7, 2005, counsel for the Board forwarded the attached Settlement Agreement, along with the attached excerpt of minutes from the Board's Executive Session on June 15, 2005 memorializing the Board's agreement to the settlement.

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 13, 2005
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

7-15-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

OXFELD COHEN, PC
60 Park Place 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

ROBERT ALLEN,	:	COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DOCKET NO. EDUOA 09589-2003 Agency Ref. No. 283-8/03
-vs-	:	
BOARD OF EDUCATION WARREN COUNTY TECHNICAL SCHOOL DISTRICT,	:	**SETTLEMENT AGREEMENT**
Respondent.	:	

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 JUL -8 P 1:07

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Respondent will pay to the Petitioner $1,803.18;

2. In return for the payment of this money, Petitioner agrees that he will drop any pending claims he has against the Board of Education, including withdrawing his claim in the instant matter, with prejudice, and further agrees that he is waiving his right to bring any other claims against the Respondent arising out of his employment by the Respondent so long as Respondent complies with the terms of this agreement;

3. The Respondent agrees that it currently has no outstanding claims against the Petitioner arising from his employment by the Respondent with the exception of any defenses it may be raising in the Petitioner's workers

compensation claim against the Respondent and further agrees that it hereby waives its right to bring any other claims against the petitioner arising out of his employment by the Respondent so long as Petitioner complies with the terms of this Agreement;

4. The check from Selectech dated 07/02/02 in the amount of $772.80 made out to Robert Allen and currently in the possession of the Respondent is money to which the Respondent is entitled. The Respondent will request Selectech to reissue tne check in the name of Respondent. If Selectech will only issue the check in the name of Petitioner, Petitioner agrees to cooperate with Respondent in signing said check over to Respondent.

OXFELD COHEN, PC
Attorneys for Petitioner

By _____
Nancy I. Oxfeld

DATED: 6/28/05

PFEIFFER WINEGAR WILHELM & GLYNN
Attorneys for Respondent

By _____
Edward J. Glynn

DATED: 6/30/05

Board of Education
Warren County Vocational-Technical School

EXECUTIVE SESSION MINUTES
June 15, 2005

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 JUL -8 P 1:07

EXECUTIVE SESSION

Resolution E120-05 Personnel and Litigation Matters

Motion by Mr. Warne, seconded by Mrs. Johnson, at 5:23 p.m. the Board moved into executive session by adopting the following resolution:

BE IT RESOLVED, by the Board of Education of the Warren County Technical School as follows:

A. That the public be excluded from the attendance at a portion of its meeting held on April 20, 2005, for the reason that the following subject matter be discussed:

Personnel and Litigation Matters

B. The Board may exclude the public from the meeting pursuant to N.J.S.A. 10:4-12, B3 & B8 of the Open Public Meetings Act.

C. The matters discussed will be revealed to the public when the Board determines that such would not invade any right of privacy.

D. No action is anticipated.

VOICE VOTE: Yeas - Unanimous ***MOTION CARRIED***

The Board Members discussed several legal issues.

The Martha Shade case is still in the discovery stage; we have provided Mr. Ed Glynn, the Board's attorney, with pertinent information we had in our files.

Dr. Mancuso will be deposed the week of June 20th for the Brown and Brown case. Mrs. Sharon Cooper from Brown and Brown will also be deposed that day. Mr. Carl Salisbury, the Board's special attorney, continues to believe the Board has a strong case.

Mrs. Crivello updated the Board on the Robert Allen case. The Board owes Mr. Allen the amount of $1,803.18 in connection with a Workers' Compensation case; the amount due is a result of a miscalculation. Mr. Allen will sign an agreement stating that with this payment, he will have no further recourse against the Board of Education. The Board members agreed to make payment in the amount of $1,803.18 to settle this case. Mrs. Crivello will provide the Board with a copy of the agreement at the July Board meeting.

287-05

JOY FERRONTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ET AL, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the validity of the Board's reduction in force, claiming violation of her tenure and contractual rights, when her position as School Clerk was eliminated after the 2001-2002 school year, her prior responsibilities were divided between two newly created part-time positions, and the Board failed to offer her an alternate full-time position.

The ALJ found: that the petitioner's termination was the direct result of the Chief School Administrator's determination that the petitioner was not competent to perform her clerical duties; that Board was required to comply with the provisions of *N.J.S.A.* 18A:6-10 before it could terminate petitioner under the facts contained in the record; and that the Board failed to substantiate its argument that it terminated petitioner in the course of a valid RIF based upon economic considerations. The ALJ ordered that the petitioner be restored to her employment with the Board, and that she receive full back pay to the date of her termination, adjusted for other earnings. The ALJ further ordered the Board to pay petitioner's counsel fees.

Upon a thorough and independent review of the record in this matter the Commissioner concurs with the findings and conclusions in the Initial Decision. Accordingly, the Initial Decision is adopted as the final decision, with one exception. As the Commissioner is without authority to award counsel fees, that portion of the ALJ's order that awards same is rejected.

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 11, 2005

OAL DKT. NO. EDU 8774-02
AGENCY DKT. NO. 279-9/02

JOY FERRONTO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY, LINDA N. GAVULA AND MARGUERITE BETZ,	:	
RESPONDENTS.	:	

This appeal followed the Weymouth Board of Education's (the Board) elimination of petitioner's position of "School Clerk." Petitioner challenges the validity of the reduction in force (RIF), and alleges that the Board's action violated her tenure and contractual rights. The Commissioner has carefully and independently reviewed the record, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's reply exceptions[1], and for the following reasons is constrained to adopt the Initial Decision of the Administrative Law Judge (ALJ).

Petitioner worked for the Board as a school aide from the 1988-1989 school year through the 1993-1994 school year. In 1994, she accepted the position of "School Clerk." It is undisputed that in the position of School Clerk, which petitioner held for the next eight years, she

[1] Respondent's exceptions were not timely received and have not been considered. The OAL has indicated that the initial decision was mailed to the parties on July 6, 2005. Respondent's exceptions were received on July 20, 2005, past the thirteen day period in which exceptions may be filed.

achieved tenure. Examination of the School Clerk job description (P-11) indicates that, as the School Clerk, petitioner performed both school aide responsibilities and most of the clerical tasks and office routines listed in the job description for the position of secretary. The record includes copies of several certificates indicating that petitioner took training in computer literacy and DOS before she commenced the position of School Clerk, and in Excel (beginning, intermediate and advanced) during her tenure as School Clerk. (P7)

On July 18, 2002, upon the recommendation of a new chief school administrator, respondent Linda Gavula, the Board voted to eliminate petitioner's position of School Clerk and create two part-time positions (P-15), i.e., secretary and school aide. (P-J; P-8) Each of the two positions was to be 25 hours per week. (P-4) The Board also decided not to renew one of the three cafeteria/playground aides that had been working during the 2001-2002 school year. (P-1; Initial Decision at 2)

The schedules formulated for the new part-time secretary and part-time aide overlapped 1) during the students' lunch hour, 2) in the last two periods of the school day, and 3) for about ten minutes at the end of the day for bus duty. (P-6A; P-6B) Ms. Gavula maintained that the aide work and clerical work that petitioner had been performing needed to be done simultaneously, and that consequently the School Clerk position had to be eliminated. (Initial Decision at 4)

Neither the certified minutes of the July 18, 2002 Board meeting (P-15) nor the testimony before the ALJ demonstrated economic exigencies as the reason for the abolishment of the School Clerk position. (Initial Decision at 5-8) (As there are no transcripts in the record, the Commissioner must rely on the ALJ's account of the testimony.) An economic analysis of the action was not undertaken until Marguerite "Maggie" Betz, Business Administrator/Board

Secretary, prepared one for the OAL hearing. (R-4; Initial Decision at 5) Because no benefits need be paid to the new part-time secretary and aide, the combined payroll cost for them was less than petitioner's School Clerk job with benefits. *Ibid.*

Ms. Betz testified, however, that she was unaware of anything that indicated that the Board eliminated petitioner's job and created two part-time positions for economic reasons. (*Id.* at 6) She further denied that petitioner was terminated to enable the Board to avoid health benefit costs. *Ibid.* Petitioner's salary for the 2002-2003 school year had been included in the district budget. *Ibid.*

The ALJ noted that, on redirect examination, "after prodding by respondent's [sic] counsel," Ms. Betz changed her position, stating that economy had been discussed during both the open and closed portions of the July 18, 2002 Board meeting, and that the District needed to use the money saved from petitioner's benefits to create the new positions, which had not been included in the 2002-2003 budget. *Ibid.* She conceded, however, that there was no mention of same in the meeting minutes. *Ibid.*

Testimony by Ms. Gavula also shed some doubt on the efficacy of the Board's action. She conceded that subsequent to the 'reorganization,' an additional aide had been hired to work ten hours per week. (*Id.* at 4)

It appears that Ms. Gavula had not, before recommending the elimination of petitioner's position, attempted to work with petitioner to configure a new schedule which would allow petitioner to keep her job. *Ibid.* According to the ALJ, Ms. Gavula "could not explain why petitioner could not continue to work buses from 8:00 a.m. to 9:00 a.m., then work as a secretary from 10:30 a.m. to 3:00 p.m. . . ." *Ibid.* (The schedule for part-time secretary that was disseminated by respondents was 10:30 a.m. to 4:00 p.m.) In fact, prior to the Board's action,

respondents had never discussed with petitioner their plans to abolish her position. *Ibid.* Petitioner testified that she had never received notice that the Board intended to take action which could affect her employment, and had never been afforded the opportunity to meet with the Board and explain why she should be retained as School Clerk. (*Id.* at 7)

The record contains a copy of a notice dated July 22, 2002, advertising the two new part-time positions of aide and secretary, job descriptions with the same date for both positions (P-8; P-9), and copies of letters to petitioner dated July 23, 2002, and July 22, 2002, from Ms. Gavula and Ms. Betz (also respondents) about the 'reorganization.' (P-13; R-3) Ms. Betz's letter informed petitioner that she could choose to continue her medical benefits through COBRA, for $1272.62 per month. Ms. Gavula's letter, which advised petitioner that her position had been abolished, also informed her that she would be receiving COBRA information from Ms. Betz, a clear indication that petitioner was terminated.

The letter also included job descriptions for the two new part-time positions, and encouraged petitioner to apply for the aide position: "I truly hope you will apply for the aide's position. I've been pleased with what I've seen when you work with children and I feel you would be an asset in this capacity." (P-13) Noticeably absent was any suggestion that petitioner apply for the part-time secretary job. Ms. Gavula sent petitioner another short letter on July 29, 2002, advising that the deadline for letters of interest for the two new part-time positions was August 9, 2002. (P-14)

At the hearing Ms. Gavula revealed that she did not believe that petitioner would be a good candidate for the new secretary position. She doubted whether petitioner could multi-task and work independently. (Initial Decision at 4) She did not regard petitioner as astute

or proficient in spelling and grammar, and stated that petitioner's work had to be corrected before it could be sent out. *Ibid.*

Petitioner testified that she had performed and was well able to perform both the clerical and aide functions of her job, but Ms. Gavula had reduced her clerical tasks and increased her playground and cafeteria duties. (*Id.* at 6) Ms. Gavula's explanation to petitioner for the change was that she needed petitioner elsewhere. *Ibid.* The only job evaluation Ms. Gavula prepared for petitioner was generally positive, with the instructions that petitioner comply with directives and let Ms. Gavula know when she has completed her work and can assume more. (P-10)

The ALJ found Ms. Gavula's credibility to be less than he would expect from a chief school administrator. He perceived her to be following a scripted story and resistant to questions that deviated from the script. (Initial Decision at 5) Notwithstanding her twenty years as a school administrator, she said she had no knowledge of seniority or bumping rights. (*Id.* at 4) She did not take into account petitioner's seven years as an aide, could not say whether petitioner should have been moved into one of the new jobs, but rather took the position that once the School Clerk position was eliminated, petitioner had no further right to employment. *Ibid.*

The ALJ was ultimately not convinced that the facts adduced at the hearing supported respondents' position that Ms. Gavula's recommendation and the Board's action to eliminate petitioner's job were driven by economic necessity. (*Id.* at 7) Thus, the ALJ concluded that respondents had not satisfied *N.J.S.A.* 18A:28-9, which requires that reductions in tenured

staff be necessitated by economy, pupil reduction, or changes in the administrative or supervisory organization of the district, or for other good cause.[2] *(Ibid)*

Nor was the ALJ persuaded that the facts supported respondents' contention that petitioner's termination was the necessary consequence of the creation of separate and primarily simultaneous positions for part-time secretary and part-time aide. In the ALJ's view, respondents violated petitioner's tenure and seniority rights by declining to assign petitioner the new secretarial position and let her continue the morning bus greeting activities she had performed as School Clerk. (*Id.* at 9) Together, these duties would have allowed her to work 32.5 hours per week and retain her benefits, and respondents could not explain why this was not done. *Ibid.*

The ALJ determined that the facts before him supported an impermissible motive for eliminating petitioner's job, i.e., Ms. Gavula's perception that petitioner's performance, at least with regard to clerical duties, was inadequate. (*Id.* at 8) This determination was based upon Ms. Gavula's testimony about petitioner's capabilities, upon petitioner's statement that Ms. Gavula reduced her clerical responsibilities, and upon Ms. Gavula's July 23, 2002, letter to petitioner in which she invited petitioner to apply for the part-time aide position, but not the secretarial position. *Ibid.* The ALJ concluded that the dividing of the School Clerk position was a subterfuge to remove petitioner. (*Id.* at 9)

While the ALJ allowed that Ms. Gavula may have been correct about petitioner's capabilities, he explained that "the law sets forth specific requirements for removing an incompetent or inefficient tenured employee, and none of those requirements was complied with here." *Ibid.* More specifically, the ALJ cited *N.J.S.A.* 18A:6-10, which sets forth allowable

[2] On its face, *N.J.S.A.* 18A:28-9 refers only to teaching staff. However, the Commissioner endorses the ALJ's reliance on the statute for guidance in evaluating professed reductions in force of clerical or secretarial employees.

grounds for dismissal of a tenured employee, and requires certain procedural rights, such as written charges and a hearing before the Commissioner of Education or his/her designee. (*Id.* at 9-10) Further, the ALJ cited *N.J.S.A.* 18A:6-11, which requires, in the case of allegations of inefficiency, that the Board provide written notice to the employee specifying the perceived deficiencies and a period of 90 days or more for the employee to correct same. (*Id.* at 10)

Thus, while the ALJ made no findings about petitioner's efficiency or competence, he found that respondents did not substantiate their argument that petitioner was terminated for economic reasons; that the termination was rather motivated by Ms. Gavula's dissatisfaction with petitioner's performance; and that respondents did not follow the legal preconditions to terminating a tenured employee. *Ibid.* He reversed the Board's action terminating petitioner and directed that she be restored to her employment with back pay (less any amount earned during the applicable time period) and counsel fees. (*Id.* at 11)

Having reviewed the entire record, the Commissioner concludes that respondent has presented no basis to reject the ALJ's determination that the elimination of petitioner's School Clerk position was not based upon permissible grounds, i.e. economy of cost or scheduling. There were no transcripts or evidence provided to the Commissioner that would show that the district discussed financial considerations or sought advice about same prior to the Board action eliminating petitioner's job.

Regarding respondent's argument about scheduling, consideration of the proposed hours for the two new part-time positions alone is not adequate to conclusively resolve the question of whether the district could have kept petitioner on as a full-time or almost full-time employee. The record reveals that there were three part-time aides in addition to School Clerk at the end of the 2001-2002 school year. The district abolished the School Clerk position and let go

one part-time aide, at the same time that it added a part-time secretary and part-time aide position. The net result was an extra part-time secretary and a deficit in number of hours devoted to aide work.

This was at a time when, according to respondent's counsel, pupil enrollment was up. (Respondent's brief at 2) Indeed, it appears from the record that the district had to hire another part-time aide to ameliorate the deficit. (Initial Decision at 4) As the ALJ noted, respondent's witnesses were unable to explain why the aide hours could not be arranged so that petitioner could work the hours of the new part-time aide position created in 2002, plus the bus greeting hour every morning, which would constitute a full-time position, albeit at less hours than petitioner worked as School Clerk. Nor could respondents explain why the hours of the part time secretary could not be combined with bus greeting to comprise a full time job.

The foregoing, as well as other facts mentioned by the ALJ suggest a disregard of petitioner's rights and a lack of good faith in reorganizing the non-professional staff. There is no evidence, for instance, that respondent notified petitioner before the Board action eliminating her position. As a tenured employee, she was entitled to reasonable advance notice, so that she could request that the matter be openly debated at the Board meeting before the execution of any action. *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64, 73 (App. Div. 1977).

Nor is there anything in the record which would justify discounting the ALJ's determination that respondent's main witness, Ms. Gavula, lacked credibility. Generally, the head of an agency must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See *Clowes v. Terminix International,*

Inc., 109 *N.J.* 575, 587 (1988); *Renan Realty Corp. v. Department of Community Affairs*, 182 *N.J.* Super. 415, 419 (App. Div. 1981). Where the agency head believes it is necessary to reject or modify a factual finding of the ALJ, he or she must first determine that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent evidence in the record. *N.J.S.A.* 52:14B-10 (c). Further, the agency head must state with particularity the substantial, credible, competent evidence in the record on which he or she relies in making new or modified findings. *N.J.A.C.* 1:1-18.6 (d). After thorough review of the record, applying the legal standards set forth above, the Commissioner is constrained to accept the ALJ's credibility determination.

It is undisputed that petitioner had tenure in Weymouth as a clerk, that she had years of experience as an aide, and that, in fact, the business administrator, Ms. Gavula, had praised her performance as an aide. Thus, the ALJ was correct in determining that best efforts should have been expended to retain her. Unless respondent could prove one of the criteria in *N.J.S.A.* 18A: 6-10 for dismissing tenured employees, e.g., conduct unbecoming, inefficiency, incapacity or other just cause, it did not have the right to violate petitioner's tenure. (And in the case of inefficiency charges, employees are entitled to written notice and 90 days to cure.) (*N.J.S.A.* 18A:6-11)

Under the school laws, the only other way respondents could terminate petitioner was by way of a RIF. *N.J.S.A.* 18A:6-10. As mentioned above, the permissible reasons for reductions in teaching staff are set forth in *N.J.S.A.* 18A:28-9, and will be used by the Commissioner as guidance. They include economy, reduction in number of pupils, change in the administrative or supervisory organization of the district, or other good cause. There is nothing in the record to indicate that there was a district reorganization of the administration or

supervisory staff, and the pupil population, according to respondent, increased during the time period at issue. Since, as has been established above, the Commissioner must adopt the ALJ's conclusion that the record did not support the notion that economy drove the elimination of the School Clerk position, respondent has not satisfied the Commissioner that there was a legitimate basis for the alleged RIF.

The ALJ also appears to have concluded, and the Commissioner agrees, that petitioner should have had precedence over any non-tenured secretary who might take the newly created, part-time secretary position. Tenure in the position of secretary is not generally interchangeable with tenure as a clerk. *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School District, Essex County, decided by the Commissioner December 29, 1997; Diane Giardina v. Board of Education of the Township of Pequannock, Morris County,* Commissioner's decision dated April 1, 2005. However, there is precedent in the case law for disregarding job titles and, rather, determining whether an employee has tenure in a sought after "position" by examining the actual duties and tasks the employee has been performing over the years and deciding whether same meet the requirements of the desired position - notwithstanding official title designations. In other words, substance is to prevail over form. *Quinlan v. Board of Education of the Township of North Bergen,* 73 *N.J. Super.* 40, 50 (App. Div. 1962); *Viemeister v. Board of Education of the Borough of Prospect Park, Passaic County*, 5 *N.J. Super.* 215, 218 (App. Div. 1949); *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School District, Essex County, decided by the Commissioner December 29, 1997.*

Under the circumstances of this case, petitioner's tenure in the School Clerk position was applicable to the new part-time secretary assignment, as it was described in the

posting. The job description for that new position was very similar to the description of the clerical duties in the School Clerk position, and petitioner testified that she had performed all of the listed job functions. (Initial Decision at 6)

Hence, because of her tenure and capabilities, petitioner had tenure rights over the non-tenured individual who was given the newly created secretarial job. Regarding respondent's alleged scheduling needs, petitioner could have been assigned the secretarial job in combination with the bus greeting duties, to keep her at full time. At the very least, respondents could have shown some good faith by allowing petitioner to work as an aide for both the hours designated for the new job, and the bus greeting hours. That would have added up to a full-time position, albeit most probably at a lower salary than her previous job.

If Ms. Gavula's allegations about petitioner's secretarial deficiencies were true, the remedy under the school laws should have been written notice, a 90-day period to cure, and proper tenure proceedings. The Commissioner agrees with the ALJ that Ms. Gavula's action, of reducing petitioner's clerical responsibilities in the School Clerk job rather than implementing a performance improvement plan, suggests bad faith. To conclude otherwise would be to "permit a local school board to control the rights of employees who had tenure by restricting the amount of work covered by tenure which it assigned to them." *Quinlan, supra,* 73 *N.J. Super.* at 51. And Ms. Gavula's specific invitation to petitioner to apply for the new aide job, but not the secretarial job, also denotes a desire to remove petitioner from her clerical position without following tenure procedures.

Accordingly, for the reasons expressed by the ALJ and stated herein, the Commissioner finds that the elimination of petitioner's position was in bad faith, and qualified neither as a legitimate RIF nor a proper observance of the school laws regarding tenure. The

ALJ's recommended order for relief is to be implemented forthwith, with one exception. As the Commissioner is without authority to award counsel fees, *Balsley v. North Hunterdon Regional School District Board of Education*, 117 *N.J.* 434, 447 (1990), that portion of the ALJ's order that awards same is rejected.

IT IS SO ORDERED.[3]

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of decision: 8/11/05

Date of mailing: 8/11/05

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8774-02

AGENCY DKT. NO. 279-9/02

JOY FERRONTO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ET AL, ATLANTIC COUNTY,

Respondent.

Richard L. Press, Esq., for petitioner (Press & Taglialatella, L.L.C., attorneys)

William S. Cappuccio, Esq., for respondent

Record Closed: June 20, 2005 Decided: June 28, 2005

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent's action terminating her employment. The petitioner requested a fair hearing and the matter was transmitted to the Office of Administrative Law (OAL) on December 30, 2002, to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled for a hearing on April 19, 2005, in the OAL office in Atlantic City, New Jersey. The hearing proceeded on that date. Briefs were to be

submitted by June 6, 2005. Respondent's reply brief was submitted on June 22, 2005. The record closed on June 22, 2005.

FACTUAL DISCUSSION

Petitioner was initially hired by respondent in 1987 as a School Aide working 37.5 hours per week. In 1994 her title was changed to School Clerk.

Her duties in each position were varied, but differed little regardless of which title she held. At the beginning of the school day, petitioner greeted the incoming buses filled with school children. Thereafter, she worked where she was needed. She supervised children on the playground. She also worked in the main office. She answered the phone and took messages. She ran the copy machine, typed, prepared the daily attendance sheet, issued late passes, scheduled the bookmobile, inventoried supplies, and kept track of various matters such as warning notices and fire drills. In an emergency, she acted as a classroom teacher. At the end of the day she oversaw placing the children on the buses. Generally, she seems to have been the school's jack-of-all-trades. A review of the job description for School Clerk (R-5) confirms those duties.

From 1987 until 2000, petitioner was supervised by the Chief School Administrator (CSA), Marshall E. Behr. In 2000, Mr. Behr departed the district, and Linda N. Gavula became CSA. Ms. Gavula testified that she sought to reorganize and upgrade the school operation in Weymouth Township. Following the completion of the 2001-2002 school year, Ms. Gavula determined to reorganize certain positions.

At that juncture, the main office staff consisted of a full time Principal's Secretary and petitioner. Another secretary serviced the Child Study Team. Additionally, the district employed three Cafeteria/Playground Aides (Nicolosi, Vesce, and Wolf). These aides worked from 8:00 a.m. to 9:00 a.m. greeting the buses, then worked from 11:30 a.m. to 1:30 p.m. supervising students in the cafeteria and on the playground.

Ms. Gavula testified she determined she needed to restructure the employees. Her goal was to have an aide who worked 25 hours and a secretary who worked 25 hours. To that end, on July 18, 2002, respondent passed a motion abolishing the position of School Clerk. The respondent also terminated Aide Nicolosi, notwithstanding the fact that she was senior to the other two aides.

On July 23, 2002 Gavula wrote to petitioner and officially advised her that her job position had been abolished (R-8). She told her that the positions of aide and secretary had been established in place of the School Clerk's position. Ms. Gavula then stated:

"I truly hope you will apply for the aide's position."

Nowhere in the letter was petitioner encouraged to apply for the secretary's position.

Ms. Gavula went on to say she would be advertising for the two new positions and interviewing for them the following week. The letter concluded by stating petitioner would receive COBRA information. The letter does not specifically state that petitioner's employment was terminated, but the language thereof allows no other conclusion.

Ms. Gavula then instituted schedules for the new secretary and aide positions. The secretary worked 25 hours per week as follows (P-6A):

Monday	-	9:30a.m. – 4:00 p.m.
Tuesday through Thursday	-	10:30a.m. – 4:00 p.m.
Friday	-	10:30a.m. – 3:00 p.m.

The aide worked 21 hours per week in accordance with the following daily schedule (P-6B):

Bus and Playground	-	8:00 a.m. – 9:00 a.m.
Lunch Duty	-	11:30 a.m. – 2:00 p.m.
Classroom Aide	-	2:00 p.m. – 2:51 p.m.
Bus Duty	-	2:51 p.m. – 3:00 p.m.

Ms. Gavula asserted that this new schedule was necessary because she needed two people to do the work that petitioner had been performing, and since the work of the secretary and the aide overlapped during certain portions of the day, petitioner could not do both jobs at once. Therefore, concluded Ms. Gavula, the School Clerk's position had to be eliminated, and petitioner had to be terminated.

Ms. Gavula admitted that the schedule has now been augmented. Another aide has been hired for an additional ten hours per week, making the total 60 hours per week for the jobs petitioner and Nicolosi had previously performed.

Ms. Gavula explained her need for the new secretary's position and why petitioner would not be a good candidate for same. Ms. Gavula stated she needed a secretary who could handle things independently. She stated she did not know if petitioner was multi-tasked oriented. She did not believe petitioner was astute. She stated she found it necessary to check items typed by petitioner for spelling and grammar. Frequently, petitioner's work had to be corrected before it could be sent out.

Ms. Gavula admitted she never discussed with petitioner her plans to revise the positions and eliminate the School Clerk. While she stated petitioner could not perform both tasks (secretary and aide) because they required performance at the same time, Ms. Gavula admitted she made no effort to configure a schedule which would allow petitioner to retain a position at Weymouth School. She could not explain why petitioner could not continue to work buses from 8:00 a.m. to 9:00 a.m., then work as a secretary from 10:30 a.m. to 3:00 p.m., or as an aide from 11:30 a.m. to 3:00 p.m.

Ms. Gavula stated she had over twenty years experience as a school administrator. Notwithstanding that experience, Ms. Gavula stated she had no knowledge of seniority or bumping rights. She could not say whether petitioner should have been moved into one of the new jobs. She took the position that with the elimination of the School Clerk's position, petitioner had no further right to employment. She admitted she had not considered the impact of petitioner's seven years as an aide between 1987 and 1994.

I listened carefully to Ms. Gavula's answers and observed her closely during her testimony. I found her to be evasive in her answers. She appeared to have a scripted story prepared, and she resisted questions which forced her to deviate from that script. She was incapable of explaining why petitioner was terminated instead of transferred. She also could not explain why petitioner could not continue performing the duties heretofore assigned to her, either as the new secretary or as the new aide. Her inability to explain her actions is troubling. I found her credibility to be significantly less than I would normally expect of a Chief School Administrator.

Marguerite "Maggie" Betz testified for respondent. Ms. Betz is the Board Secretary/Business Administrator for respondent, and has served in that capacity for nine years.

Ms. Betz testified that on July 18, 2002, respondent passed a resolution abolishing the School Clerk position (see Minutes of Board meeting – R-1). Additionally, the respondent created the new positions of Secretary-Main Office (P-8) and School Aide (P-9).

In preparation for this trial, Ms. Betz prepared an analysis reflecting the economic impact of the respondent's actions of July 18, 2002 (R-4). I note that this analysis was not prepared until long after the Board acted on July 18, 2002. Ms. Betz calculated that between 9/1/02 and 12/31/03, petitioner would have received salary in the amount of $20,856.51 and benefits valued at $24,410.22, for a total of $45, 266.73. Since the two new positions were part time, no benefit package was required for either. Therefore, computed Ms. Betz, the total cost of those two positions for the same time period equaled $18,092.64. Accordingly, stated Ms. Betz, respondent saved $27,174.09 over the time period specified. (Ms. Betz did not explain why she utilized a sixteen month period for her calculation.)

On cross examination, Ms. Betz opined that petitioner had been a good employee. She did not work directly for Ms. Betz, and Ms. Betz was uncertain how much secretarial work petitioner had performed for Mr. Behr.

Ms. Betz admitted that the resolution and the Board minutes (R-1 and R-2) make no mention that the actions were taken for economic reasons. Ms. Betz stated she was aware of nothing to indicate that respondent acted for economic reasons. Her understanding was that petitioner was terminated because she could not perform the two new jobs at the same time. That understanding came to her from Ms. Gavula. Ms. Betz confirmed that petitioner's salary for the 2002-2003 school year was provided for in the budget. She stated no Board member ever stated that the District could not afford petitioner. She denied that petitioner was terminated because of the cost of her health benefits. She stated the cost of petitioner's benefits was never the issue; schedule flexibility was the reason the action was taken.

On redirect, after prodding by respondent's counsel, Ms. Betz changed her position. She stated matters of economy were discussed during both open and closed session on July 18, 2002. She said the district needed the money from petitioner's benefits to create the new position because the new position had not been budgeted for.

Ms. Betz admitted that nothing contained in the open or closed Board minutes (R-1 and R-2) reflects any discussion showing that the abolishment of the School Clerk's position and the creation of the two part time positions was caused by economic factors.

Petitioner testified on her own behalf. She delineated her work history as described above. She reviewed the job functions contained in the job descriptions for Secretary-Main Office and School Aide (P-8 and P-9), and stated she had previously performed and was well able to perform all of the functions contained therein.

Petitioner testified that after Ms. Gavula was hired, her daily tasks changed. Her clerical and bus duties were reduced, while her playground and cafeteria duties increased. When she asked Ms. Gavula why her duties had changed, Ms. Gavula responded that she needed petitioner elsewhere.

Petitioner introduced her 2001-2002 evaluation (P-10). This document was prepared by Ms. Gavula, and reflects a positive evaluation. Certain areas were designated for improvement,

specifically, petitioner needed to follow directives, and petitioner was to advise Ms. Gavula when her work was completed and she could take on additional tasks.

Petitioner testified she never received notice that the Board intended to take action which could affect her employment (the so-called "Rice letter"). She was never afforded an opportunity to meet with the Board and explain why she should be retained in her employment. At no time did Ms. Gavula ever meet with her or with her and the aides to determine whether the schedule could be reconfigured to meet Ms. Gavula's stated needs and still maintain the existing employees.

Petitioner stated she was never told she held tenure in the district. She only learned she had tenure after commencement of this action.

LEGAL ANALYSIS

Respondent has attempted to cloak its action herein in the guise of economics. Specifically, respondent argues its action was taken for economic purposes. It needed two positions and lacked funding for two. By eliminating one full time position of 37.5 hours, it was able to create two part time positions for a combined 50 hours and still save money.

If the facts adduced at trial supported this argument as the motive for respondent's actions, respondent would prevail. *N.J.S.A.* 18A:28-9 expressly permits the Board to reduce the number of teaching staff members. Although petitioner is not a teaching staff member, the same body of law would apply to her position. Were I satisfied that this case concerned economics, I would not hesitate to hold for respondent.

Unfortunately, the facts placed before me in no way indicate that economics was the motivating factor behind petitioner's termination.

First, both Ms. Gavula and Ms. Betz testified the primary purpose of the action was to reconfigure the schedule of the employees. On direct examination, Ms. Betz was specific that economics played no part in respondent's decisions. While her counsel attempted to rehabilitate

her on re-direct, the Board minutes (R-1 and R-2) are devoid of any mention of economics as the reason for respondent's actions. The absence of any mention of economics in the Closed Session Minutes (R-2) is particularly significant, since closed session is customarily where such matters are discussed in detail. Further, Ms. Betz's financial analysis (R-4) was prepared many months *after* petitioner's position was abolished on July 18, 2002, and was, in fact, expressly prepared not for Board consideration, but for this trial.

The minutes and the testimony reflect that respondent acted on the advice of its CSA, Ms. Gavula. For the reasons set forth below, I **FIND** that Ms. Gavula was motivated not by economics, but by a desire to rid herself of an employee she found to be inadequate.

The record reflects Ms. Gavula's negative opinion of petitioner's work. Ms. Gavula testified petitioner could not handle work independently. She stated petitioner was neither astute nor "multi-tasked oriented." Her grammar and spelling were inadequate, and Ms. Gavula had to continuously correct her work before sending it out.

Petitioner testified after Ms. Gavula arrived, she began doing less clerical work and spent more time on the playground and in the cafeteria. Clearly, Ms. Gavula believed petitioner to be inefficient at her clerical duties.

That such is the case reflected by Ms. Gavula's letter to petitioner of July 23, 2002 (R-8), the document which advised petitioner that she had been terminated. The letter bespeaks volumes about Ms. Gavula's attitude toward petitioner's work, not by what it says, but by what it does not say. After advising petitioner that her job had been abolished and replaced by two part time positions, Ms. Gavula wrote:

> I truly hope you will apply for the aide's position. I've been pleased with what I've seen when you work with children and I feel you would be an asset in this capacity.

Nowhere does Ms. Gavula urge petitioner to apply for the Secretary-Main Office position.

Nor could Ms. Gavula offer any explanation why petitioner was not transferred into the part time secretarial position. Petitioner introduced documents prepared by respondent showing the schedule for the new positions (P-6A and P-6B). P-6A reflects the Secretary-Main Office schedule. Nothing was offered into evidence tending to show that petitioner could not fit into this schedule. Additionally, Ms. Gavula testified the aides met the school buses between 8:00 a.m. and 9:00 a.m. Petitioner testified that task was one of her functions. Ms. Gavula could not explain why petitioner was not retained in the district performing those two functions for 32.5 hours per week.

Nor could Ms. Gavula explain how respondent's action would fail to affect petitioner's tenure and seniority rights. Despite her twenty years of school administration experience, Ms. Gavula appeared ignorant of the impact of those concepts on the situation.

The conclusion I reach is that Ms. Gavula considered petitioner to be inadequate at handling clerical tasks, and used the dividing of her job position as a subterfuge to remove her. Ms. Gavula may well have been correct; petitioner may have been incompetent or inefficient in her performance of her duties. The problem respondent faces is that the law sets forth specific requirements for removing an incompetent or inefficient tenured employee, and none of those requirements was complied with here.

N.J.S.A. 18A:6-10 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.

The parties stipulated that petitioner is tenured in her clerical capacity. Notwithstanding that fact, no charges have been filed alleging inefficiency. Nor is there any evidence that respondent complied with the provisions of *N.J.S.A.* 18A:6-11, which states in pertinent part:

> Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

Instead of complying with the statutory scheme, Ms. Gavula has attempted to avoid the lengthy and arduous tenure process by proceeding under the guise of "reduction in force," seeking shelter under that portion of *N.J.S.A.* 18A:6-10 which states:

> 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.

Her effort is doomed to fail. I **FIND** that petitioner's termination was the direct and proximate result of Ms. Gavula's determination that petitioner was not competent to perform her clerical duties. In that judgment Ms. Gavula may well have been correct; I make no finding as to petitioner's efficiency or competence because that issue is not before me. I do **FIND** that respondent was required to comply with the provisions of *N.J.S.A.* 18A:6-10 before it could terminate petitioner under the facts before me. I further **FIND** that respondent has failed to substantiate its argument that it terminated petitioner for economic reasons. The testimony of

Ms. Betz is clear that the economic issue was never discussed at the time of petitioner's termination, and was only developed after the fact when petitioner filed her petition herein.

For all the reasons set forth above, I **REVERSE** respondent's action terminating petitioner and direct that she be restored to her employment with back pay and counsel fees.

I note that nothing contained herein restricts respondent from reconfiguring petitioner's work hours in accordance with the needs of the district, provided respondent acts within the parameters of the law on this issue.

ORDER

I **ORDER** that the action of respondent terminating petitioner's employment be **REVERSED.**

I **ORDER** that petitioner be restored to her employment with respondent.

I **ORDER** that petitioner receive full back pay to the date of her termination, minus any amount earned during that time period.

I **ORDER** that respondent pay to petitioner her counsel fees for this action.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 2005
DATE

BRUCE M. GORMAN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 6 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES

For Petitioner:

Joy Ferronto, petitioner

For Respondent:

Linda N. Gavula, Chief School Administrator

Marguerite "Maggie" Betz

EXHIBITS

For Petitioner:

P-1 Memo from M. Betz, February 13, 2003

P-2 Memo regarding petitioner's employment history from M. Betz, April 2, 2003

P-3 Employment Contract, 2001/2002

P-4 Posting Notice for Aide and Secretary, July 22, 2002

P-5 Cafeteria/Playground Aide Job Description

P-6 Memo from L. Gavula, March 3, 2003

P-6A Secretary Schedule

P-6B Playground Aide/Classroom Aide Schedule

P-6C Salary Guide

P-7 Atlantic County Vocational Technical School Certification

P-8 Job Description for Secretary – Main Office, July 22, 2002

P-9 Job Description for School Aide, July 22, 2002

P-10 Evaluation for J. Ferronto, June 19, 2002

P-11 Job Description for School Clerk, August 23, 2002

P-12 Employment Contract, 2001/2002

P-13 Letter from L. Gavula to J. Ferronto, July 23, 2002

P-14 Letter from L. Gavula to J. Ferronto, July 29, 2002

P-15 Certification of Board Minutes, February 13, 2003

For Respondent:

R-1 Board Meeting Minutes, July 18, 2002

R-2 Board Closed Session Minutes, July 18, 2002

R-3 Pension/COBRA Letter, July 22, 2002

R-4 Summary of Position Costs, 7/18/02 – 12/31/03

R-5 Job Description for School Clerk, August 23, 2002

R-6 Job Description for Secretary – Main Office, July 22, 2002

R-7 Job Description for School Aide, July 22, 2002

R-8 Letter from L. Gavula to J. Ferronto, July 23, 2005

R-9 Letter from L. Gavula to J. Ferronto, July 29, 2002

R-10 Layoff/Rehire Policy, May 3, 1990

R-11 Assignment - Transfer Policy, April 19, 1990

289-05

#289-05

OAL DKT. NO. EDU 2157-04 AGENCY DKT. NO. 470-12/03	:	
ANTHONY MUSCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, handwritten settlement document and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that neither the file nor the settlement document includes a copy of the respondent Board of Education's (the Board) resolution approving the settlement and designating the Superintendent to sign the settlement agreement. Neither, in the alternative, does the settlement document bear the signature of the Board attorney, who serves as the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

The Commissioner also notes that the settlement, as set forth in the document presented for the Commissioner's review, requires the petitioner to "[relinquish] his tenure/seniority rights to the position of Supervisor of Special and Related Services" in exchange for $34,000. While petitioner may withdraw his petition and/or decline to pursue the job in question, he may not waive the statutory right of tenure.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating who may sign on its behalf. In addition, the settlement agreement must be revised to correctly reflect the law concerning tenure. 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.*

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/11/05

Date of Mailing: 8/11/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et. seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2157-04

AGENCY DKT. NO. 470-12/03

ANTHONY MUSCO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

Respondent.

Steven E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy, & O'Neil, attorneys)

Record Closed: July 6, 2005 Decided: July 6, 2005

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 22, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

At the July 6, 2005 hearing scheduled in this matter, the parties entered into successful settlement negotiations. The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 6, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

7-8-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 11 2005

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

Musco

v.

Carteret Board of Education

OAL Dkt. No.
EDU-2157-04

The parties hereby enter into the following settlement to resolve the above matter.

In consideration of the petitioner, Anthony Musco relinquishing his tenure/ seniority rights to the position of Supervisor of Special and Related Services, the respondent,

B

#349-05

349-05

OAL DKT. NO. EDU 11308-04
AGENCY DKT. NO. 283-8/04

J.D. AND T.W., on behalf of minor child, U.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was transmitted to the Commissioner by the Office of Administrative Law (OAL) on September 14, 2005 for consideration of petitioners' withdrawal of the petition in this matter.

Upon review, the Commissioner notes that, notwithstanding petitioner T.W.'s telephone call to the OAL indicating that the petition was being withdrawn because the "child has moved out of [the] District," the Board of Education of the City of Orange's (Board) Answer in this residency matter contains an unresolved request by the Board for tuition for the period that the student received services while he was ineligible. In that the record before the Commissioner does not contain an affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioners' son in its schools, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/29/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

350-05

OAL DKT. NO. EDU 1352-05
AGENCY DKT. NO. 420-11/04

VERONICA TAPERINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS COUNTY SCHOOL OF TECHNOLOGY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/29/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1352-05

AGENCY DKT. NO. 420-11/04

VERONICA TAPERINO,

Petitioner,

v.

BOARD OF EDUCATION OF MORRIS COUNTY SCHOOL OF TECHNOLOGY, MORRIS COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

John M. Mills, III, Esq., for respondent (Mills & Mills, attorneys)

Record Closed and Decided: August 25, 2005

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 21, 2005, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Petitioner contends she was removed from her office and position in violation of her tenure rights.

A hearing was initially scheduled for March 29, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. However, since the parties were not ready to proceed on said date, it was adjourned to July 26, 2005 and then to August 25, 2005. At the

hearing held on August 25, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 25, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

August 31, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 1 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

VERONICA TAPERINO AGENCY # 420-1104 EEO - 1352-2005A
vs 01352-05
MORRIS COUNTY SCHOOL of TECHNOLOGY

8-25-05

[redacted]VE SECRETARY TO ATHLETIC DIRECTOR/
DISCIPLINARIAN

Neil Torino

Hours — SAME AS Present

Duty Area — As per Diagram outside AD OFFICE
Appropriate Desk Equipment

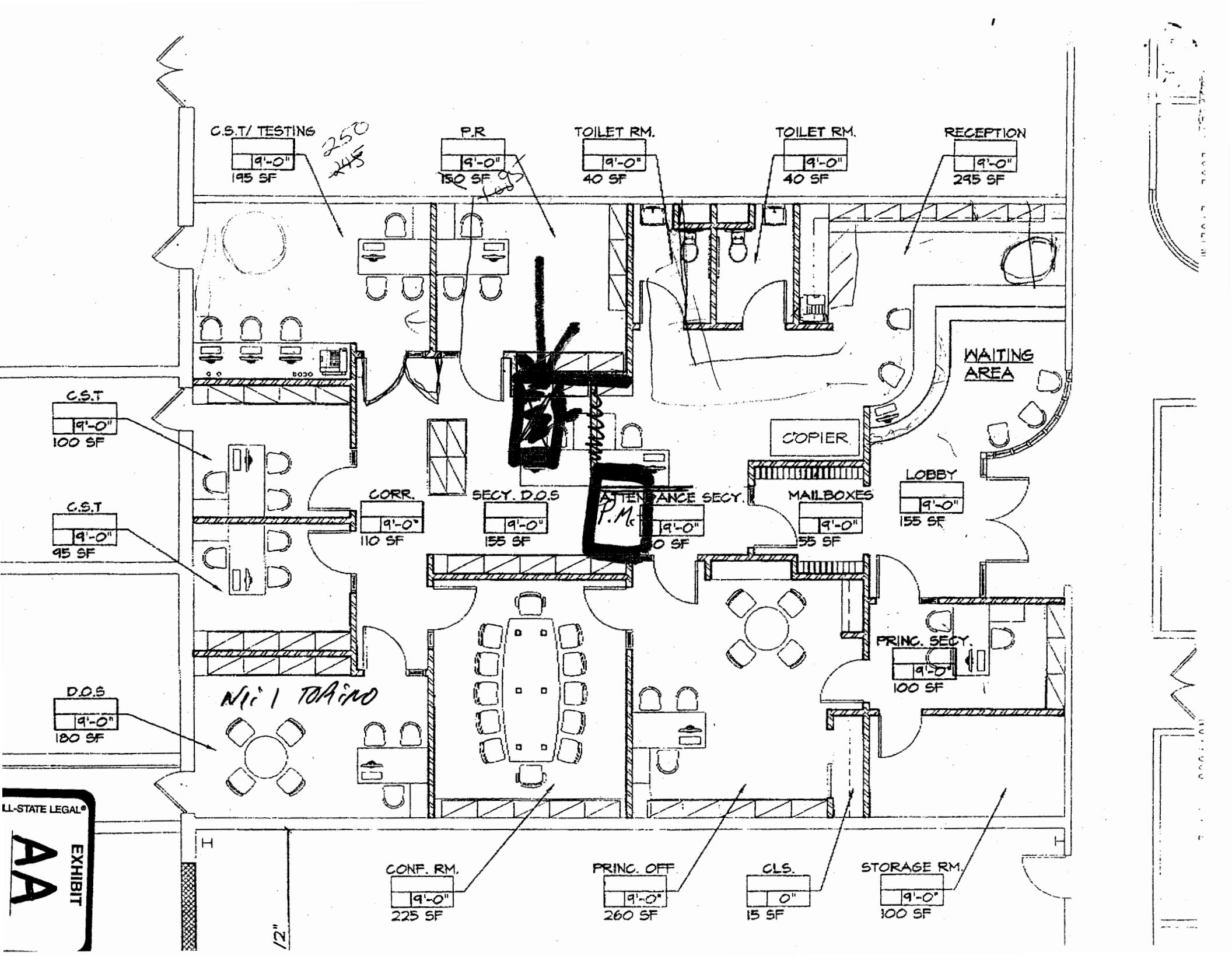
Duties

(1) TYPE AD - Observations & Annual Evals
(2) Prepare Disciplinary Referral Forms
(3) Arrange Student Discp. Appts w AD
(4) Event Planning
(5) Budget Prep AD Dept / Purchasing AD Dept
(6) Site Management Assistance (Clerical)
(7) Occasional Clerical Assistance to Jan Kilgallen & Fred Finck As Processed through AD
(8) Answer Phone for AD only
(9) ALL Correspondence for AD Office
(10) Subject to Conditions set forth on the attached Policies

Veronica Taperino

(11) Withdraw Grievance

M. Mills


C.S.T/ TESTING
9'-0"
195 SF
250
245
P.R
9'-0"
150 SF
TOILET RM.
9'-0"
40 SF
TOILET RM.
9'-0"
40 SF
RECEPTION
9'-0"
295 SF
WAITING AREA
C.S.T
9'-0"
100 SF
C.S.T
9'-0"
95 SF
CORR.
9'-0"
110 SF
SECY. D.O.S
9'-0"
155 SF
ATTENDANCE SECY.
9'-0"
0 SF
COPIER
MAILBOXES
9'-0"
55 SF
LOBBY
9'-0"
155 SF
PRINC. SECY.
9'-0"
100 SF
D.O.S
9'-0"
180 SF
CONF. RM.
9'-0"
225 SF
PRINC. OFF
9'-0"
260 SF
CLS.
0"
15 SF
STORAGE RM.
9'-0"
100 SF
EXHIBIT
AA

291-05

OAL DKT. NO EDU 3877-05
(EDU 11152 ON REMAND)
AGENCY DKT. NO. 348-9/04

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHLEEN DESAI,	:	
SCHOOL DISTRICT OF MORRIS,	:	COMMISSIONER OF EDUCATION
MORRIS COUNTY.	:	DECISION
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/12/05

Date of Mailing: 8/12/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3877-05

AGENCY DKT. NO. 348-9/04

(Remand OAL Dkt. No. EDU 11152-04)

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN DESAI, SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY.

John M. Iaciofano, Esq., for petitioner Kathleen Desai
(Iaciofano, Flamingo & Perrone, attorneys)

John G. Geppert, Jr., Esq., for respondent School District of Morris
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: July 20, 2005 Decided: July 22, 2005

BEFORE **BARRY N. FRANK**, ALJ:

This matter was remanded to the Office of Administrative Law (OAL) from the Department of Education on April 20, 2005, for further expansion of the record and revision of documents.

The parties agreed to abide by the Commissioner's request by modifying the agreement; thus, a hearing was not required. The parties have prepared a revised Stipulation of Settlement (please note that the Remand OAL Dkt. No. EDU 11152-04 was used on the revised settlement, which should have reflected the current OAL Dkt. No. EDU 3877-05) indicating the terms thereof, which is attached and fully incorporated

herein as well as the extract minutes by the Board approving said new settlement, which was held on June 9, 2005.

I have reviewed the record and the terms of the revised settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 22, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

7-27-05
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

RECEIVED
STATE OF NEW JERSEY
DEPARTMENT OF LAW
2005 JUL 20 P 3:14

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, May 23, 2005at 6:30 p.m.** in the Auditorium of Lafayette Learning Center 31 Hazel Street, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Mrs. Marie Fornaro, Dr. Peter Gallerstein, Mrs. Terry Murphy, Ms. Lisa Pollak, Mr. Leonard Posey, Mrs. Ann Rhines, Dr. Angela Rieck, Mr. John Schafer and Ms. Lee Connor, the Morris Plains Representative.**

The following members of the Board of Education were absent: **NONE**

The following Resolution was offered by **Mr. Schafer** seconded by **Dr. Gallerstein** and adopted by the Board of Education by the following roll call vote:

Roll Call:	***AYES:***	Mrs. Bangiola, Mrs. Fornaro, Dr. Gallerstein, Mrs. Murphy, Ms. Pollak, Mr. Posey, Mrs. Rhines, Dr. Rieck, Mr. Schafer,
	NOES:	None
	ABSENT:	None
	ABSTAIN:	Ms. Connor

RESOLVED:

Motion #16 that, upon the recommendation of the Superintendent, the Board of Education approve the following revision to the stipulation of settlement approved at the January 24, 2005 meeting involving Employee #0764:

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Susan Young, Business Administrator/Board Secretary of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, May 23, 2005,** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **9th day of June, 2005.**

(Seal)

Business Administrator/Board Secretary

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(973) 539-1313
Attorneys for Morris School District Board of Education

IN THE MATTER OF
KATHLEEN DESAI

OFFICE OF ADMINISTRATIVE LAW
Docket No. EDUTH 11152-2004N

COMMISSIONER OF EDUCATION
Agency Reference #348-9/04

STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the Commissioner of Education through the filing of tenure charges by the Morris School District Board of Education ("Board") and the parties having agreed to enter into a settlement of the above matter, and the parties intending to fully and finally resolve all issues, matters, claims, potential claims, disputes, and potential disputes between them, except for the enforcement of the terms hereof; and

WHEREAS, the parties in good faith have engaged in negotiations concerning this matter and the parties have amicably settled and resolved the above dispute.

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained in the agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. The parties acknowledge that a true and accurate copy of the Tenure Charges have been forwarded to the Commissioner of Education and the Office of Administrative Law.

2. The parties acknowledge and agree that their respective interests justify the settlement and result effected hereby, specifically, the parties acknowledge and agree that the

within resolution effects a result satisfactory to each of them, while eliminating the risk of an adverse decision and avoiding the time and expense that would attend contested litigation.

3. By signing the within Stipulation of Settlement, the parties have each evidenced their consent to the terms and conditions hereof.

4. The Respondent, Kathleen Desai, affirms and agrees that she has entered into this Stipulation of Settlement with a full and complete understanding of her rights.

5. The parties acknowledge and agree that the settlement effected hereby and the agreement represented by this settlement, is in the public interest in that the respondent has agreed to resign her employment, thereby avoiding the expenditure of public time and resources on litigating a dispute that is subject to a resolution consented to by both parties.

6. The Respondent, Kathleen Desai, acknowledges 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 loss of certificate in accordance with the provisions of N.J.A.C. 6A:3-5.6 and N.J.A.C. 6A:9-17.6(a)(1).

7. Respondent, Kathleen Desai irrevocably and permanently resigns her employment with the Morris School District effective February 14, 2005 and will submit a letter to that effect in the form attached hereto as Exhibit A. Notice of the said resignation shall be deemed given as of December 14, 2004. The Board will act to accept the resignation of Kathleen Desai at the time the Board approves this settlement.

8. The Morris School District shall pay to Kathleen Desai all salary/wages for the period September 7, 2004 through February 14, 2005. Ms. Desai shall not receive any withheld increments. Payment in full shall be made within ten (10) days of approval of this Stipulation of

Settlement by the Commissioner of Education. As a result of her resignation, Ms. Desai shall receive no payment for unused sick leave.

9. The Morris School District shall continue to provide to Kathleen Desai and pay for all normal and applicable benefits, including but not limited to, health insurance through March 31, 2005. Subsequent to that Kathleen Desai, at her option, may purchase health insurance through the Morris School District pursuant to the provisions of C.O.B.R.A. or other applicable law. In the event of such an election by Kathleen Desai, the Morris School District shall cooperate with her obtaining coverage in all respects.

10. The Morris School District agrees that its response to all inquiries regarding Ms. Desai's employment will be limited to the information required to be provided by law, which includes upon request providing the following information pursuant to Order No. 11 (1974): name, title, position, salary, payroll record, length of government services, amount and type of pension, if any, date of separation and reason for separation. The reason for separation shall be stated as "resignation."

11. The District will not disclose the documents related to this action except as required by law. The District will notify Kathleen Desai of any disclosures made.

12. The Board makes no representations regarding Kathleen Desai's future pension status and this Agreement shall in no way be contingent upon Ms. Desai receiving pension benefits.

13. The parties agree that this Stipulation of Settlement is contingent upon the approval of the Commissioner of Education, and that, upon the approval of the Commissioner of Education, the Tenure Charges presently pending before the Office of Administrative Law and the Commissioner of Education shall be deemed to be dismissed with prejudice.

14. The parties agree that neither party is responsible for the payment of the other party's attorneys' fees in connection with this matter.

15. Through this Settlement Agreement, Kathleen Desai releases and waives any and all rights and claims that she has or may have against the Morris School District accrued to date.

16. This Settlement Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

17. Each party acknowledges that she/it has consulted with an attorney or representative of her/its choosing prior to the signing of this Settlement Agreement, that each party fully understands their rights, and that with a full knowledge of their rights each party signs this Agreement as her/its own voluntary act and deed, and that each party fully understands the duties and obligations enumerated herein.

18. Nothing in this Settlement Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Kathleen Desai.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Date: 7/5/05

Kathleen Desai

IACIOFANO, FIAMINGO & PERRONE
Attorneys for the Respondent

Date: 7/12/05

By:

John Iaciofano, Esq.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT

Date: 5/29/05 By: _____

Dr. Angela Rieck
School Board President

WILEY, MALEHORN AND SIROTA
Attorneys for the Petitioner

Date: 6-13-05 By: _____

John G. Geppert, Jr., Esq.

294-05

DENISE A. IRVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, ALONSO KITTRELS, SUPERINTENDENT, AND MARVIN HOPKINS, EXECUTIVE DIRECTOR OF HUMAN RESOURCES,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner asserted that she was forced to resign from the Willingboro School District, and sought, *inter alia,* reinstatement to the position of Principal, with back pay. Petitioner alleged that she had been subjected to a hostile work environment, and differential treatment and pay because of her gender and age. She further claimed constructive discharge of a tenured employee.

The ALJ found, *inter alia,* that: there is nothing in the record to support petitioner's claims of constructive discharge or hostile work environment; the petitioner's testimony and demeanor lacked credibility; and that testimony on behalf of the respondent Board was sincere and credible. The ALJ concluded that petitioner failed to prove that she was constructively discharged from employment by the Willingboro Township Board of Education, and that her petition seeking reinstatement to her untenured position of Principal of the Adult Education School should be dismissed.

The Acting Commissioner concurs with the ALJ, concluding that the petition in this matter should be dismissed because petitioner failed to prove by a preponderance of the credible evidence that she was constructively discharged from employment, and adopts the Initial Decision as the final decision, for the reasons set forth 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.

August 16, 2005

OAL DKT. NO. EDU 2122-04
AGENCY DKT. NO. 67-2/04

DENISE A. IRVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, ALONSO KITTRELS, SUPERINTENDENT, AND MARVIN HOPKINS, EXECUTIVE DIRECTOR OF HUMAN RESOURCES,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and the Willingboro Board's (Board) reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner initially takes issue with what she characterizes as "the facts as determined by the Administrative Law Judge (ALJ)" (Petitioner's Exceptions at 2), claiming, *inter alia*, that:

> 1. There was no testimony that she applied for the principal positions at the Bookbinder, McGinley and Levitt schools because of a mutiny against her while she was vice-principal at the high school. Rather, she applied to those positions because the principal positions were a promotion and the positions were more in line with her training in elementary education. (*Id.* at 2)

[1] It is noted that, although petitioner represented herself at hearing and filed *pro se* exceptions to the Initial Decision, petitioner subsequently notified the Bureau of Controversies and Disputes that Richard T. Fauntleroy, Esq., was representing her in this matter and, thus, requested that the exceptions filed by Mr. Fauntleroy be considered. Accordingly, in that a party may *either* represent him/herself *or* be represented by an attorney, and petitioner has designated Mr. Fauntleroy as attorney of record, only the exceptions filed by Mr. Fauntleroy on petitioner's behalf have been considered by the Commissioner in making his decision. See *N.J.A.C.* 1:1-5.1.

2. All three of the principal positions for which she applied were given to men from outside the school district. Instead, she was offered the position of principal of the Adult High School, a position for which she neither applied nor interviewed. (*Ibid.*)

3. She was not provided the same status or office arrangements as her male counterparts and she did not sign the time sheets because of the warning given to her by the Payroll Administrator with respect to an indication that time was being submitted for payment when the persons had not actually worked. (*Ibid.*)

4. She had no adult high school background or experience, and no one had created a job description listing specific job requirements and objectives for this newly created position; yet her supervisors were "threatening" to evaluate her. (*Ibid.*)

5. She did not attend a meeting where her position was clarified with respect to Mr. McGee, the Director of the school. (*Ibid.*)

6. She did not take a medical leave because her request for a transfer would not be honored, but, instead, because of depression, which was indicated by a doctor on her medical leave form given to Mr. Hopkins in support of her request for a medical leave of absence. (*Id.* at 3)

7. Mr. Kittrel's letter of October 31, 2003, stating that petitioner's claim was "self-serving," was written after notification that she had filed a discrimination complaint with the Division of Civil Rights while she was out on medical leave. (*Ibid.*)

8. The November 13, 2003 letter of resignation was written under duress because she was told that the offer would be taken off the table if she did not have a letter of resignation on Mr. Kittrels' desk by 8:30 a.m. on November 13. Mr. Rocco directed petitioner to use his conference room and his secretary to prepare a letter of resignation. (*Ibid.*)

9. The ALJ found Mr. Kittrels to be more credible than petitioner in his testimony because of his calm demeanor, but gave no reasons as to why he ignored the inconsistencies in the testimonies between Mr. Kittrels, Mr. Hopkins and Mr. Rocco with respect to the facts surrounding petitioner's transfer to the Adult High School, the manner in which the original resignation was obtained, and the reason for reassigning petitioner back to the position of Assistant Principal upon her return from stress leave. (*Ibid.*)

Moreover, petitioner contends that the ALJ's determination that her proofs on unlawful discrimination were lacking was arbitrary and capricious in light of the fact that the ALJ prevented petitioner, who was acting *pro se* at the time, from cross examining witnesses and providing direct testimony with respect to discrimination, informing her that those issues were not before him. (*Id.* at 4) Petitioner maintains that there was ample evidence that she was subjected to a hostile work environment because of her gender and age, and points to: her claim that she was forced to resign because of the discriminatory actions of administrators in hiring three men, instead of her, for the three principal positions for which she applied; her appointment to the Adult School; her removal from her position as principal of the Adult School; and her re-assignment to the position of assistant principal upon her return from medical leave. (*Ibid.*) Petitioner further repeats her assertion that her constructive discharge claim stems from her contention that these actions were retaliatory for her filing a civil rights claim against the Board. (*Ibid.*)

Additionally, petitioner avers that the ALJ overlooked the fact that she did not apply for the principal position to which she was assigned at the Adult School, noting that it was not one of the three principal positions advertised. (*Id.* at 5) Petitioner maintains that the position of principal of the Adult School was created by the Board in an effort to cover up the Board's discriminatory conduct in not appointing her to one of the three vacant principal positions for which she did apply. (*Ibid.*) Pointing to *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 603-604 (1993) – which sets forth the four-prong test for establishing a cause of action in a hostile work environment claim by requiring that "***the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive" – petitioner asserts that: hiring three

less-qualified males in positions for which she applied; placing her in a similar title without an office, staff and the other perks that her male counterparts received; treating the male consultant as the person running the Adult School rather than petitioner; and refusing to permit her to address the time sheet issue, would certainly cause a reasonable woman to believe her condition of employment was altered and the working environment was hostile or abusive. (*Ibid.*)

Petitioner also points out that, according to *Kluczyk v. Tropicana Products, Inc.*, 368 *N.J. Super.* 479, 493 (App. Div. 2004) and *Shepherd v. Hunterdon Center*, 174 *N.J.* 1, 27-28 (2000), "[a] prima facie case of constructive discharge exists in New Jersey when a plaintiff can establish that an employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to such conditions would resign." (*Id.* at 7) If she hadn't resigned, petitioner submits, she would have been returned to the position of assistant principal of Memorial Middle School, which would have meant a reduction in salary in the area of $23,000.00, and would have resulted in her being humiliated among her peers as she would be going backwards in her career from principal to vice-principal. (*Ibid.*)

Moreover, petitioner contends that even if there was no underlying harassment, petitioner's forced resignation constituted a retaliatory discharge in violation of the Law Against Discrimination because her October 22, 2003 claim of discrimination with the New Jersey Division on Civil Rights was reported to Mr. Kittrels and Mr. Hopkins and, within days of her return from her medical leave on November 3, 2003, she was required to submit a resignation letter and withdraw her pending claims before the Division on Civil Rights. (*Id.* at 8) Finally, petitioner avers that the ALJ completely ignored her arguments as to the coercive manner in which her resignations were obtained. (*Id.* at 8-9)

In reply, the Board comments that petitioner appears to take exception as to how the evidence was characterized rather than the actual basis of the evidence presented, and claims

that petitioner is trying to retry the facts and represent the brief that was originally presented before the ALJ. (Board's Reply at 3) The Board further avers that the ALJ's findings of facts are supported by the record through the parties' joint stipulation of facts and the documents submitted by the parties. (*Id.* at 4)

Pointing to *N.J.S.A.* 52:14B-10(c) and *In re Taylor*, 158 *N.J.* 644 (1999), the Board avers that there is no basis in the record that would support disturbing the credibility determinations of the ALJ and, thus, urges that deference be given to the ALJ's valuation of the testimony since assessment of such evidence may rely upon observation and demeanor, which is criteria not generally reflected in the record: (*Id.* at 5) The Board also submits that petitioner failed to meet her burden of proof that she was constructively discharged and contends that petitioner chooses to ignore that she forfeited statutory protections upon her voluntary submission of her resignation. (*Ibid.*) In support thereof, the Board notes that petitioner did not obtain tenure in her position as principal of the Adult school and that she voluntarily relinquished her rights to her tenured assistant principal position. (*Id.* at 6) Moreover, the Board claims that the record is void of any evidence that petitioner was subject to a hostile work environment. Rather, the Board contends, petitioner determined her own fate when she sought not to be the educational leader of the Adult School, when she determined not to verify the time sheets for hourly employees, when she requested a transfer from the Adult School, and when she determined that she did not wish to be transferred from the Adult School to her last tenured position of assistant principal. (*Ibid.*)

Additionally, the Board maintains that there is nothing in the record to support petitioner's claim that she was forced to resign or that the move to change the date of her resignation was done under duress, but, instead, the record shows that petitioner was told to take time to think about what she was doing and to get the advice of counsel. (*Id.* at 6-7) The Board

also sets forth its position that petitioner did not prove that the conduct occurred because of her sex, pointing out that petitioner was the one who sought the transfer. (*Id.* at 7) Moreover, the Board contends that petitioner also did not prove that the conditions of employment were so pervasive, intimidating, hostile or offensive that a reasonable woman, in a tenured assistant principal position, would have submitted a resignation of her tenured position. (*Ibid.*)

Upon a careful and independent review of the record, the Commissioner finds that this matter turns primarily on the credibility of the witnesses. In this regard, the Commissioner recognizes that the ALJ's credibility determinations are entitled to his deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *may not* reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record. (emphasis added) *N.J.S.A.* 52:14B-10(c).

Here, after considering petitioner's testimony and observing her demeanor, the ALJ found "her account of the events leading up to her leaving the District improbable, if not totally implausible, and having nothing to do with a hostile work environment." (Initial Decision

at 11) In contrast, the ALJ found the district's witnesses credible and the superintendent to be "a sincere, credible witness" whom he quotes as stating that "[w]e always tried to help you [the petitioner], and sometimes it comes back to bite you." (*Id.* at 12)

Upon review of the full record,[2] the Commissioner finds that the ALJ's credibility assessments are not arbitrary, capricious or unreasonable, but, instead, are supported by sufficient, competent and credible evidence in the record. The Commissioner, therefore, finds no cause to disturb the ALJ's credibility determinations.

Moreover, notwithstanding petitioner's assertions to the contrary, the Commissioner finds that the ALJ's findings of fact and conclusions of law are wholly supported by the record and that there is nothing in the record to substantiate petitioner's allegations that she was subjected to either a discriminatory or a hostile work environment. As stated by the ALJ, "there is nothing in this record to suggest that the hostile work environments alleged by petitioner to have existed in her last three positions were anything other than of her own making or in her own mind." (Initial Decision at 11) In this regard, the exhibits submitted by the parties show that the District valued petitioner's contribution and that the District demonstrated its confidence in her by promoting her to the newly-created position of principal of the Adult School when she was not selected to fill any of the open principal positions which had been advertised.[3] Petitioner accepted the promotion, but less than a month thereafter expressed her unhappiness with her assignment in that position, stating that she preferred an assignment to a "more traditional principal position" and, thus, requested a principal assignment in a more traditional setting. (Exhibit P-1, No. 9) The Board declined her request and informed her that she would be returned to her tenured position of assistant principal.

---

[2] The parties did not provide the Commissioner with transcripts of the hearing before the ALJ.

[3] Although petitioner claims that she was better qualified to fill these advertised positions than the individuals selected, petitioner did not introduce anything into the record in support of this allegation.

The Commissioner finds that the record clearly supports the conclusion that it was petitioner who made the decision to resign rather than to remain in the Adult School principal position to which she had been assigned, and it was petitioner who determined that she would not interview for the principal position at the Bookbinder School (see below). It was also petitioner's decision to reject the transfer to her tenured assistant principal position because she felt it would be easier to resign and get a new job as a principal if she were applying as a principal. In apparent support of petitioner's concerns to leave the district as a principal, as noted by the ALJ, the superintendent "offered her the 'parachute' of the Director of Special Projects position at the Country Club Elementary School, a temporary position created solely for her and comparable in salary to that of principal, starting immediately and continuing until the effective date of her resignation." (Initial Decision at 5)

There is also no evidence supporting petitioner's contention that she was coerced into withdrawing her claim before the Division on Civil Rights and Equal Opportunity Commission, which she filed October 22, 2003, shortly after her request for a transfer to a "more traditional principal position" was denied. In a letter withdrawing her claim, dated November 13, 2003, petitioner states:

> Please cancel all activity as it relates to charges against Willingboro Board of Education.
> In other words, I would like to drop my complaint immediately.
> Thank you in advance.
> (Exhibit P-1, No. 31)

Almost a month later, in response, the Division on Civil Rights sent a confirming letter, dated December 8, 2003, informing petitioner that in order to withdraw her pending claims, she would need to sign a Request for Withdrawal of Charge of Discrimination, which stated, *inter alia*:

> I am aware that the EEOC and the NJDCR protect my right to file a complaint. I have been advised that it is unlawful for any person

> covered by Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act (ADEA) of 1967, as amended, or Title I of the Americans with Disabilities Act (ADA) of 1991, as amended, to threaten, intimidate or harass me because I have filed this complaint.
>
> I request the withdrawal of my charge because I no longer wish to pursue this complaint.
> (Exhibit R-12)

On December 11, 2003, petitioner signed the Request for Withdrawal of Charge of Discrimination with the Division on Civil Rights and with the Equal Employment Opportunity Commission.

Additionally, there is no evidence to support petitioner's contention that she was coerced into resigning from employment with the Willingboro Board. In a letter dated November 4, 2003 to Superintendent Kittrels, petitioner states:

> I met with the Board President on November 3, 2003. She told me to remain at the Adult High School to make tenure there.
>
> Mrs. Holley told me to put this situation behind me. Also, I do not intend to interview for the Bookbinder position.
>
> I agree with her findings that the Adult High School is not a Hostile Work Environment. I am in charge not Mr. McGee.
>
> P.S. I also signed the timesheets this morning. Mr. Rocco should be in possession of them.
> (Exhibit R-8)

Petitioner's resignation letter also supports the conclusion that she decided to resign of her own accord:

> After much forethought, I would like to thank you for the tremendous experience I have gained while working for the Willingboro School District.
>
> First of all I appreciate your appointing me the Principal of the Adult High School. However, with that said I am at this time resigning from my position effective April 2, 2004.

> The position was not what I had in mind and in light of this fact, I would like to exercise my options. In hindsight, I should have probably remained at Stuart Elementary School.
>
> With that said I wish the District much success. As the leader of this District, you have done a wonderful job. Thank you in advance.
> (Exhibit P-1, No. 32)

Accordingly, as explicated above, the Initial Decision, concluding that the petition in this matter should be dismissed because petitioner failed to prove by a preponderance of the credible evidence that she was constructively discharged from employment, is adopted for the reasons set forth therein.

IT IS SO ORDERED.[4]

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/16/05

Date of Mailing: 8/16/05

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2122-04S
AGENCY DKT. NO. 67-2/04

DENISE IRVIN,
Petitioner,

v.

BOARD OF EDUCATION
OF THE TOWNSHIP OF
WILLINGBORO, et als.
Respondents.

Denise Irvin, *pro se*[1]

Kathleen Smallwood-Johnson, Esq., appeared for Respondents

Record Closed: September 8, 2004 Decided: May 18, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ

On February 23, 2004, petitioner filed an application for emergent relief with the New Jersey Department of Education. The application, supplemented by letter brief filed on March 11, 2004, requested her immediate "Reinstatement to the position of Principal with the Willingboro

[1] Although the petition was filed by Michael D. Homans, Esq. (Flaster/Greenberg P.C., attorneys), Ms. Irvin stated on the record that she had discharged him and proceeded to represent herself at the hearing. At the conclusion of the

School District, Reinstatement of Time-in-Position as Principal From December 11, 2003 to the present, Back pay from December 11, 2003, my last day of work, through the present, [and] The internet site on the Willingboro Server using my name removed."

This matter was transmitted to the Office of Administrative Law (OAL) on March 17, 2004 for a hearing on the requested emergent relief. The hearing, which consisted solely of oral argument, was conducted on March 29, 2004 at the OAL, Quakerbridge Plaza, Building 9, Quakerbridge Road, Mercerville, New Jersey. By Order dated March 31, 2004, the undersigned Administrative Law Judge concluded that emergent relief was not warranted and scheduled the matter for a hearing on the merits, which was held on May 25, June 1, June 2, and June 25, 2004. The record closed on September 8, 2004 upon receipt of the parties' post hearing briefs.

* * *

Petitioner was initially employed by the Willingboro Board of Education as an Assistant Principal at Willingboro High School on July 29, 1997. She obtained tenure as an Assistant Principal on September 1, 2000 and remained in that position until November 28, 2001, when she was promoted to the position of Vice Principal. Following a district-wide reorganization which resulted in the elimination of all Vice Principal positions, she was assigned to the Stuart Elementary School as Program Administrator, a position described as comparable to that of Principal, on July 1, 2002.

A few months later, petitioner complained that the Stuart Elementary School was a "hostile work environment." More specifically, she alleged that, as had been the case when she was a Vice Principal at the High School, staff members were making defamatory statements about her and were engaged in a "mutiny" to undermine her authority. She therefore applied for the open Principal's positions at Bookbinder Elementary School, McGinley Elementary School, and Levitt Middle School. Although she was not selected for any of those positions, she was offered – and accepted – the newly created position of Principal of the Adult Education School on August 12, 2003.

---

hearing, Richard T. Fauntleroy, Esq. entered his appearance, stating that he had been retained by petitioner to write

Shortly after her arrival at the Adult School, petitioner complained that she did not have an office, air conditioning, or "contracted staff" like "every other Principal in the district," explaining that the teachers were all hourly employees. *Irvin Memo, October 9, 2003*; Exhibit R-5. She also repeatedly took exception to having to sign off on the time sheets of these teachers, despite having been told by the Assistant Superintendent of Schools, Harry Rocco, that it was part of her job responsibility as principal.

Petitioner further complained that she was being "discredited and slandered by this District." By way of example, she noted that the *Burlington County Administrators Directory* failed to list her as Principal and instead listed Jack McGee as Director of the Adult Education School. However, the district had submitted its list of administrators for the 2003-2004 school year to the *Directory* prior to the creation of the Principal's position at the Adult School and, at that time, Mr. McGee, an independent contractor, was in fact employed as Director of the school.

Another bone of contention was the fact that Mr. McGee was going to remain at the school as a consultant and assist petitioner with the transition. However, prior to and after the date petitioner first reported to the Adult School, Marvin Hopkins, the Executive Director of Human Resources and Administrative Services, had met with McGee "to make sure he understood his new limited role reporting to Ms. Irvin." In fact, petitioner had attended the meeting that took place after she assumed her new position. Still, petitioner complained that McGee's presence rendered her position as Principal meaningless and her appointment as such tantamount to a demotion.

Referring to the Adult High School as "hostile" and "an even more uncomfortable work environment" than the Stuart Elementary School had been, on or about September 12, 2003 petitioner requested another transfer, asking that she be appointed Principal of Bookbinder Elementary School. She also filed a complaint with the New Jersey Division on Civil Rights, asserting that she was being differentially treated and paid because of her gender and age. At this point, Superintendent of Schools Alonzo Kittrels asked Harry Rocco, Assistant Superintendent in charge of Operations, to conduct an investigation into petitioner's complaints. After several

---

her post hearing brief.

meetings with petitioner and other individuals, Mr. Rocco found petitioner's complaints to be unfounded.

On October 3, 2003, when it became apparent that the requested transfer to Bookbinder Elementary would not be forthcoming, petitioner took a thirty-day medical leave of absence for treatment of "Depression – Situational Stress." Throughout this period of medical leave, she continued to complain that the Adult School was a hostile work environment, and met with Marvin Hopkins, Executive Director of Human Resources, on several occasions to discuss these allegations.

On October 31, 2003, as her thirty-day leave was about to expire, Superintendent Kittrels advised her by letter that "based on an internal district investigation, there is no evidence that suggests or supports your allegation that the Adult Education School is a hostile work environment," and that her complaints appeared to have been "self-serving." *Kittrels Letter, October 31, 2003*; Exhibit R-7. He also advised her that "[i]n light of your continued claim that the Adult Education School is a hostile work environment, it is imperative that you meet with Mr. Hopkins and Mr. Rocco on November 3, 2003 at 9:30 a.m. in the Human Resources Office to discuss your return to work and assignment." *Ibid.*

As directed, petitioner returned to work on November 3, 2003 and met with Messrs. Rocco and Hopkins, as well as the Superintendent. At that time Mr. Kittrels advised her that instead of having her return to what she had been complaining was a hostile work environment, he had decided to her to her tenured position as an Assistant Principal and assigned her to the Memorial Middle School, at the salary set forth in the Collective Bargaining Agreement between the Board and the Willingboro Education Administrator's Association. However, this would have resulted in an approximately $22,000-23,000 reduction in salary and Mr. Kittrels acknowledged that she might have been entitled to sixty days' notice. Nevertheless, he told her that she was still to report to Memorial pending a final decision on that issue. She was also given "two or three days" to consult an attorney and decide whether to accept the new assignment. Petitioner was sent a confirming letter on November 4, 2003. Exhibit P-1.30.

Later that same day, petitioner sent Superintendent Kittrels a letter advising him that she'd had an opportunity to meet with Board of Education President Holly and decided "to put this situation behind me, remain at the Adult High School and make tenure there." She also withdrew her request for a transfer to Bookbinder Elementary School and retracted her prior complaints regarding the situation at the school, stating "I agree with [Ms. Holly]'s findings that the Adult High School is not a Hostile Work Environment. I am in charge not Mr. McGee." *Irvin Letter, November 4, 2003*; Exhibit R-8.

Despite her purported change of heart, the Superintendent decided it would be imprudent to place petitioner back in a situation she had repeatedly claimed was a "hostile work environment." Therefore, on September 7, 2003, Superintendent Kittrels advised her that he would be recommending that the Board of Education return her to her tenured position of Assistant Principal. According to Messrs. Kittrels and Rocco, petitioner was unhappy with what she believed was a "double demotion,"[2] stated that it was "time to move on." She then expressed her intention to resign and requested a letter of recommendation. When they inquired if she was certain, petitioner stated that she knew what she was doing and would rather resign than go to Memorial because it would be "easier to get a job as a principal if she were applying as a principal." When they next asked if she wanted time to think the matter over, petitioner replied that all she required was that the resignation not be effective until June 4, 2003, which would give her sufficient time to find a new job.

Since he had given already given her written notice of her return to an Assistant Principal's position, the Superintendent factored in the sixty-day period that would precede her official change of position and secured her consent to change the effective date of her resignation to April 2, 2003. However, he also offered her the "parachute" of the Director of Special Projects position at the Country Club Elementary School, a temporary position created solely for her and comparable in salary to that of Principal, starting immediately and continuing until the effective date of her resignation. By letter dated November 13, petitioner accepted the offer as follows:

[2] The "double demotion" was described as being demoted from Principal directly to Assistant Principal, even though she had not obtained tenure as a Principal or Vice Principal, and the District had eliminated all Vice Principal positions, opting instead to have "Deans" for each grade of students at each individual school.

> After much forethought, I would like to thank you for the tremendous experience I have gained while working for the Willingboro School District.
>
> First of all I appreciate your appointing me the Principal of the Adult High School. However, with that said I am at this time resigning from my position effective April 2, 2004.
>
> The position was not what I had in mind and in light of this fact, I would like to exercise my options. In hindsight, I should have probably remained at Stuart Elementary School.
>
> With that said I wish the District much success. As the leader of this district, you have done a wonderful job. Thank you in advance.
>
> [*Irvin Letter, November 13, 2003*; Exhibit R-9]

Upon receipt of her letter, Superintendent Kittrels and Mr. Rocco both provided petitioner with letters of recommendation praising her as an "intelligent and conscientious administrator ... [who] is responsible, works well with students and effectively communicates with parents." *Rocco Letter of Recommendation, November 19, 2003*; Exhibit P-1.34. The Superintendent also asked petitioner about the status of her complaint to the Division of Civil Rights. Petitioner replied that she would withdraw it and sent a letter to Division Investigator Aldo Gonzalez stating, "I would like to drop my complaint immediately." *DCR Letter to Irvin, December 8, 2003*; Exhibit P-1.48.

On or about December 7, 2003, petitioner noticed that the New Jersey State Department of Education had published an advertisement in *The Star Ledger* newspaper for five budget examiner positions. Two days later she met with Superintendent Kittrels, showed him the advertisement, and asked him to call "his good friend Bill," Commissioner Librera, on her behalf. Without making any promises, the Superintendent said he would mention her interest in the positions the next time he spoke to the Commissioner.

On December 11, 2003, petitioner met with Superintendent Kittrels and Mr. Hopkins, stating that she had "financial issues" involving a piece of real estate and needed to cash out her pension benefits as soon as possible. When it was suggested that she consider taking out a loan instead, petitioner replied that a loan would "be too complicated." After further discussion, she

submitted an interoffice memorandum consisting of two sentences: "I would like to change my last day of work from April 2 to Thursday, December 11, 2003. Thank you in advance for your kind consideration." *Interoffice Memorandum, December 11, 2003*; Exhibit R-10. It was on this date that petitioner also completed and returned the "Request for Withdrawal of Charge of Discrimination" form she'd received from the Division on Civil Rights.

On December 15, 2003, during its regularly scheduled open public meeting, the Willingboro Board of Education approved petitioner's request to change her date of resignation to December 11, 2003. Two months later, on February 23, 2004, petitioner filed her complaint with the Commissioner of Education.

* * *

As a tenured Assistant Principal, petitioner was protected by a statutory scheme the purpose of which is to establish a competent and efficient school system by affording teachers and administrators "a measure of security in the ranks they hold after years of service." *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). *N.J.S.A.* 18A:28-5 is part of this statutory scheme and provides that certain enumerated employees of boards of education shall be awarded and work under tenure after they have served the requisite number of years. More specifically, the statute provides that

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by [*N.J.S.A.* 18A:6-9 *et seq.*], after employment in such district or by such board for:

> (a) Three consecutive calendar years, or shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. *Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S. 18A:28-6 in a position in which the individual actually served.*
>
> [*N.J.S.A.* 18A:28-5 (emphasis supplied)]

Additionally, *N.J.S.A.* 18A:28-6 further provides that an individual such as petitioner, who has achieved tenure in one position and then consented to a transfer or promotion to another position, shall not obtain tenure in the new position until after:

> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and *in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary he would have received had the transfer or promotion not occurred* together with any increase to which he would have been entitled during the period of such transfer or promotion.
>
> [*Ibid* (emphasis added)]

The tenure petitioner obtained was in the position of Assistant Principal and that tenure did not extend to her relatively short terms as Vice Principal of the High School, Program Administrator (Principal) at the Stuart Elementary School, and Principal of the Adult Education School. Consequently, her reassignment as Assistant Principal at Memorial Middle School was not subject to the limitations or conditions set forth in *N.J.S.A.* 18A:28-5. Rather, subject to the terms of her contract of employment, the Superintendent had the absolute authority to terminate her non-tenured employment as Principal of the Adult Education School and return her to her former tenured position of Assistant Principal at the salary she would have received in that position; together with any increase she might have been awarded. And pursuant to the principal's contract she signed on or about August 12, 2003, the sole obligation the Superintendent had was to provide petitioner with sixty days notice.

Of course, tenure and reemployment rights may be voluntarily relinquished. *O'Toole v. Forstal*, 211 *N.J. Super.* 394, 402 (App. Div. 1986), *certif. denied* 107 *N.J.* 123 (1987). *Accord, Lange v. Bd. of Educ. of Audubon*, 26 *N.J. Super.* 83, 88 (App. Div. 1953). *See also, Adler v. John Carroll Univ.*, 549 *F. Supp.* 652, 656 (N.D. Ohio 1982) (college teacher who voluntarily resigned from his position was not a victim, but rather "generated his own fate"). And here, petitioner's own words and actions demonstrate that she clearly understood what she was doing, not only when she initially decided to resign, but also when she moved up the effective date of that resignation.

Petitioner has since claimed that Superintendent Kittrels coerced her into resigning and in so doing constructively discharged her. According to petitioner, the Superintendent said that

> he would place me in a very attractive position as Principal Special Projects with a nice office in the new Country Club Elementary School. He told me in order for this to occur however, I would have to turn in a letter of resignation dated April 2, 2003.
>
> Mr. Kittrels told me that he had hired his own personal lawyer, Mrs. Smallwood-Johnson, to handle the four lawsuits from the female administrators – including myself, (three (3) Principals {two (2) tenured} and one Central Office Director) who had filed charges against him within this six weeks.[3] Mr. Kittrels told me

[3] The record is devoid of any evidence concerning these alleged lawsuits or the identities of the individuals who allegedly filed them.

> that if I fought him it would be "brutal." *This is why I decided to drop my charges.*
>
> He then told me that he would be able to get me a job working with the State of New Jersey Department of Education through his friendship with the Commissioner of Education.
>
> Mr. Kittrels told me he would take the offer off the table if I did not have my letter of resignation on his desk by 8:30 a.m. November 13, 2003. He said without the letter of resignation I would be demoted immediately.
>
> ...
>
> This was Constructive Discharge – Forced Resignation through Coercion. The influence of Mr. Kittrel's (*sic*) friendship with the Commissioner of Education. As well as the fact that I did not want to be demoted. **Tangible Employment action. – Employer sanctioned adverse action officially changing my employment status**.
>
> *Charges/Violations*; Exhibit P-3, Lavender Pages 2-3.

Petitioner also claimed that the second "forced resignation" was constructive discharge of a tenured employee. As she explained,

> On Sunday, December 7, 2003, there was an ad in the Star Ledger for five (5) Budget Manager/Examiners for the Department of Education. I took the ad to Mr.Kittrel's (*sic*) office. We discussed the positions in depth. He told me that getting one of these jobs for me would not be a problem. Mr. Kittrels told me he would call his friend, the Commissioner of Education, "Bill."
>
> Mr. Kittrels told me that if I wanted the position, I needed to revise my original resignation date from April 2, 2004 to December 11, 2003. He told me he would see if he could keep me on the payroll as consultant. I said, "Okay." I was not going to miss this opportunity. I was approximately 90 days from being unemployed.
>
> *Charges/Violations*; Exhibit P-3, Lavender Page 3.

Constructive discharge may be found where an employee is offered a choice of either accepting a discriminatory assignment or resigning. *Goss v. Exxon Office Systems Co.*, 747 *F.*2d 885, 888 (3d Cir. 1984). It may also be found where an employer has knowingly permitted

conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *See Muench v. Township of Haddon*, 255 *N.J. Super.* 288, 302 (App. Div. 1992). However, but for a vague, undeveloped allegation that the more traditional principal's positions at Bookbinder Elementary School, McGinley Elementary School, and Levitt Middle School were all awarded to men, and that Mr. McGee was listed in the *Burlington County Administrators Directory* as Director of the Adult Education School while there was no mention of her as Principal, there is absolutely no evidence whatsoever that respondents offered her, much less forced her to accept, a discriminatory assignment. To the contrary, petitioner eagerly accepted the offer, and when she began to complain about the conditions, the complaints had nothing to do with sexual discrimination.

Similarly, a hostile work environment may be found to exist where an employee has been harassed based on characteristics such as sex, race and creed. More specifically, harassment will violate the Law Against Discrimination when the complained of conduct would not have occurred but for the employee's protected characteristic and was severe or pervasive enough to make a reasonable person of the same protected class believe that the conditions of employment have been altered and the working environment is hostile or abusive. *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 603-05 (1993). However, there is nothing in this record to suggest that the hostile work environments alleged by petitioner to have existed in her last three positions were anything other than of her own making or in her own mind.

In adjudging a witness's credibility, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). Having had an opportunity to consider petitioner's testimony and observe her demeanor, I find her account of the events leading up to her leaving the District improbable, if not totally implausible, and having nothing to do with a hostile work environment.

Among other things, many of her complaints have been about the lack of perquisites and status to which she believed she was entitled. For example, the very first complaints she raised about her assignment to the Adult High School related to the lack of an office, air conditioning, or full-time staff like "every other Principal in the district." She also took umbrage over the fact

that the *Burlington County Administrators Directory*, which had been published prior to her appointment, did not list her as Principal. Then, instead of appreciating having Mr. McGee present as a consultant to assist her with the transition, petitioner complained that his presence rendered her position as Principal meaningless and her appointment as such tantamount to a demotion. And finally, rather than accept a return to her tenured position and continued employment and, therefore, income as an Assistant Principal, she tendered her resignation because it was "time to move on."

In complete contrast, I found Superintendent Kittrels to be a sincere, credible witness. He remained remarkably composed throughout the course of the hearing and I took him at his word when he responded to one of petitioner's questions as follows: "We were never out to fight with you or hurt you. If I could have gotten you a job with the State, I would have, if for no other reason than to avoid all of this. We always tried to help you, and sometimes it comes back to bite you." And so it was here.

* * *

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to prove by a preponderance of the credible evidence that she was constructively discharged from employment by the Willingboro Township Board of Education, Superintendent Alonzo Kittrels, and Executive Director of Human Resources Marvin Hopkins. Accordingly, I further **CONCLUDE** that her petition seeking reinstatement to her untenured position of Principal of the Adult Education School should be dismissed. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 18, 2005

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

May 18, 2005

DATE

Mailed to Parties:

MAY 23 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

Denise A. Irvin, petitioner

For Respondent:

Alonzo Kittrels, Superintendent of Schools

Harry A. Rocco, Assistant Superintendent

Marvin Hopkins, Executive Director of Human Resources

EXHIBITS

Joint Exhibit:

J-1 Joint Stipulation of Facts

For Petitioner:

P-1 Collection of Documents and Narrative (approximately 86 pages)

P-2 Collection of Documents and Narrative (approximately 51 pages)

For Respondent:

R-1 Collection of 85 documents

R-2 Irvin Letter to Hopkins dated October 27, 2003

R-3 Irvin Letter/Memorandum to Hopkins dated September 30, 2003

R-4 Rocco Letter to Irvin, October 2, 2003

R-5 Irvin Memo to Kittrels dated October 9, 2003

R-6 Irvin Memo to Kittrels dated October 28, 2003

R-7 Kittrels Letter to Irvin dated October 31, 2003

R-8 Irvin Letter to Kittrels dated November 4, 2003

R-9 Irvin Letter to Kittrels dated November 13, 2003

R-10 Irvin Memo to Kittrels dated December 11, 2003

R-11 Employee Payroll Record

R-12 Irvin Letter to Aldo Gonzalez dated November 13, 2003

R-13 Job Description – High School Principal

R-14 Principals' Salaries

297-05

D.B.R., on behalf of minor child, N.R.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that her granddaughter, N.R.L., was not entitled to a free public education in the Morris Township Schools, claiming entitlement pursuant to *N.J.S.A.* 18A:38-1(b)1. The Board answered that the parents of N.R.L. do not reside in the District, nor does any legal guardian, and that no family or economic hardship has been shown. The Board counterclaimed for tuition against petitioner for the period of time that N.R.L. attended Morris Township Schools from October 2004 onward.

The ALJ found that the only factual basis presented in support of the application to permit N.R.L.'s attendance in the District's schools as an affidavit student was that N.R.L. wanted to move back to the District and wanted to live with her grandmother, and that such reasons do not establish that her parents are not capable of providing care for her due to a family or economic hardship. The ALJ concluded that there is a no genuine issue of material fact in this case, and that the District is entitled to Summary Decision as a matter of law; the petitioner's appeal is dismissed and the petitioner is ordered to pay the District the sum of $11,778.38 in tuition for the 2004-2005 school year.

Upon careful and independent review of the Initial Decision and the record in this matter, the Commissioner determines to adopt the decision of the OAL as the Final Decision. In so doing, the Commissioner finds that counsel for petitioner submitted exceptions that were both untimely filed and based on revised answers to interrogatories that cannot be submitted, incorporated, or referred to within exceptions. Therefore, the petitioner's exceptions and the Board's reply thereto were not considered in making the final determination in this case. The Commissioner dismisses the petition, and orders the petitioner to pay the Board $11,778.38 for the 163 days of N.R.L.'s ineligible attendance during the 2004-2005 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.

August 18, 2005

OAL DKT. NO. EDU 12060-04
AGENCY DKT. NO. 364-10/04

D.B.R., on behalf of minor child, N.R.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

On July 8, 2005, the Initial Decision of the Office of Administrative Law (OAL) was mailed to the parties. Pursuant to *N.J.A.C.* 1:1-18.4, exceptions in this matter were, therefore, due on July 21, 2005. On July 27, 2005, the Morris Township Board of Education (Board) filed a reply to petitioner's exceptions, noting that it was unclear as to whether the submission it received from petitioner constituted her exceptions[1] and stating that:

> We received the following from Mr. Jenson (sic) on July 21, 2005: (1) a July 21 letter addressed to John G. Geppert, Jr. of this office indicating "I have forwarded to the Commissioner exceptions to the Office of Administrative Law Decision dated July 8, 2005," (2) a July 18 letter containing a substitution of attorney, (3) revised discovery responses dated July 21, 2005 and (4) a July 21 letter to the Honorable Jesse H. Strauss, cc: to John G. Geppert, Jr., Esq. and D.B.R. We did not receive any correspondence or exceptions addressed to the Commissioner of Education.

When Mr. Jensen's July 21 submission to the Commissioner (referenced above) had not been received by July 28, a telephone call was placed to his office to ascertain what had happened to the copy of "exceptions" which Mr. Jensen had discussed in his letter to the Board,

[1] The Commissioner notes that petitioner was *pro se* when this matter was considered at the OAL.

and to arrange for the missing submission to be immediately faxed to the Bureau of Controversies and Disputes for the Commissioner's consideration. Mr. Jensen's secretary indicated that he was on vacation until August 1, 2005 and that she was unable to fax anything with respect to the instant matter because the file was empty. A message was left for Mr. Jensen to immediately fax whatever submission was sent to the Board to the Bureau of Controversies and Disputes upon his return from his vacation. When nothing was received, the Director of the Bureau of Controversies and Disputes faxed a letter, dated August 4, 2005, to Mr. Jensen again requesting that he fax whatever submission was sent to the Board with respect to this case, followed with a hard copy by mail, within five days of receipt of the faxed August 4 letter. Additionally, Mr. Jensen was advised that:

> In that the time for the filing of exceptions has passed, you must also provide an explanation as to why the Commissioner did not receive your exceptions, along with proof that your submission was mailed and/or delivered for the Commissioner's receipt within the 13 days specified for receipt of exceptions.

Later that same day, August 4, the Bureau of Controversies and Disputes received from Mr. Jensen, by Federal Express, dated August 3, 2005: 1) an August 3, 2005 letter addressed to the Commissioner indicating that he was representing petitioner in this matter; 2) a copy of a letter of exceptions to Judge Strauss, dated July 21, 2005; and 3) a revised set of answers to interrogatories. On August 11, 2005, Mr. Jensen responded to the August 4 communication which requested the submission of proof that his submission was mailed and/or delivered for the Commissioner's receipt with the 13 days specified for receipt of exceptions, wherein he stated, in pertinent part:

> I hereby certify that our exceptions were filed within thirteen days, however, they were inadvertently forwarded to Judge Strauss instead of the Commissioner of Education. I now understand that this was the incorrect procedure and I apologize

> for this oversight. On August 3, 2005 I did in fact Federal Express the original letter dated July 21, 2005 along with all attachments to the Commissioner's office.
> (Jensen Letter, dated August 8, 2005)

Upon consideration of Mr. Jensen's explanation, the Commissioner has determined that petitioner's exceptions were not timely filed and, thus, will not be considered. In so determining, the Commissioner points out that the instructions for the filing of exceptions are *clearly* set forth on the last page (page 13) of the Initial Decision in this matter:

> Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. (emphasis in text)

The Commissioner also points out that this is not a case where a clerical error occurred and the exceptions were simply placed in an incorrect envelope. By counsel's own admission, petitioner's exceptions were addressed and directed to the Administrative Law Judge (ALJ) and were not filed with the Commissioner until thirteen days after the due date. Moreover, even assuming, *arguendo*, that the exceptions were deemed timely filed, they would not be considered, in that a review of the two-page exception letter reveals that petitioner's exceptions are entirely based upon the revised answers to interrogatories submitted with the exceptions. Pursuant to *N.J.A.C.* 1:1-18.4(c), "[e]vidence not presented at the hearing[2] shall not be submitted as part of an exception, nor shall it be incorporated or referred to within

[2] *N.J.A.C.* 1:1-2.1 defines "hearing" as "a proceeding conducted by a judge for the purpose of determining disputed issues of fact, law or disposition" and "plenary hearing" as "a complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witness and to make arguments." In this matter, the parties were provided a "hearing" in that the ALJ provided a full opportunity to be heard through the submission of legal briefs and certifications and determined to decide this matter on a summary basis.

exceptions." Accordingly, for the reasons set forth above, the Commissioner has not considered petitioner's exceptions or the Board's reply thereto in making his determination herein.

Upon a careful and independent review of the Initial Decision of the OAL and the record in this matter, therefore, the Commissioner concurs with the ALJ's conclusion to grant the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C.* 1:1-12.5 (b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (App. Div. 1995) (*citing, Brill, supra).* Moreover, the Commissioner finds that petitioner has failed to establish that N.R.L.'s parents are not capable of providing care for her due to a family or economic hardship within the meaning of *N.J.S.A.* 18A:38-1(b)1 so as to entitle N.R.L. to a free public education as an affidavit student in the Morris Township School District. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $11,778.38 for the 163 days of N.R.L.'s ineligible school attendance in the Morris Township School District during the 2004-2005 school year.

Accordingly, the Initial Decision of the ALJ granting summary decision to the Board is adopted for the reasons expressed therein.

IT IS SO ORDERED.[3]

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05

Date of Mailing: 8/18/05

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12060-04
AGENCY DKT. NO. 364-10/04

D.B.R., o/b/o MINOR CHILD, N.R.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,
Respondent.

D.B.R., *pro se*, for petitioner

John G. Geppert, Jr., Esq., for respondent (Wiley, Malehorn and Sirota, attorneys)

Record Closed: June 22, 2005 Decided: July 7, 2005

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner D.B.R. (petitioner) appealed the determination by respondent Board of Education of the Township of Morris, Morris County (District) that her minor granddaughter, N.R.L., was not entitled to a free public education in the District. Petitioner

claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b)(1). The District answered that N.R.L.'s parents do not reside in the District, she does not have a guardian that resides in the district and the appeal has not shown a family or economic hardship as required by this statute. The District also counterclaimed for tuition against petitioner for the period of time that N.R.L. attended the District from October 2004 onward.

Petitioner filed a Non-Resident Enrollment Application on September 29, 2004. In support of her application, she submitted a Support Resident Affidavit and a Parent Affidavit. Following the District's rejection of the application, petitioner filed her appeal on October 20, 2004 with the Commissioner of Education (Commissioner). On November 12, 2004, the District filed an Answer to the Petition and a Counterclaim. Pursuant to *N.J.S.A.* 18A:38-1(b), N.R.L was admitted to school, provided that petitioner would be liable for tuition if the District ultimately prevailed in this litigation. Subsequently, on December 28, 2004, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case.

The initial hearing date of May 11, 2005 was adjourned at the request of the District, with the consent of petitioner, due to the unavailability of the District's primary witness. On June 1, 2005 the District filed a Motion for Summary Decision or to Bar Testimony with supporting documents and a brief. Petitioner filed what she identified as a cross Motion for Summary Decision and brief in support thereof on June 17, 2005, which was in fact a brief in opposition to the District's Motion. Pursuant to *N.J.A.C.* 1:1-12.2(d), the undersigned permitted the District, as the moving party, to file papers responding to matters raised by petitioner. The undersigned received the reply brief on June 22, 2005. Although the parties requested oral argument, the undersigned determined that the written submissions were sufficiently thorough to permit him to dispose of the issues raised without the necessity of oral argument.

This matter had been scheduled for hearing on August 2, 2005.

STATEMENT OF FACTS

The following facts are undisputed for the purpose of the cross-motions.

Petitioner is a resident of the District and the grandmother of N.R.L. N.R.L.'s parents, O.N.L. and T.S.J., had been residents of the District but moved to North Carolina sometime in 2004. N.R.L. had completed kindergarten through seventh grade in the District. When petitioner attempted to enroll N.R.L. in the District for the 2004-2005 school year, she submitted a Support Resident Affidavit executed by her and a Parent Affidavit executed by N.R.L.'s father, O.N.L., both on September 29, 2004. The Parent Affidavit indicates that O.N.L. is the owner of a construction company; no one has been appointed guardian of N.R.L; N.R.L will reside with petitioner indefinitely during the school year, including week nights, week-ends, vacations and the following summer, and petitioner would be paying for the support, maintenance and personal obligations of N.R.L. and would not receive payment in any form from either parent of N.R.L. The response to the question on the affidavit form as to why the child is not currently residing with her mother and/or father was, "She wanted to move back to N.J." The response to the question on the affidavit form as to why the child was placed in the home in the District was, "She wanted to live with Grandmother." The Support Resident Affidavit indicates that petitioner would be supporting N.R.L. *gratis* and had accepted the responsibility for the care, lodging, feeding, health, safety and all personal obligations of the child; petitioner agreed with the parents to permit the child to reside with her and to support the child free of charge indefinitely. This affidavit signed by petitioner also had the following provision: "I have been informed that the Morris School District will review this affidavit periodically and may request additional information or verification at a later date." [See, District Exhibit B].

The District subsequently determined that N.R.L. was ineligible to attend its schools and informed petitioner of that determination. Petitioner advised the District of her intention to appeal, and, since October 6, 2004, N.R.L. has been permitted to attend the schools of the District. Petitioner, in her responsive pleadings, does not dispute that the annual per pupil cost to the District for eighth graders is $13,006, or, divided by 180 school

days, $72.26 per day. From October 6, 2004 through the end of the school year on June 22, 2004, N.R.L. attended the District's schools for 163 days at a cost of $11,778.38.

By letter to the Commissioner dated October 17, 2004, signed by both T.S.J., the mother of N.R.L., and petitioner, they indicated, "The family relocated to another State in August 2004, however, personal circumstances resulted in [N.R.L.] returning to New Jersey to live with her grandmother in Morris Township due to family hardship. There appears to be a rather minor piece of information the Director of Pupil Services indicated was desired. This hardly seems like a substantive reason for denying enrollment. Hardship is defined as hard circumstances of life or difficulty. This definition in no way implies a family must be completely incapable of providing a home." [See petitioner Exhibit C].

Following the submission of the District's Answer to the Petition, petitioner submitted a letter to the Commissioner dated November 16, 2004, where she acknowledged that *N.J.S.A.* 18A:38-1(b) requires a sworn statement from the parents "indicating their hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free education within the district." Rather than provide, through her own November 16 statement or through another statement of the parents of her granddaughter, facts in support of a parental hardship, she criticized the Parent Affidavit form for the absence of a statement that the parents needed to indicate there was a family or economic hardship and added ". . . we did not realize the level of detail needed, nor was there a supplemental instruction sheet provided that described the level of detail needed." She also indicated, "If the district wanted to know if there was a hardship then the form should be [*sic*] clearly ask that question." In response to that part of the District's Answer alleging a discussion with petitioner where she was given an opportunity to provide family hardship information, her response in her November 16 letter was, "It is not my place to provide information about my daughter's personal business and should not be included as an instance where the District alleges hardship was not demonstrated. Why didn't the district ask the parent's for additional information?" [See District Ex. C].

By letter of December 14, 2004, Director of Pupil Services Nancy Helterman communicated with both petitioner and N.R.L.'s mother, T.S.J., where she indicated,

> "While I am not in agreement with your premise that, under the existing statute, [N.R.L.] should have been granted unrestricted permission to enroll based on your statements, I will provide you with an opportunity to complete new forms. When they are ready, I will send them to you and request that you complete them and submit them for new consideration. I hope this will give you the opportunity to provide information that will permit [N.R.L.]'s registration to be made permanent, and her education to be uninterrupted." [See petitioner Ex. D].

Ms. Helterman again communicated with petitioner on March 29, 2005 enclosing the District's revised guidelines for residents who wish to enroll a student in the District including instructions and blank copies of the affidavits previously completed. Her letter indicates, "If you would like to do so, you may complete the questionnaire and the new affidavits and return them to my office at your convenience. I will review them and make a new determination regarding [N.R.L]'s enrollment." The revised instructions regarding an "affidavit" student provide in relevant part as follows:

> "Students are not eligible to attend school as "affidavit" students unless the student's parent or guardian is not capable of supporting or providing care for the student due to family or economic hardship, and unless it is clear that the student is not living in the district solely for purposes of receiving a public education there. Please explain the circumstances applicable in this case, with special attention to the parent/guardian's family and/or economic hardship." [See petitioner Exhibit D].

As a result of petitioner's appeal of the District's decision not to admit N.R.L. for the 2004-2005, school year, the District served interrogatories on petitioner. Interrogatory 13 directed that petitioner "explain in detail why N.R.L. is not residing with her parents," to which she replied, "It is not my place to discuss someone else's personal business." Interrogatory 14 directed that petitioner explain in detail the family or personal hardship that prevents N.R.L.'s parents from supporting or caring for N.R.L." to which she replied, "It is not my place to discuss someone else's personal business." [See District's Exhibit D].

The District also served a demand for admissions on petitioner. The following responses to the following requests for admissions were provided by petitioner:

Admission 1. Do you admit that you refuse to provide a reason why N.R.L's parents are incapable of supporting or caring for her?

Answer: It is not my place to discuss someone else's personal business.

Admission 3. Do you admit that you refuse to provide a reason why there is a personal or family hardship in this case?

Answer: It is not my place to discuss someone else's personal business

Admission 4. Do you admit that N.R.L.'s parents refuse to provide a reason why there is a personal or family hardship in this case?

Answer: All I know is [N.R.L.]'s parents did complete the form given to them by Nancy Helterman.

Admission 5. Do you admit that the reason N.R.L. is attending school at the Morris School District is because N.R.L. wanted to move back to New Jersey?

Answer: [N.R.L.] is attending the Morris School District because she returned to New Jersey.

Admission 6. Do you admit that N.R.L. is living with you because she wanted to live with her grandmother?

Answer: I am her grandmother - family helping family when in need.

Admission 7. Do you admit that you are not the legal guardian of N.R.L.

Answer: I am [N.R.L.]'s grandmother and do not need to be her legal guardian in order for her to live with me. [See District Exhibit E].

LEGAL DISCUSSION

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." This language is substantially similar to the guidelines for summary judgment under New Jersey Court Rule 4:46-2(c) which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield*, 17 *N.J.* 67, 74 (1954).

Recently, 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 America*, 142 *N.J.* 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." *Brill* at 540.

New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of her parents. *P.P.M. on behalf of S.S. v. Bd. of Ed. of the South Orange-Maplewood School District,* http://lawlibrary.rutgers.edu/oal/html/initial/edu01839-031.html. However, an exception exists under the following circumstances enumerated in *N.J.S.A.* 18A:38-1(b)1:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so

> required by the board, a sworn statement that he is domiciled within the district and is supporting the child *gratis* and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, to meet the statutory requirement for the admission to the schools of a district of a child whose parent or parents do not live in the district, the evidence must show that; (1) petitioner is domiciled within the district; (2) petitioner is supporting the child *gratis*; (3) the child's parents are not capable of supporting or caring for her due to family or economic hardship, and (4) the child is not residing with petitioner solely for the purpose of receiving a free public education in the district. The requirement of the parents to substantiate the last two of the above elements is reiterated in *N.J.A.C.* 6A:22-3.2(a)1i which provides that a student is not eligible to attend school in a district unless:

> The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

Where the above elements are not met, the resident shall be assessed tuition computed 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. *N.J.S.A.* 18A:38-1(b)1.

If the school board determines that the evidence does not support the validity of the claim of the resident for admission of a child whose parents or guardian do not live in the district, it may deny admission to the child and the resident may appeal to the Commissioner for a hearing. The resident "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 [the statute]." *N.J.S.A.* 18A:38-1(b)1.

Notwithstanding that an evidentiary hearing has not yet occurred, petitioner, as the resident in this matter, has not demonstrated that she could meet her burden of proof as she has consistently failed and refused to provide information to support a claim of hardship. I have considered the fact that petitioner is representing herself and may not have the legal sophistication of experienced counsel. However, her several submissions since the initial determination of the District rejecting the application to have N.R.L. attend the District schools as an affidavit student make it clear that she understands the critical question related to the District's rejection but has refused to answer it. Her brief and case and statutory citations leave no doubt that petitioner has not been handicapped in the presentation of her position or confused as to her obligations. It is not acceptable for petitioner to avoid answering the questions related to hardship by arguing that such information must come from the parents of N.R.L. since the statute (which she recites in her papers) is clear that the burden to establish the elements for qualification as an affidavit student rests with the resident who is petitioner. Therefore, I reject petitioner's contention in her brief that, "the question here is not whether there is a hardship rather who is required to provide the hardship information."

The Parent Affidavit in support of the application recites as the reason N.R.L. is not residing with her parents is that she wanted to move back to New Jersey and the reason she was placed in a home in the District was because she wanted to live with her grandmother. Those statements, without any elaboration or explanation, fall woefully short of satisfying the requirement of a sworn statement that the parents are not capable of supporting or providing care for the child due to a family or economic hardship. At best, these statements suggest that N.R.L.'s presence in the District was due to her own personal preference and not hardship. Petitioner missed this <u>first</u> opportunity to establish

hardship, but had ample subsequent chances to resolve this issue even if her complaint were meritorious that the initial Parent Affidavit form was ambiguous as to the need to present evidence of hardship.

Petitioner contends in her brief that the hardship information was provided in a letter she and her daughter submitted dated October 17, 2004. This letter is enlightening in several respects. It is signed by both petitioner and the mother of N.R.L. thereby negating any notion that the parent was not available or capable of providing such information or that petitioner had no means of exacting such information from the parent or parents. Moreover, based on a review of the letter, petitioner's contention that there is a family or personal hardship and that the hardship information was provided in the October 17 letter is not supported by the letter's contents. Despite knowing that the District had rejected the application because of the inadequacy of the information provided in the Parent Affidavit, the parent's reference to family hardship in the letter merely stated a conclusion and provided nothing as to the nature of the hardship or any evidence in support of the hardship claim. The recitation, "personal circumstances resulted in [N.R.L.] returning to New Jersey to live with her grandmother in Morris Township due to family hardship" certainly did not provide the District with any information whatsoever upon which it could evaluate the *bona fides* of a claim of hardship. Although the letter acknowledged that there appears to be a rather minor piece of information the Director of Pupil Services indicated was desired, both the resident and parent declined this second opportunity to provide this information. Petitioner's criticism of the lack of clarity of the questions on the Parent Affidavit is meaningless in view of her subsequent recognition of the District's demand for additional information.

In her November 16, 2004 response to the Commissioner of the District's Answer to her Petition, petitioner criticized the Parent Affidavit form for the absence of a statement that the parents needed to indicate a family hardship and complained that they did not realize the level of detail needed. Obviously, petitioner, at that point, was well aware that a level of detail in support of the hardship claim was necessary, but inexplicably declined to take this third opportunity to detail the hardship. Instead, petitioner argued that it is not her place to provide information about her daughter's personal business. Again, as the

resident, it was indeed her place to either provide such information or secure it from her daughter or N.R.L's father. She recited from *N.J.S.A.* 18A:38-1(b)(1) in the November 16 letter but ignored that part of the statute that requires that a parent's sworn statement that he is not capable of providing care for the child due to a family hardship be accompanied by documentation to support the validity of the sworn statements.

Subsequently, the District afforded petitioner an additional opportunity to support her application by advising her in December 2004 that it would be providing her with new forms to submit "for new consideration." The letter specifically advised that this process would give petitioner the opportunity to submit information that would permit N.R.L.'s registration to be made permanent. In her brief, petitioner does not indicate that she availed herself of the fourth opportunity to provide the necessary information, but instead referenced the revised questionnaire only to support her non-dispositive contention that the original questionnaire was deficient.

Finally, petitioner ignored a fifth opportunity to support the claim of hardship by refusing to answer clear and unambiguous interrogatories and requests for admissions that went to the critical issue in this matter by instead reiterating her earlier position that it is not her place to discuss someone else's personal business, obviously referring to her daughter and N.R.L.'s father. Again, as petitioner was the applicant for allowing N.R.L. to attend the District's schools as an affidavit student, it was her responsibility to ultimately provide support for the application or to obtain from others such information necessary to support that application. Petitioner has repeatedly complained about the process while blithely declining multiple opportunities to support a claim of hardship. In doing so, she has failed to satisfy the statutory obligations by which to establish N.R.L.'s eligibility to attend District schools. *N.J.A.C.* 1:1-10.1 provides that the purpose of discovery rules in an administrative proceeding is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. The 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. *Id.* Petitioner's responses gave the District no facts which tended to support her position.

After evaluating all of the submissions by petitioner and the parents, the only factual basis presented in support of the application to permit N.R.L.'s attendance in the District's schools as an affidavit student was that N.R.L. wanted to move back to the District and N.R.L. wanted to live with her grandmother. Such reasons do not establish that her parents are not capable of providing care for her due to a family hardship within the meaning of the statute. A petitioner must establish not only a family hardship but one that renders the parents not capable of caring for their child. *H.K and G.K on behalf of minor children J.K. and C.K v. Board of Education of the Township of Cherry Hill, Camden County,* http://law library.rutgers,edu/oaldecisions/initial/edu673-97.html.(1998). Petitioner has not presented any evidence that might establish either element. Accordingly, I **CONCLUDE** that petitioner has failed to present affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing and that the District is entitled to Summary Decision as a matter of law dismissing petitioner's claims. As petitioner has not contested the number of days in which N.R.L. attended the District's schools during the 2004-2005 school year or the daily per pupil cost for eighth graders, and in view of the above conclusion, I further **CONCLUDE** that the District is entitled to assess petitioner the sum of $11,778.38 in tuition for N.R.L. pursuant to *N.J.S.A.* 18A:38-1.

ORDER

It is hereby **ORDERED** that the District's Motion for Summary Decision be **GRANTED;** it is further **ORDERED** that petitioner's appeal of the determination of the District that N.R.L. is not entitled to a free public education in the District be **DISMISSED**, and it is further **ORDERED** that petitioner pay the District the sum of $11,778.38 in tuition for N.R.L. for the 2004-2005 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 2005
DATE

JESSE H. STRAUSS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 7, 2005
DATE

Mailed to Parties:

JUL 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

298-05

OAL DKT. NO. EDU 2380-05
AGENCY DKT. NO. 46-2/05

L.G., on behalf of minor children, B.S., K.W. and T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to petitioner by the OAL on July 30, 2005, providing petitioner with thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.[1]

IT IS SO ORDERED[2]

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05
Date of Mailing: 8/18/05

[1] It is noted that the pleadings in this matter contained a counterclaim for tuition by the Board. However, the instant file contains a letter, dated July 26, 2005 from Board counsel, Jeffrey F. Belz, to Administrative Law Judge James W. Faison stating that, at this point in time, after a full review of petitioner's submissions, the district has determined to allow petitioner's children to attend the Ewing schools free of tuition. *However*, he reports that the parties have agreed that the Commissioner's previous determination, #157-05 dated May 2, 2005, wherein he assessed tuition in the amount of $13,769.35 for 127 days of illegal attendance during the 2003-04 school year, remains in full force and effect.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

441-06

#441-06

OAL DKT. NO. EDU 9413-06
AGENCY DKT. NO. 282-8/06

M.M. and T.M., on behalf of minor child, E.M., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, : DECISION

RESPONDENT. :

:

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09413-06

AGENCY DKT. NO. 282-8/06

M.M. and T.M. on behalf of minor, E.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT,

Respondent.

George J. Cotz, Esq., for petitioner

Linda G. Ott, Esq., for respondent (Apruzzese, McDermott, Mastro, & Murphy, attorneys)

Record Closed: November 27, 2006 Decided: November 27, 2006

BEFORE **IMRE KARASZEGI, JR.,** ALJ

On August 15, 2006, the Commissioner of Education received Petitioner's application for emergent relief regarding the revocation of Petitioner's senior parking privileges on the school campus. On August 23, 2006, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a

contested case. On August 29, 2006, oral argument was presented in the Newark offices of the Office of Administrative Law before this Judge and, after hearing the arguments of counsel and any other documentation submitted, Petitioner's motion for emergent relief was denied. A hearing date was scheduled for October 27, 2006 at the OAL in Newark. Prior to the hearing, under letter dated October 18, 2006, counsel for the Board submitted the attached Settlement Agreement.

Having reviewed the record and the terms of the settlement I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 27, 2006
DATE

IMRE KARASZEGI, JR., ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

db

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Respondent

RECEIVED
2006 OCT 19 A 11:46
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

M.M. and T.M. o/b/o E.M.,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	
	:	
v.	:	OAL Docket No.: EDU 13-06
	:	Agency Ref. No.: 282-8/06
NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

THE WITHIN MATTER having been opened to the Court by George J. Cotz, Esq. Attorney for Petitioners and Respondent having been represented by Linda Ganz Ott, Esq.; and it appearing that the parties have resolved the issues amicably; the within action is dismissed, with prejudice, on the following terms:

1. Petitioner E.M.'s senior parking privileges shall be restored at the latest on November 1, 2006. If the senior parking privileges of any students are restored prior to November 1, 2006, E.M.'s parking privileges shall also be restored on the same date.

2. This Agreement settles a disputed claim and is not an admission of liability or wrongdoing by any party. Respondent expressly denies that it has violated any law, statute, policy, duty or obligation whatsoever.

3. Petitioners agree that this Stipulation of Settlement settles any and all claims against Respondent, its officers, employees, agents and assigns relating to the suspension of the senior parking privileges of E.M.

NORTHERN HIGHLANDS REGIONAL
HIGH SCHOOL BOARD OF EDUCATION

By: _____
Dr. Robert McGuire, Superintendent

Dated:

_____
Mark Manahan

Dated: 10-3-06

_____
Toni Manahan

Dated: 10-2-06

S:\CAP\Northern Highlands BOE\E.M. Stip of Settlement 9-11-06.doc

EXTRACT FROM THE MINUTES OF A MEETING OF
THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL
BOARD OF EDUCATION, BOROUGH OF ALLENDALE
BERGEN COUNTY, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, New Jersey, convened in Regular session on October 9, 2006at 8:00 p.m. in the Northern Highlands Regional High School, 298 Hillside Avenue, Allendale, New Jersey.

The following member(s) of the Board of Education were present: Mrs. Aversa, Mrs. Garand, Mrs. Gravina, Dr. Hands, Mrs. Kashishian, Mr. Kohn, Mr. Pessolano, Mrs. Trumbetti, Mrs. Winning

The following member(s) of the Board of Education were absent: Mrs. Loughnane

The following resolution was offered by Mrs. Winning and seconded by Mrs. Aversa and adopted by the Board of Education by the following Roll Call Vote:

RESOLVED: That the Board of Education approves the following Resolution of Pending Legal Matter:
WHEREAS, there is currently pending a matter before the Office of Administrative Law, M.M. and T.M. o/b/o E.M. v. Northern Highlands Regional School District, EDU 9413-06; and
WHEREAS, a proposed settlement has been negotiated between counsel for the Northern Highlands Regional High School Board of Education and counsel for Petitioners that would fully resolve all outstanding claims, issues and disputes involving the parties; and
WHEREAS the proposed settlement would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary for the continuation of the pending litigation; and
WHEREAS, no expense will be incurred by the Board pursuant to the proposed settlement.
NOW, THEREFORE BE IT RESOLVED that the Board approves the Stipulation of Settlement and authorizes the Superintendent to execute the written Stipulation of Settlement.

ROLL CALL: Ayes: 9 Nays : 0 Abstain: 0

STATE OF NEW JERSEY)
)ss
COUNTY OF BERGEN)

I, Gary S. Lane, Secretary of the Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on October 9, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said the Northern Highlands Regional High School Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 17th day of October, 2006.

Gary S. Lane, RSBA

Business Administrator/Board Secretary

440-06

LAURIE COLES, KAREN JIMENEZ, LINDA LYNCH, DAVID MILLER AND TRACIE MILLER, PATRICIA MURPHY, TRACIE LUCARELLO, FRANK DALY, JANET CONWAY, MARIE LIPSITZ, TARA SMALLZE AND DARREN SMALLZE, ELIZABETH BEVAN, KELLY BOUSHAY, LENNY HARRIS, CYNTHIA CRESCENZO, LISA DOWNEY AND MARK DOWNEY, CHERYL BUTLER, RUSSEL KING AND PATRICIA KING, MICHAEL LAROCCO AND ROBIN LAROCCO AND LAURA DEPINTO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged respondent Board's mandatory school uniform policy, which became effective September 25, 2006, and sought emergent relief for an order to declare the policy invalid. An emergent hearing was held on October 19, 2006. Respondent argued that petitioners cannot meet the criteria for emergent relief, and that the petition was untimely filed.

On November 2, 2006, the ALJ issued an Order on emergent relief, finding, *inter alia,* that the petitioners failed to timely file their claims under the 90-day rule, and sufficient justification was not demonstrated to relax the rule. The ALJ dismissed the petition.

The Commissioner found that the ALJ had conclusively resolved this matter on procedural grounds of untimeliness, notwithstanding that her decision was issued in the form of an Order. Therefore, the Commissioner treated this matter as an Initial Decision pursuant to *N.J.A.C.* 1:1-18.3, and afforded the parties 13 days from the date of notice of such to submit exceptions and reply exceptions. Petitioner's exceptions were subsequently late filed, and not considered in reaching a final decision. The Commissioner concurred with the ALJ that the petition was untimely, and accordingly adopted the decision of the OAL dismissing the matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 10535-06
AGENCY DKT. NO. 365-10/06

LAURIE COLES, KAREN JIMENEZ, LINDA LYNCH, DAVID MILLER AND TRACIE MILLER, PATRICIA MURPHY, TRACIE LUCARELLO, FRANK DALY, JANET CONWAY, MARIE LIPSITZ, TARA SMALLZE AND DARREN SMALLZE, ELIZABETH BEVAN, KELLY BOUSHAY, LENNY HARRIS, CYNTHIA CRESCENZO, LISA DOWNEY AND MARK DOWNEY, CHERYL BUTLER, RUSSEL KING AND PATRICIA KING, MICHAEL LAROCCO AND ROBIN LAROCCO AND LAURA DEPINTO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – which included the audiotape of proceedings conducted at the Office of Administrative Law (OAL) on October 19, 2006 – and the Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, it was evident that the ALJ had conclusively resolved this matter on the procedural grounds of untimeliness of the petition, notwithstanding that her decision was issued in the form of an Order. Therefore, by letter dated November 21, 2006 – transmitted by facsimile and regular mail – the Director of the Bureau of Controversies and Disputes advised the parties that the Commissioner would be treating this matter as an Initial Decision, pursuant to *N.J.A.C.* 1:1-18.3 and, as such, they would be afforded 13 days from the date of this letter to submit exceptions and reply exceptions – in accordance with

N.J.A.C. 1:1-18.4 – to the ALJ's conclusion that this matter was untimely filed.[1] Petitioners' exceptions – dated and filed by facsimile on December 5, 2006 – were untimely and, thus, are not considered herein.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ, for the reasons detailed on pages 4-7 of her decision, that this matter is appropriately dismissed as it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(d) and petitioners have provided no factual or legal justification which would warrant relaxation of this rule.

Even assuming, *arguendo*, that untimeliness had not barred consideration of the instant petition, the Commissioner agrees with the ALJ that petitioners' request for emergent relief must be denied as they have failed to satisfy any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). She further agrees – again for the reasons set forth in the decision – that the collateral "as applied" claims of the LaRocco's and Miller's must also be dismissed. Finally, the Commissioner would decline to award any relief to parent D.G., as this individual is not a party to this matter.

Accordingly, the Commissioner adopts the decision of the OAL dismissing this matter as untimely pursuant to *N.J.A.C.* 6A:3-1.3(d). By copy of this decision, the Commissioner requests that any vestiges of this matter remaining at the OAL be returned to the Agency.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

---

[1] *N.J.A.C.* 1:1-12.6 makes no provision for the filing of exceptions or reply exceptions to an emergent relief Order.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

December 8, 2006

Karen R. White Morgen, Esq
Robert A. Vort, LLC
2 University Plaza, Suite 200
Hackensack, New Jersey 07601

Robert J. Merryman, Jr., Esq.
Apruzzese, McDermott, Mastro & Murphy
25 Independence Boulevard
P.O. Box 112
Liberty Corner, NJ 07938

Dear Parties:

LAURIE COLES, KAREN JIMENEZ, LINDA LYNCH, DAVID MILLER AND TRACIE MILLER, PATRICIA MURPHY, TRACIE LUCARELLO, FRANK DALY, JANET CONWAY, MARIE LIPSITZ, TARA SMALLZE AND DARREN SMALLZE, ELIZABETH BEVAN, KELLY BOUSHAY, LENNY HARRIS CYNTHIA CRESCENZO, LISA DOWNEY AND MARK DOWNY, CHERYL BUTLER, RUSSEL KING, ROBIN LAROCCO AND LAURA DEPINTO V. BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, AGENCY DKT NO. 365-10/06, OAL DKT NO. EDU 10535-06, COMMISSIONER DECISION NO. 440-06

We are enclosing a copy of the decision of the Commissioner of Education dated December 8, 2006, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/pp:o/dec ltr/lcoles-440-06
Enclosure
c: Jones Addo, State Library
Mumtaz Bari-Brown, Adm. Law Judge
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO EDU 10535-06
AGENCY DKT. NO. 365-10/06

LAURIE COLES, KAREN JIMENEZ, LINDA LYNCH, DAVID MILLER and TRACIE MILLER, PATRICIA MURPHY, TRACIE LUCARELLO, FRANK DALY, JANET CONWAY, MARIE LIPSITZ, TARA SMALLZE, and DARREN SMALLZE, ELIZABETH BEVAN, KELLY BOUSHAY, LENNY HARRIS, CYNTHIA CRESCENZO, LISA DOWNEY, and MARK DOWNEY, CHERYL BUTLER, RUSSELL KING and PATRICIA KING, MICHAEL LAROCCO and ROBIN LAROCCO and LAURA DEPINTO,

Petitioners,

v

BAYONNE BOARD OF EDUCATION,

Respondent.

Karin R. White Morgen, Esq., and **Robert A. Vort,** Esq., for petitioners
(Robert A. Vort, LLC, attorneys)

Robert J. Merryman, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

On October 16, 2006, the Commissioner of Education transmitted the matter to the Office of Administrative Law ("OAL") for determination as a

contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On October 19, 2006, an emergent hearing was held and subsequent to presenting oral argument, the parties submitted a post argument summary.

Board of Education ("Board" or "Respondent") from enforcing a mandatory school uniform policy and to declare the policy invalid.

Petitioners David and Tracie Miller claimed a religious exemption from the school uniform policy for their children.

Petitioners Michael and Robin LaRocco claimed a medical exemption from the school uniform policy for their child.

Parent D.G. submitted a certification dated October 18, 2006, and appealed the denial of her application for a medical exemption from the school uniform policy for her child, M.G. D.G. is not listed as a party in this matter. Notwithstanding the omission, her request shall be addressed.

Respondent opposes the petition and application for emergent relief. The Board argues that petitioners cannot meet the elements for emergent relief. Further, the Board contends that the petitions are untimely under N.J.A.C. 6A:3-1.3(i).

FACTS

Based on the petition and certifications I **FIND** the following relevant **FACTS**.

1. Petitioners, parents of children who attend the Bayonne School District grades Pre-K to 8, seek emergent relief for an order to restrain respondent Bayonne. On June 19, 2006, the Board adopted a mandatory School Uniform Policy No. 5511. ("Policy") pursuant to N.J.S.A. 18A:11-8.

2. The Policy became effective September 25, 2006.

3. On June 28, 2006, the Board adopted the Regulations, "Dress and Grooming-Elementary School R. 5511.1", providing for implementation, procedures and consequences for non-compliance of Policy 5511.

4. On July 26, 2006, the Board amended the regulation, which it originally adopted on June 28, 2006.

5. The June 28, 2006 regulation required student compliance within three (3) school days of a Policy violation, and included as potential discipline, detention, in-school suspension, and loss of privileges such as playing for school sports teams, and participation in school sponsored activities.

6. The regulation as amended on July 26th, required compliance within five (5) school days of a violation, and included discipline or detention and loss of privileges. The provision allowing suspension was removed.

7. On August 29, 2006, the Board amended Policy 5511 to delete in school suspension for repeated violations of the Policy.

8. The Policy contains opt-out provisions for students on religious and medical grounds.

ISSUES

The issues are whether Petitioners have timely filed their petitions and if, so, have they met all requirements for emergent relief.

DISCUSSION

90-DAY RULE

The N.J. Administrative Code provides that a Petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.4. See N.J.A.C. 6A:3-1.3(a) and (i). In addition to serving the petition upon each Respondent, the petition must be filed:

> No later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

In Kaprow v. Berkeley Twp. Bd. of Educ., the N.J. Supreme Court held that adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. 131 N.J. 572, 587 (1993). Specifically, the 90-day period begins to run when the Petitioner "learns or reasonably should learn [of] the existence of that state of facts which may equate in law with a cause of action." Id. at 587 (citing Burd v. N.J. Tel. Co., 76 N.J. 284, 291 (1978)). Therefore, the 90-day period begins to run when a Petitioner knows or reasonably should know of facts that would enable him to file a timely claim.

Here, the Board took action on June 19, 2006. The parents had a right to know about the Board's action. The Board adopted the resolution at a public meeting, which the Petitioners were permitted to attend, and notice that the Policy had been adopted was disseminated shortly thereafter. Subsequently, on June 26, 2006, the Board enacted regulations implementing the policy, which it later amended on July 26, 2006. On August 29, 2006, the Board amended the Policy to remove in school suspension as a potential discipline for chronic non-compliance.

I am persuaded that Petitioners' challenge is based upon the Board's initial action in implementing the mandatory school uniform policy. See Petition at 1. Indeed, Petitioners do not challenge the subsequent regulation amendments, nor do they challenge the change in wording that was adopted on August 29th. Therefore, the Petitioners had notice that the Policy had been adopted on or about June 19th, and the 90-day period began to run on that date. The Petitioners filed their petition with the Bureau of Controversies and Disputes on October 10, 2006, approximately 113 days after the dress code was amended to become the uniform Policy. Consequently, unless good cause exists to justify relaxation of the rule, Petitioners claim is fatally time-barred, and must be dismissed.

The 90-day rule has been strictly followed, and applied almost without exception. In Dreher v. Jersey City Bd. of Educ., Petitioner filed his petition two days out of time, and the matter was dismissed as untimely. OAL Dkt. No. EDU 2777-87 (December 18, 1987), adopted Comm'r (February 2, 1988), aff'd St. Bd. of Educ. (July 8, 1988). Regardless of whether the board complies with statutory or administrative requirements, the Petitioner is required to file the petition no later than 90 days after receipt of notice. Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381, 383. But see Eisenberg v. Fort Lee Bd. of Educ., 2003 WL 23643569 (St. Bd. of Educ.) (holding that because the Petitioner learned of new facts that gave rise to an additional claim, the 90-day rule did not start running until the date of notice of those facts). Moreover, attempts to resolve a dispute with a school board through avenues other than litigation will not serve to toll the 90-day rule. Wise v. Trenton Bd. of Educ., 2000 WL 34401734 (Requests to a board of education for reconsideration of its final determination do not toll the 90-day rule). See also Pacio v. Lakeland Regional School District Bd. of Educ., 1989 S.L.D. 2060, 2069. Here, the 90-day rule must be applied to the Petitioners claims.

Petitioners received notice of the Policy on or about June 19, 2006, but took no action until October. They assert that the "final action" of the board took

place on August 29, 2006. However, the finality of the Board's action is not the standard. Considering that the rule specifically includes "final orders", "rulings" or "other actions", and specifically refers to "notice of" any of those actions, the proper standard is when Petitioners had or reasonably should have had notice of the Board's action. N.J.A.C. 6A:3-1.3i. Petitioners' assertion that the Board did not comply with statutory and administrative requirements in adopting the Policy, and that the policy is facially defective because it does not contain a provision for low income students is unsupported. Procedural and statutory non-compliance does not exempt petitioners from the rules' requirement. Moreover, the amendments and any ongoing dialogue between the Board and parents are of no moment in terms of when the 90-day period began to run. The rule cannot be tolled. The facial challenge does not fall within the purview of Eisenberg because no new facts that would give rise to additional claims that have come to light since the Board's action on June 19, 2006. Therefore, the facial challenge to the Policy for all Petitioners is out of time.

I have considered the circumstances presented and N.J.A.C. 6A:3-1.16, which allows relaxation of the rule in exceptional cases. DeMaio v. New Providence Bd. of Educ., held that the authority to relax or waive the rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur. 96 N.J.A.R.2d (EDU) 449, 453 (citing Gordon v. Passaic Bd. of Educ., 1985 S.L.D. 1929, 1931, aff'd, A-3294-84 (App. Div. May 27, 1986), certif. denied, 105 N.J. 534 (1986)). Brunetti v. Borough of New Milford, further exempted three types of cases from the 90-day rule; (1) cases involving important and novel Constitutional questions, (2) informal or *ex parte* determinations of legal questions by administrative officials, and (3) important public, rather than private, interests which require adjudication or clarification. 68 N.J. 576, 586 (1975). None of these exceptions applies in this case.

There is no novel Constitutional question over which this tribunal has jurisdiction. "Normally, in administrative proceedings, Petitioners can attack the

Constitutionality of rules as applied, but they may not mount facial attacks." 37 New Jersey Practice, Administrative Law and Practice, § 3.8, at 107 (Lefelt, Miragliotta and Prunty) (2d Ed. 2000). "Pure legal questions are reserved for the courts. Accordingly, an agency has no power to determine the Constitutionality of a statute on its face." Ibid. The Commissioner of Education and ALJs do not have authority to strike down statutes, rules, etc. Ibid. Thus, there is no jurisdiction for an ALJ to consider a facial Constitutional challenge.

On the other hand, in "as applied" challenges, the question involves whether an agency is applying its rule in such a way as to violate an individual's Constitutional rights. Ibid. Here, it would appear that the Petitioners assert that the statute enabling public schools to enact uniform policies is unconstitutional, and as such, any action taken under the authority of the statute is tainted. Petitioners also question whether the Board's actions in implementing the Policy were in violation of the statute and applicable school laws. A challenge of this sort does not justify relaxing the 90-day rule. Alleged school board violations of applicable statutes and regulations are the reason the 90-day rule exists; to obtain prompt resolution of school Board malfeasance, and to provide a measure of repose to parties. See Kaprow, 131 N.J. at 582. Therefore, in order to challenge the Board's actions as unconstitutional, Petitioners must challenge the statute authorizing its' action in Superior Court. Had Petitioners timely filed this petition, they could have challenged the Board's actions as unconstitutionally violative of applicable statutes and regulations. However, those claims are barred by the 90-day rule.

Additionally, there was no informal or ex parte rulemaking. All proceedings in this matter were open to the public and were formal, regardless of whether the Petitioners attended. The interests here, though not purely private, are not justifiable in this forum for the above noted reasons. As a result, no valid reason exists that would justify relaxation of the 90-day rule.

EMERGENT RELIEF

The standard for granting emergent relief is set forth in N.J.A.C. 6A:3-1.6, and Crowe v. DeGioia;

1. The Petitioner will suffer immediate and irreparable harm if the requested relief is not granted;

2. The legal right underlying the Petitioner's claim is settled;

3. The Petitioner has a substantial 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 would the Respondent if the relief is not granted. 90 N.J. 126 (1982); N.J.A.C. 6A:3-1.6; See also W.L.B. and K.B. v. Bd. of Educ. of Woodbury Sch. Dist., 96 N.J.A.R.2d (EDU) 695 (1996).

Emergent relief is awarded as an "extraordinary equitable remedy ... [and] must be administered with sound discretion and always upon the considerations of justice, equity, and morality." Zoning Bd. of Adj. v. Service Electric Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985). Assuming, arguendo, that the challenge were not time barred, Petitioners must satisfy the applicable standards.

First, Petitioners' contend that if the students continue in non-compliance with the Policy, they will suffer irreparable harm, i.e., detentions, exclusion from school sponsored activities, and potential ostracism. I reject Petitioners' argument. No irreparable harm results if students are temporarily required to comply with the Policy, and wear the school uniform, pending the outcome of this case.

Second, Petitioners must demonstrate they are entitled to relief. Notwithstanding the 90-day rule, Petitioners have not demonstrated that they have a legal right to demand a moral opt-out provision in the Policy. The statute does not require any opt-out provisions, nor does it prescribe or proscribe what provisions, if any, a school may include.

Third, as to the likelihood of success on the merits, Petitioners have not shown that they have a substantial likelihood of success.

Finally, when the balance of equities is weighed, the Board's need to implement and to enforce a school uniform policy outweighs Petitioners' desires not to have their children wear the school uniform. Temporary compliance with the Policy will not be unduly burdensome. Therefore, assuming arguendo that the 90-day rule has not barred the filing, Petitioners would not have been able to satisfy the standard.

As to Petitioners LaRocco, Miller and parent D.G., whose collateral "as applied" claims remain, only D.G. satisfies the emergent relief standard.

PETITIONERS MICHAEL AND ROBIN LAROCCO

Petitioners Michael and Robin LaRocco have requested their child be granted an exemption from the school uniform policy. Their petition must be dismissed under N.J.A.C. 6A:3-1.3(a) and (i). The Board must have taken action in order for a petitioner to bring a challenge. Ibid. Petitioners LaRocco have requested a medical exemption. However, they concede that the Board has not acted on their application. The LaRocco's have failed to assert any action by the Board that would constitute a denial of their request. Therefore, the requirements of N.J.A.C. 6A:3-1.3(a) and (i) have not been met, and their petition must be dismissed as premature.

PETITIONERS DAVID AND TRACIE MILLER

Petitioners David and Tracie Miller have requested that their children be exempted from the Policy on the grounds that a mandatory uniform policy irreconcilably conflicts with their religious beliefs. They claim that the Board acted in violation of their First Amendment free exercise rights when it requested more information from them in response to their application.

First, the Miller's claim is premature because the Board has taken no formal action as to their application. See discussion of N.J.A.C. 6A:3-1.3(a) and (i) supra. No further documentation has been submitted indicating that the Board has formally denied the exemption. The Millers asserted that the school Principal verbally informed David Miller that the application would be denied for failure to complete the application process. Petition at 7. The Board has not disputed the assertion. However, the Principal's alleged statement does not constitute action by the Board. The Principal does not speak on behalf of the school Board, nor is she authorized to make decisions on the Board's behalf. The Miller's petition is premature.

Assuming, arguendo, that the Miller's petition is timely, their claim requires that two threshold elements to be met before religious beliefs are accorded First Amendment protection. Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981). A court's task is to decide whether the avowed beliefs are (1) sincerely held, and (2) religious in nature. Ibid.; see United States v. Seeger, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed.2d 733 (1965); see also Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981). If either of these two elements is not satisfied, the Court need not reach the merits of whether a legitimate and reasonably exercised state interest outweighs the proffered First Amendment claim. Africa 622 F.2d at 1030. It is inappropriate for any court to attempt to assess the verity of an asserted religious belief. The U.S. Supreme Court held, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Hicks v. Halifax County

Bd. of Educ., 93 F. Supp. 2d 649, 657 (E.D.N.C. 1999), citing Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). However, the truth of an asserted belief may not be questioned by a governmental entity. 380 U.S. at 185. Whether the belief is truly religious in nature, and whether it is sincerely held remains a threshold question into which the government may inquire. Ibid. Without some sort of required showing of sincerity from the individual seeking protection, the First Amendment would become a limitless excuse for avoiding all unwanted legal obligations. Africa, 622 F.2d at 1030.

Indeed, the courts have consistently allowed governmental entities to inquire into the actual religiousness of the asserted views, and the sincerity with which they are held. However, inquiries must be undertaken with extreme caution. I/M/O Alan Paul Sherr, 672 F. Supp. 81, 95 (E.D.N.Y. 1987) (An investigation by the school district found that the "temple" to which Petitioners claimed that they belonged was a sham because it held no services, had no organization or structure, operated out of the founder's home, and was essentially a "mail order church"; The school's actions in investigating were not questioned by the Court); See United States v. Ballard, 322 U.S. 78, 64 S. Ct 882 (1944); Wilkins v. Penns Grove-Carney's Point Reg. Sch. Dist., 123 Fed. Appx. 493, 2005 U.S. App. LEXIS 2491 (3d Cir. 2005); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

As to the Miller's application, the Board has not asked whether the Millers' beliefs are truly religious. Rather, it is constitutionally permissible for the Board to verify the sincerity of the applicant's belief. Indeed, the Board is prepared to exempt any student provided the parents document the sincerity of their religious beliefs.

The Board used the questionnaire to verify the sincerity of the Miller's asserted beliefs. The Millers claimed that it was "onerous" and "intrusive" and they refused to answer the questionnaire. Bearing in mind that a school district

may not inquire as to the verity or reasonableness of the Miller's beliefs, but only whether the beliefs are sincere and "religious" in nature, the questionnaire was reasonable. It asked nothing more than twelve "yes" or "no" questions related to whether the Millers or their children currently ware, or ever had worn, a uniform for any purpose; professional, recreational, educational or religious. A governmental entity such as a school board is entitled to make an inquiry when an individual subject to their authority makes a request for religious exemption. Perhaps more importantly, unless required by statute, governmental entities are not bound to grant exemptions based on bald assertions. Therefore, the Bayonne Board of Education would be completely within its rights in refusing to grant the application on this basis.

Consequently, in addition to being premature, the Miller's claim must be dismissed because the Board acted within its rights by making further inquiries into the applicants conduct.

PARENT D.G.

Parent D.G. has requested a medical exemption for her son, M.G., which the Board denied on or about October 13, 2006. The July 26, 2006 regulation provides that a student may wear a uniform of alternative material or non-uniform clothing, "upon presentation of proper medical documentation, approved by the Chief Medical Inspector of the school district". D.G. claims that her son has "fine motor incoordination, Asperger's Syndrome, and tactile hypersensitivity". Further, M.G. is physically unable tolerate wearing any clothing with collars, snaps, buttons or zippers. The uniform for boys requires either pants or shorts, and a collared polo shirt with three buttons. Sweat pants and district logo T-shirts may only be worn for physical education class. George Mellendick, M.D. and Chief Medical Inspector, denied the exemption as a whole.[1] Unlike Principal

[1] Dr. Mellendick permitted D.G. to dress her son in sweat pants instead of regular pants or shorts.

Quinn's alleged comments to Mr. Miller Dr. Mellendick's denial of the exemption was on behalf of the Board, and was sanctioned by the Board,.

The standard for emergent relief has been satisfied. M.G. cannot wear collared shirts or clothing with buttons, the school polo has both. M.G.'s educational progress and medical wellbeing are likely to suffer irreparable harm if the policy is enforced as to him. The school uniform policy contains an exemption for medical reasons. Therefore, the legal right underlying D.G.'s claim is settled. Given the uncontested facts, D.G. has a substantial likelihood of success on the merits. When the balance of equities is weighed, the child's interests (medical condition) outweigh the interest of the Board in enforcing the policy as to him. Therefore, D.G. has satisfied both the timeliness standard, and the standards governing emergent relief.

CONCLUSIONS

I **CONCLUDE** that Petitioners have not timely filed their claims under the 90-day rule. N.J.A.C 6A:3-1.3i. I further **CONCLUDE** that petitioners have not demonstrated sufficient justification to relax the rule the 90-day

Therefore, Petitioners' challenge to the Policy is hereby **DISMISSED**.

I **CONCLUDE** that even if the 90-rule did not apply, Petitioners would not have satisfied the stands for emergent relief. Therefore, Petitioners' application would be **DENIED** and their petitions would be **DISMISSED**.

I **CONCLUDE** that the claim of Petitioners Michael and Robin LaRocco for a n exemption is not ripe for adjudication. Therefore, their claim is **DISMISSED.**

I **CONCLUDE** that the Miller's claim is premature because the Board has not acted upon petitioners' request for religious exemption. Additionally, I

CONCLUDE that the Board acted reasonably regarding the application. Therefore, the Miller's claim is **DISMISSED.**

I **CONCLUDE** that D.G. has satisfied the standard for emergency relief, provided she file a motion to amend the petition and be a named party to this case.

It is so **ORDERED.**

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 2, 2006
DATE

MUMTAZ BARI-BROWN, ALJ,

sej/nd

438-06

OAL DKT. NO. EDU 9568-06
(EDU 1320-06 ON REMAND)
AGENCY DKT. NO. 302-10/05

B.L.E. on behalf of minor child I.L.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The petition and respondent's counter claims are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

Lucille Edday

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 09568-06N

Agency Ref. No. 302-10/05

B.L.E. ON BEHALF OF MINOR CHILD, I.L.W.

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE ESSEX COUNTY

Respondent.

Brenda L. Ellis., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: September 26, 2006 Decided: November 16, 2006

BEFORE **CARIDAD F. RIGO**, ALJ:

On January 12, 2006, this matter was transmitted to the Office of Administrative Law by way of an application for due process filed by petitioners B.L.E. on behalf of I.L.W., challenging the Board of Education's residency determination. (Docket Number EDU 1320-06N)

A hearing was scheduled on May 8, 2006 at the OAL, 33 Washington Street, Newark, New Jersey, during which time the parties reached a settlement. On May 23, 2006, the parties prepared and submitted a settlement and the undersigned rendered an Initial Decision/Settlement on May 24, 2006.

On August 31, 2006 this matter was remanded to the Office of Administrative Law because the settlement did not contain a copy of the Board's resolution approving the settlement nor did was it signed by the Board's attorney.

September 26, 2006 the Board's attorney forwarded a copy of an extract of the Board minutes, certified by the Board Secretary, from its May 22, 2006 meeting wherein the settlement was approved by the Board which are incorporated herein by reference.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their authorized representatives and/or as further evidenced by the recording of the official minute book as attached hereto.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 16, 2006
DATE

CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

11-22-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

RECEIVED
2006 MAY 24 P 1:15

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 1320-2006
AGENCY REF. NO. 302-10/05

B.L.E., ON BEHALF OF MINOR CHILD, I.L.W.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws her petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Petitioner shall pay respondent the sum of $300 in full settlement of all tuition charges. Payment shall be made within 15 days of the approval of this settlement by the Commissioner of Education.

(4) If petitioner does not make payment within 15 days of the Commissioner's approval of the settlement, respondent shall be entitled to the entire amount of tuition for the period of I.L.W.'s school attendance in West Orange.

(5) The settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payment previously made by petitioner shall be refunded by respondent.

(6) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

Brenda L. Elllis, Petitioner

Rachel Woodson, Parent

Attest:

Secretary

Board of Education of
The Township of West Orange

By: _____
President

EXTRACT FROM THE MINUTES OF A MEETING OF THE WEST ORANGE PUBLIC SCHOOLS BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

RECEIVED
2006 SEP 26 A 4:01
STATE OF NEW JERSEY
OFFICE OF THE COUNTY

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on May 22, 2006 at 8:00 P.M., at Edison Middle School, 75 William Street, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mrs. Garnes, and seconded by Mr. Petigrow, and adopted by the Board of Education by the following roll call vote:

Stipulation of Settlement: B.L.E. v. West Orange Board of Education.

ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

Abstain: None

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 22, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 13th day of July 2006.

Mark A. Kenney
Business Administrator/Board Secretary

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 973-736-1636
FAX : 973-243-0505

RECEIVED
2006 SEP 26 A 4:00
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

September 25, 2006

Hon. Caridad F. Rigo, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: B.L.E. o/b/o I.L.W. v. Board of
Education of the Township of
West Orange
OAL Docket No. EDU 01320-06

Dear Judge Rigo:

Relative to the above remanded case, I enclose an extract of the Board minutes, certified by the Board Secretary, from its May 22, 2006 meeting wherein the settlement was approved by the Board.

I trust this will satisfy the Commissioner and Your Honor can resubmit her Initial Decision with the stipulation of settlement.

Please advise as to whether the October 2 telephone conference will still be necessary.

Very truly yours,

Stephen J. Christiano
Board Attorney

SJC:mpc
Enc.

cc: Brenda L. Ellis

437-06

#437-06 R

OAL DKT. NO. EDU 9569-06
(EDU 9292-05 ON REMAND)
AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the seventh paragraph of the agreement states that the settlement "is conditioned upon approval of the board." In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement, nor, in the alternative, is the agreement executed (as opposed to witnessed) by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for supplementation of the record and/or revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06
Date of Mailing: 12/08/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09569-06
AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner (LaRocca, Feeley, Smith & Rosellini, attorneys)

Marvin L. Comick, Esq., for respondent (Love and Randall, attorneys)

Record Closed: October 19, 2006 Decided: October 23, 2006

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 31, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Release indicating the terms of settlement, which was received by the undersigned on October 19, 2006

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 23, 2006
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10/25/06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 211
South Orange, NJ 07079
Attorney for Petitioner, Mitchell Viteillo

MITCHELL VITIELLO Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOR-09292-2005N
ORANGE BOARD OF EDUCATION, Respondent.	:	Agency Reference No.: 130-5/05 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Orange Board of Education (the "Board") with administrative offices located at 451 Lincoln Avenue, Orange, New Jersey, 07050 and Mitchell Vitiello (the "Petitioner"), whose address is 5 Roland Road, Peaquannock, New Jersey 07440. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on March 8, 2004, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on March 8, 2004, while Petitioner was in the employ of the Board; and

WHEREAS, on February 25, 2005, the criminal complaint against Petitioner was dismissed pursuant to a not-guilty verdict after trial; and

WHEREAS, Petitioner filed a Petition of Reimbursement with the Commissioner of Education on or about May 18, 2005, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement

from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on July 25, 2005, the board filed its answer to the Petition of Reimbursement with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Twelve Thousand Dollars ($12, 000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Petitioner, in consideration of this Agreement, herby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Reimbursement.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE ORANGE BOARD OF EDUCATION:

By: _____ By: _____

ADEKUNLE JAMES, BUSINESS ADMINISTRATOR , Witness

Date: 4-11-06

PETITIONER:

_____ 4-25-06

Mitchell Vitiello

Date: 4-21-06

Sworn and subscribed to before me this
25 day of April, 2006

_____

Notary Public

ZINOVIA HATZIPETROS
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL

MARVIN L. COMICK

JOHN C. LOVE - 1964-1989

57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(973) 674-6000
FAX: (973) 674-8813

loveandrandallesqs@verizon.net

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN LAW
2006 OCT 19 P 3:43

October 17, 2006

Timothy R. Smith and Associates, LLC
Attorneys-at-Law
76 South Orange Avenue
Suite 211
South Orange, New Jersey 07079
Attn.: Timothy R. Smith, Esq.

RE: MITCHELL VITIELLO vs. ORANGE BOARD OF EDUCATION

Mr. Smith:

Enclosed please find amended Stipulation signed by Board President. I apologize for delay. Kindly have your client sign and forward same to court.

If you have any questions or concerns, please advise.

Very Truly Yours,

LOVE & RANDALL, ESQS.

BY Marvin L. Comick/as
MARVIN L. COMICK

MLC:as
Enc.
CC: Judge Edith Klinger, A. L. J.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE ORANGE BOARD OF EDUCATION:

By: Patricia Arthur

PATRICIA ARTHUR, BOARD PRESIDENT

Date: 10/13/06

By: _____, Witness

MARVIN L. COMICK
Attorney at Law
State of New Jersey

PETITIONER:

_____

Mitchell Vitiello

Date: _____

Sworn and subscribed to before me this
_____ day of _____, _____

_____

Notary Public

436-06

#436-06SEC

IN THE MATTER OF CARMELO GARCIA,	:	
HOBOKEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION

SYNOPSIS

The School Ethics Commission determined that respondent, a member of the Board of Education of the City of Hoboken, committed two separate violations of *N.J.S.A.* 18A:12-24(c) at a Board meeting in August 2005 when he voted for: 1) the appointment of his brother to a paid position with the school district; and 2) the approval of a contract with a public relations firm owned by a Hudson County Freeholder, when respondent was an employee of Hudson County. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand upon the respondent.

Upon a thorough review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Carmelo Garcia be reprimanded as a school official found to have violated the School Ethics Act.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 8, 2006

AGENCY DKT. NO. 390-10/06

IN THE MATTER OF CARMELO GARCIA,	:	
HOBOKEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent – a member of the Board of Education of the City of Hoboken – based upon the Commission's finding that he committed two separate violations of *N.J.S.A.* 18A:12-24(c) at a single Board meeting on August 30, 2005. Upon issuance of the Commission's decision, respondent was provided thirteen days from the mailing of such decision to file written comments on the Commission's recommended penalty for consideration by the Commissioner. No such comments were filed.

Upon review, the Commissioner initially emphasizes that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable herein. Rather, the Commissioner's jurisdiction is limited to review of the sanction recommended by the Commission following its finding of violation.

In light of that standard, the Commissioner determines to accept, for the reasons expressed in the Commission's decision, the recommendation that reprimand is the appropriate penalty in this matter. In so holding, the Commissioner notes that the Commission considered

the facts presented and took the operative circumstances into account, reasonably concluding that its recommended penalty was commensurate with the violations found. Therefore, the Commission's recommendation will not be disturbed by the Commissioner.

Accordingly, IT IS ORDERED that Carmelo Garcia be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket #C41-05**
CARMELO GARCIA,	:	
HOBOKEN BOARD OF EDUCATION	:	**DECISION**
HUDSON COUNTY	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Theresa Burns alleging that Hoboken Board of Education (Board) member Carmelo Garcia violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when he participated in discussions with the Hoboken superintendent regarding employment for his brother and then, on August 30, 2005, voted for the appointment of his brother to a paid position in violation of N.J.S.A. 18A:12-24(b). The complaint further alleged that, during the week of September 5, 2005, respondent attempted to coerce an employee of the district to alter the minutes of the aforementioned meeting to state that he had abstained from voting on his brother's employment, when he had not. Last, the complaint alleged that, at the August 30, 2005 meeting, respondent voted to approve a contract with a local public relations firm, Fitz Media, Inc., which is owned by Mr. Maurice Fitzgibbons, who is an elected Hudson County Freeholder. Respondent is employed by Hudson County. The complaint alleges that respondent violated N.J.S.A. 18A:12-24(c) by the above conduct.

Respondent filed his answer to the complaint setting forth that he was distracted and inadvertently voted on the appointment of his brother. He stated that he brought it to the attention of the acting board secretary that same evening and requested in writing that his vote be changed to an abstention. He denied in any way trying to pressure staff into changing the minutes. He further denied that he had any conflict of interest with Fitz Media since he was not an employee of Mr. Fitzgibbons, but an employee of the county. He denied having violated the School Ethics Act.

The parties were advised that the Commission would discuss this matter at its meeting on February 28, 2006 and further advised that they could present witnesses and testimony. Complainant Theresa Burns appeared with her attorney, Christopher Farella, Esq. At its public meeting on that date, the Commission voted to table the matter for additional information. The matter was not discussed at the March 28, 2006 meeting because only five Commission members were present and one of the five recused himself. Thus, the Commission did not have a quorum to discuss the case. At the next meeting of the Commission on April 25, 2006, the Commission voted to find probable cause to credit the allegations that Mr. Garcia violated N.J.S.A. 18A:12-24(c) when he voted for his brother's appointment and voted in favor of the Fitz Media contract. The Commission found no probable cause and dismissed the charges that respondent had attempted to intimidate a District employee in violation of N.J.S.A. 18A:12-24(b). The

Commission did not find any evidence that respondent exerted any pressure on any administrator in connection with the hiring of his brother or the subsequent request to have his vote changed to an abstention.

The Commission found that the material facts were not in dispute regarding the conduct on which it found probable cause and therefore, invited respondent to provide a written submission within 30 days from receipt of the decision setting forth why Mr. Garcia should not be found in violation of N.J.S.A. 18A:12-24(c) of the Act. The decision was sent on July 17, 2006.

Respondent submitted a timely response through his attorney, David Rubin, on August 10, 2006. Therein, he argues that there should be no distinction drawn between a board member changing a vote publicly during a meeting and waiting until after the meeting and leaving a note to that effect. In addition, Respondent argues that the meeting had not yet concluded when he left the note because the Board was still in closed session deliberating over a controversial appointment. Therefore, he argues that it is unreasonable to conclude on these facts that respondent acted unethically in connection with the vote on his brother. With regard to the Fitz Media contract, respondent argues that he is not employed by Freeholder Fitzgibbons, but by the county, which assigned him to work with the Freeholder closest to his residence. Therefore, he argues this charge should either be dismissed or, if the Commission's finding is based on a direct employment relationship, he should be entitled to a plenary hearing on the issue of whether such a relationship exists. Further, he argues that a material issue of fact exists regarding his contention that he received legal advice that he could vote on the Fitz Media contract.

FACTS

The Commission was able to discern the following facts based on the pleadings and documents submitted. The Commission found these facts to be undisputed.

At all times relevant to this complaint, respondent has served on the Board. Also, at all times relevant to this complaint, respondent has been employed by Hudson County. He is assigned as an aide to Freeholder Maurice Fitzgibbons, for which he receives a stipend.

On August 30, 2005, Mr. Garcia voted to appoint his brother to a paid position with the Board. His brother had been employed as a custodian in the Hoboken Public Schools. He applied for a position posted in the maintenance department. The Director of Facilities, Tim Calligy, interviewed him and recommended to the superintendent that he be transferred to the position of maintenance employee. The superintendent made the recommendation to the Board.

The hiring of Mr. Garcia's brother was one item in a 55-item consent agenda on which he voted. He set forth that he did not realize at the time of voting that his brother's appointment was in the agenda. Later, however, when he realized that his brother's appointment had been on the agenda, before leaving the meeting, he left a written request for the Acting Board Secretary to change his vote to show an abstention. The meeting had not yet concluded when he did so. Rather, the Board was still in Executive Session. Mr. Calligy researched the subject of changing

a vote and determined that it had to be done in a public meeting. The matter was addressed at the next public meeting and Mr. Garcia was allowed to change his vote.

Also, on August 30, 2005, Mr. Garcia voted in favor of a contract with Fitz Media, Inc. which is local public relations firm owned by Maurice Fitzgibbons. Mr. Fitzgibbons is an elected Freeholder in Hudson County. Mr. Garcia has been an employee of the County of Hudson since before he joined the Board in 2002. More particularly, he has served as an Aide to Freeholder Fitzgibbons since 1998, having been assigned to him based on his residence. He also serves as Director of Health and Human Services for the City of Hoboken.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Garcia's conduct violated N.J.S.A. 18A:12-24(c), which sets forth:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

The Commission set forth in its probable cause finding that, although Mr. Garcia's brother is not a member of his immediate family pursuant to N.J.S.A. 18A:12-23, he is a "relative" under this provision, the definition of which includes siblings. The Commission has previously held that a board member has a personal involvement in a matter concerning his relative such that his or her objectivity might reasonably be expected to impair his or her objectivity or independence of judgment. See In the Matter of Russo and Scarano, C12-97, (January 27, 1998); Commissioner Decision #22-1/98, (April 16, 1998). N.J.S.A. 18A:12-24(c) requires a showing of "some benefit to the school official." The Commission finds that there is an intrinsic benefit to a school official whose brother is appointed to a position within the district such that he should recuse himself from voting.

Respondent argues in his submission in response to the probable cause finding that, since the Commission accepted that he inadvertently voted for his brother's appointment, there should be no distinction between whether he corrected his vote during the public meeting or left a note asking for his vote to be changed. He refers to it as "a distinction without difference." The Commission disagrees. As the Commission set forth in the probable cause decision, regardless of respondent's claim that there were distractions at the meeting that led to his inadvertently voting for his brother's employment, it was his duty as a board member to know the items on the agenda and recuse himself from voting on an issue in which he has a conflict at the time of the vote, or to immediately correct the mistake during the open public meeting. The difference is that if the vote is corrected immediately, the public is made aware of the conflict and the change in the vote, which the Open Public Meetings Act requires for accurate minutes. See N.J.S.A. 10:4-14. Therefore, a vote occurring during a public meeting cannot be changed outside of a

public meeting. Mr. Calligy correctly guided respondent in the correct protocol for changing his vote in the next public meeting. The fact that the meeting had not yet concluded does not change the fact that the vote was not changed during the public session at which it was made. Therefore, the Commission concludes that respondent acted in his official capacity in a matter in which he had a personal involvement in violation of N.J.S.A. 18A:12-24(c).

Last, the Commission found probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(c), when he voted in favor of the Board's contract with Fitz Media, Inc. a corporation owned by Freeholder Fitzgibbons. In his response, respondent answered that Board Counsel told him "his status as a County employee does not preclude him from voting on a Board contract with a company owned by an elected County Freeholder, since the respondent is not employed by that Freeholder or his company." However, a Personnel Officer at the County of Hudson provided a written verification that Respondent has been employed with the County of Hudson, Department of Freeholders as an Aide to Freeholder Maurice Fitzgibbons from November 9, 1998 to the present. Further, Board Counsel Matthew Giacobbe certified that respondent never sought any type of legal guidance from him regarding this matter. Mr. Giaccobbe admits that it is possible that Respondent sought advice from one of the other Special Counsels for the Board; albeit Respondent referenced Board Counsel, not Special Counsel. Respondent argues that this discrepancy creates a genuine issue of material fact that should require a hearing before the Office of Administrative Law. The Commission disagrees because, even if it was unrefuted that Respondent received such advice, it would only mitigate against the penalty, but not negate the fact that the violation occurred.

The Commission concludes that, although Respondent was at all times an employee of Hudson County and not a direct employee of Freeholder Fitzgibbons, respondent nonetheless had an indirect financial involvement with Freeholder Fitzgibbons, having worked as his aide since 1998. That involvement might reasonably be expected to impair his objectivity when voting for the Board to contract with the Freeholder's company. Therefore, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) when he voted in favor of the contract with Fitz Media, Inc.

For the foregoing reasons, the Commission finds that Mr. Garcia violated N.J.S.A. 18A:12-24(c) when he voted for his brother's appointment and voted for Fitz Media, Inc. to receive a contract with the Board.

PENALTY

The Commission notes that there are two separate violations of N.J.S.A. 18A:12-24(c) in the present case. Clearly, by itself, the vote on respondent's brother would warrant nothing more than a reprimand. See I/M/O Dino Pettinelli, Commissioner's Decision, Agency Docket No. 266-7/04 (September 8, 2004). However, when coupled with the vote on the Fitz Media contract, the Commission believes that a censure would be more appropriate. Two factors mitigate against such a penalty, though. First, is the fact that the votes occurred at the same time leaving no additional time for reflection or consideration of whether one or both may have been in error before the next. Second, is that the Commission could not determine as fact that respondent did not receive legal advice that he could vote on the Fitz Media contract. The Commission would have to transmit this matter to the Office of Administrative Law for such a determination and it declines to use the OAL for such a limited purpose. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Robert W. Bender

Robert Bender
Acting Chairperson

Resolution Adopting Decision – C41-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, prior to its meeting of October 24, 2006, the Commission read the written submission of the respondent and reviewed its probable cause decision; and

Whereas, at its meeting of October 24, 2006, the Commission found that Carmelo Garcia violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended that the Commissioner of Education impose a sanction of reprimand*; and

Whereas, the Commission reviewed the draft decision recommending a reprimand against Mr. Garcia and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed amended decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Robert W. Bender

Robert W. Bender, Acting Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 24, 2006.

Lisa James-Beavers
Executive Director

* Chairperson Paul Garbarini and Commissioner Robert Copeland abstained from this decision.

434-06

#434-06

BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WOODLAND, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning boards of education alleged that insufficient levels of State aid had negatively impacted their ability to provide a thorough and efficient system of education (T&E) and sought individualized needs assessments by the Commissioner comparable to those ordered by the State Board for the party districts in *Bacon v. New Jersey Department of Education*. The Department moved to dismiss the petition for failure to state a claim upon which relief could be granted.

The ALJ denied the Department's motion, finding that *Bacon* created a new cause of action enabling any board of education believing itself underfunded – not only those alleging educational inadequacy and poverty – to claim entitlement to a *Bacon*-type needs assessment. The Department requested, and was granted, interlocutory review of the ALJ's decision.

The Commissioner rejected the Initial Order, finding that the ALJ misconstrued *Bacon* by confusing the specific relief crafted for the parties – rural districts demonstrating educational inadequacy and poverty comparable to *Abbott* districts but unlike their urban counterparts in important respects – with the State Board's call for systemic change in the definition, assessment and funding of T&E statewide. The Commissioner held that *Bacon* neither created a new cause of action for public school districts nor eliminated alleged educational inadequacy and poverty as prerequisites to T&E claims, and thus found that petitioners failed to present a cognizable basis for contested case proceedings. The Commissioner further noted that petitioners' concerns were appropriately addressed through implementation of the newly enacted Quality Single Accountability Continuum system for evaluation of public school districts together with the school funding formula presently being developed by the Legislature, both based on principles fully consistent with the State Board's pronouncements in *Bacon*. 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 5, 2006

OAL DKT. NO. EDU 8762-05
AGENCY DKT. NO. 98-4/05

BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WOODLAND, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

This matter comes before the Commissioner by way of a request – filed by the respondent Department of Education (Department) and granted in accordance with *N.J.A.C.* 1:1-14.10 – for interlocutory review of an Order of the Office of Administrative Law (OAL) denying the Department's motion to dismiss petitioners' appeal for failure to state a claim upon which relief can be granted.

In its request, the Department contends that the Administrative Law Judge (ALJ) erred in concluding that the State Board's decision in *Bacon, supra*, created a new cause of action enabling any local district board of education believing itself underfunded – not only those alleging educational inadequacy and poverty by the standards of *Abbott, supra* – to claim entitlement to a needs assessment of the type

ordered for the petitioners in that matter (*Bacon* districts). The Department reiterates that: 1) no *Bacon* assessment presently exists, the Commissioner having previously recommended to the State Board that such assessment await implementation of the Quality Single Accountability Continuum (QSAC) monitoring system and anticipated new funding formula currently in development; and 2) even if a *Bacon* assessment did exist, financial need remains a determinative factor and petitioners have not pled the requisite educational inadequacy and poverty to place themselves in the same posture as the *Bacon* districts. (Department's Brief in Support of Request for Interlocutory Review at 8-15)

In reply, petitioners counter that the ALJ correctly found *Bacon* to have created a new standard for determination of thoroughness and efficiency (T&E) in New Jersey public school districts – one linked to educational rather than fiscal considerations – so that, even if the relief sought by petitioners must await development of appropriate standards, they are still entitled to claim it through the present proceeding. Petitioners state:

> It has never been contested by petitioners that there can be no assessments until standards are developed. If that development must await the QSAC standards, so be it. All that means is the relief sought will not be rendered until some undetermined time in the future. It does not mean it will never be available or that the cause of action recognized by [the ALJ] should be rejected. At most, the claim should be for (*sic*) labeled as one for a QSAC evaluation instead of a *Bacon* assessment. That is nothing more than semantics. (Petitioners' Reply at 2)

In urging the Commissioner to "give direction to the parties" as requested by the ALJ, petitioners assert that "this case presents a new chapter in New Jersey School funding [growing] out of the State Board's pronouncements in *Bacon*. Rather than dismiss the petition, the Commissioner should seize this opportunity to give the New Jersey

educational community *** needed direction on the future course of education in this state, as envisaged in *Bacon*." (*Id.* at 3)

Upon review, the Commissioner cannot concur with the findings and conclusions of the ALJ and, consequently, rejects the recommended Order in its entirety. Instead, the Commissioner agrees with the Department that the State Board neither created a new cause of action through its direction of individual needs assessments in the *Bacon* districts nor eliminated allegations of poverty and educational inadequacy as prerequisites to cognizable T&E claims.

Initially, the Commissioner finds that the *Bacon* decision embodies two separate directives: one an order of relief arising from the State Board's adjudication of the claims and record before it on appeal, and the other a call for systemic change arising from the Board's concomitant exercise of its authority over the general supervision and control of public education statewide. In his reading of *Bacon*, however, the ALJ has erroneously conflated these related but distinct directives, grafting the Board's pronouncements on the need for change in State mechanisms for definition, assessment and funding of T&E onto the particularized relief granted to the parties in the specific matter on appeal.

Properly construed, *Bacon* leaves no doubt that the individualized needs assessments granted to the party districts, and now sought by petitioners herein, represent a relief crafted in direct response to the State Board's finding that the *Bacon* litigants – rural districts making a bid for "special needs" status akin to that of the *Abbott* districts – had demonstrated comparable levels of educational deprivation and poverty, but were sufficiently unlike their urban counterparts to have their deficiencies appropriately

addressed by programs, standards and funding levels developed in response to the needs and circumstances of the latter. Nothing expressed or implied in its decision suggests that the Board, in fashioning relief tailored to the unique situation of the parties in *Bacon*, had any intent whatsoever to establish a new, generalized cause of action whereby any district in the State might petition the Commissioner for comparable relief without even *alleging* a comparable degree of educational deprivation and poverty, instead relying – as petitioners here have done – solely on claims of negative impact resulting from an insufficient level of State aid.

Rather, it is the State Board's second directive that addresses the concerns underlying petitioners' appeal in this matter. As subsequently discussed, ongoing effectuation of this directive will – by operation of law – afford petitioners precisely the relief they are attempting to seek through the present litigation: individualized assessment of the thoroughness and efficiency of their districts in accordance with standards to be determined by the Commissioner consistent with *Bacon*, and a consequent level of support appropriate to their circumstances.

As the ALJ and parties recognize, regulations and performance indicators are currently being developed to implement QSAC, the Legislature's newly enacted framework for a uniform system of evaluating public school districts and assisting with their identified needs. In the Commissioner's view, the State Board's proposed rules at *N.J.A.C.* 6A:30 and the attendant quality performance indicators to be developed pursuant to them (see 38 N.J.R. 3378(a)) will work, in their final form and in conjunction with the State's anticipated new funding law, *infra*, to effectuate exactly the result directed by the Board in *Bacon*: identification of the "educational components essential

to the establishment of a unified system for public education that 'will equip all of the students of this state to perform their roles as citizens and competitors in the same society' " (*Bacon, supra*, slip opinion at 71, citing *Abbott II, supra*) and insurance of their provision through a comprehensive mandate for district-specific assessment, assistance and targeted intervention.[1]

Moreover, as the ALJ and parties further recognize, the State has committed to development of a new funding formula and has now formally articulated, through the report of the Joint Legislative Committee on Public School Funding,[2] the foundational principles that should underlie such a formula regardless of its ultimate configuration. Review of these principles – substantially embodied in the Committee's first five recommendations[3] – shows them to be fully congruent with the State Board's directive for abolishment of a "fragmented system" that meets the needs of some students while "not produc[ing] educational adequacy for all," and replacement of it with a system

---

[1] Petitioners themselves recognize the congruence of the relief they are seeking and implementation of QSAC; see Petitioners' Brief in Opposition to Motion to Dismiss at 5-7 and Petitioners' Brief in Support of the ALJ's Order at 2-3.

[2] Available online at http://www.njleg.state.nj.us/PropertyTaxSession/OPI/jcsf_Report111506.pdf. Recommendations at 63-77, and in the Executive Summary at 2-3.

[3] The referenced recommendations read as follows:

- *Recommendation 1:* State aid for every school district should be based on the characteristics of the student population and the individual district's ability to pay.
- *Recommendation 2:* Aid calculations should be simplified to ensure transparency, thereby eliminating the need for multiple additional aid categories.
- *Recommendation 3:* A new school aid formula should be developed based upon the nationally-recognized professional judgment panels (PJP) model for determining the resources necessary to meet educational standards.
- *Recommendation 4:* The formula should be based on "costing-out" calculations developed through the PJP model to determine the base per pupil cost of a thorough and efficient education, as well as the additional weights for special education, at-risk, and limited English proficiency students. This should also include use of the geographic cost of education index to accurately reflect differences in the cost-of-living throughout the State.
- *Recommendation 5:* A district's share of State education funding should be based on up-to-date measures of a district's ability to pay. The formula for calculating the ability to pay should be based equally on a district's relative property wealth and income. Property wealth should be calculated by considering the equalized property valuation per capita relative to the State median. A district's income should be calculated based upon income per capita relative to the State median.

that "ensures the provision of a constitutionally adequate education and equal educational opportunity for all students in New Jersey regardless of the district in which they live and the economic circumstances under which they were born." (*Bacon, supra*, slip opinion at 65-66, 69)

The Commissioner thus finds that – taken together – these legislative enactments and their implementation by the Commissioner, State Board and local district boards of education will "effectuate the changes that are necessary to establish a unified system for public education that fulfills the constitutional mandate both with respect to the substantive education that must be provided and the resources necessary to support such a system." (*Bacon, supra*, slip opinion at 72) Indeed, it is the fulfillment of this promise through coordinated action at all levels of government – not Commissioner rulings issued through a perpetual cycle of district-specific contested cases as would be enabled by petitioners' and the ALJ's reading of *Bacon* – that represents "the future course of education in this state, as envisaged in *Bacon.*"

Accordingly, for the reasons set forth above, the Commissioner rejects the Initial Order of the OAL and dismisses the Petition of Appeal for lack of a cognizable cause of action. Consistent with this holding, the Commissioner concurrently requests return of the file from the OAL pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.[4]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 8762-05

AGENCY DKT. NO. 98-4/05

MEDFORD TOWNSHIP BOARD OF EDUCATION; EVESHAM TOWNSHIP BOARD OF EDUCATION; LENAPE REGIONAL HIGH SCHOOL DISTRICT; HAINESPORT TOWNSHIP BOARD OF EDUCATION; LUMBERTON TOWNSHIP BOARD OF EDUCTION; NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT AND WOODLAND TOWNSHIP SCHOOL DISTRICT,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

James Schwerin, Esq., for petitioners (Parker McCay, attorneys)

Carolyn G. Labin, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of the State of New Jersey, attorney)

BEFORE **BRUCE M. GORMAN**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On April 28, 2005, a Petition of Appeal was filed with the Commissioner of Education ("Commissioner") against the New Jersey Department ("Department") requesting an increase in State aid for several school districts. See Initial Petition, Wherefore Clause. The listed petitioners were two different types of entities: the school districts, Medford Township School District ("MTSD"), Evesham Township Board of Education ("ETSD"), Lenape Regional High School District ("LRHSD"), and the Board of Education of the Township of Hainseport ("HTSD"), and the township councils, Medford Township Council and Evesham Township Council (collectively referred to as the "Township Councils").

Within the Petition of Appeal, the parties alleged that the Department had not correctly applied the Comprehensive Educational Improvement and Financing Act, N.J.S.A. 18A:-7F-1, et seq. (CEIFA"), and that the amount of State aid should be adjusted for the 2003-2004 school year to confirm with the formula found within CEIFA. See Initial Petition, Count One, ¶¶ 7, 16. Beyond the request for an increase in State aid for the 2003-2004 school year, the Districts also claimed that their ability to provide their students with a thorough and efficient education ("T&E") as required by the New Jersey Constitution, Art. VIII, §4, ¶1[1], had been "negatively impacted" because of the Department's failure to increase their State aid for the 2003-2004 school year. See Initial Petition, Count Two. Moreover, the petition alleged that the Township Councils would have to restore money to the school budgets if the budgets for ETSD and MTSD were defeated. See Initial Petition, Count Three, ¶2. On June 3, 2005, the Department filed a motion to dismiss the petition of appeal in lieu of an answer.

On June 6, 2005, the petitioners filed an Amended Petition. The Amended Petition added Northern Burlington County Regional School District Board of Education

[1] The thorough and efficient clause of the New Jersey Constitution provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. Art. VIII, § 4, ¶1.

("NBCRSD"), Lumberton Township Board of Education ("LTSD"), and the Woodland Township Board of Education ("WTSD") as parties to the matter (the school districts listed in the petition are hereinafter collectively referred to as the "Districts"). The Amended Petition also amended the counts brought against the Department.

In Count One, the Districts and Township Councils alleged that the Department had failed to increase State aid to the Districts as required by CEIFA and that therefore, the amount of State aid being provided for the 2005-2006 school year had to be increased to conform with the formula set forth within CEIFA. See Amended Petition, Count One, ¶22. The Districts and the Township Councils asserted that the Districts' State aid had not increased in accordance with the increases in the Districts' student enrollments. See Amended Petition, Count One, ¶¶12, 13, 14, 15, 16, 17, 19, 20, 21.

Furthermore, the Districts and the Township Councils alleged that because of the Department's failure to increase the Districts' State aid in accordance with the increases in their student enrollment, their ability to provide their students with a T&E had been "negatively impacted." See Amended Petition, Count Two. ¶¶2-8. In support of the alleged negative impact, the Districts made few specific assertions.

On July 5, 2005, the Department filed a second motion to dismiss in lieu of an answer. Oral argument occurred on March 9, 2006, before myself as trial judge. During the argument, counsel for petitioners attempted to orally amend the Districts' legal position claiming that, due to the State Board decision in Bacon v. New Jersey Dep't. of Educ., Docket No. #4-03, (State Board January 4, 2006), the Districts were no longer requesting additional State aid under CEIFA but rather, the educational assessment discussed in the Bacon decision.

On June 6, 2006, the Districts filed a Second Amended Petition of Appeal (hereinafter referred to as the "Petition") changing their requested relief from additional State aid to the educational assessment discussed in the Bacon decision.

The Department now moves to dismiss the amended petition.

LEGAL ANALYSIS

The Department offered two arguments in support of its motion. The more significant is its contention that petitioners have failed to state a cause of action upon which relief can be granted.

Petitioners base their cause of action upon the State Board of Education's decision in Bacon v New Jersey Department of Education, State Board Dkt. No. 4-03 (January 4, 2006) (hereinafter "Bacon"). Petitioners assert that as a result of Bacon, they are entitled to "needs assessments" for their respective districts in order to determine whether they are receiving funding sufficient to comply with the Thorough and Efficient ("T&E") provision of the State Constitution.

By asserting that petitioners have failed to state a cause of action, the Department renders a specific interpretation of the State Board's holding in Bacon. The Department's position is summarized on page ten of its brief, wherein it states:

> However, the claims raised here are dissimilar to the claims raised in Bacon. In Bacon, the school districts alleged that they were failing to provide their students with a T&E and did not have the local resources to correct their educational deficiencies. See Bacon, supra, at 4. By contrast, the Districts merely assert that their ability to provide their students with a T&E has been "negatively impacted." Thus, unlike the Bacon districts, the Districts have not asserted a constitutional deprivation of a T&E.

In so arguing, the Department asserts that the applicable standard is that petitioners must lack the local resources necessary to correct educational deficiencies. That standard was argued by the petitioners in Bacon, and the Department attempts to impose it here.

That contention is misplaced. The above referenced rule was utilized in Bacon at the trial level because Bacon was an effort by the petitioners therein to attain "Abbott"

status, that is attain the status of Special Needs District as promulgated by the line of cases known as Abbott v Burke I, II, III and IV. Consequently, the Abbott standard was used in Bacon at the trial level.

But petitioners herein do not seek Abbott status. Instead they seek a special needs assessment based upon language contained in the State Board's decision in Bacon. In essence, petitioners claim a new right based upon that decision.

The questions therefore become, does Bacon create a new cause of action, and if so, what role, if any, does the Abbott standard play in deciding the claim? In order to answer those questions, we must review the State Board's decision in Bacon.

The State Board concluded Bacon by stating its dissatisfaction with the limitations the Abbott process places upon achieving thorough and efficient education, as well as the failure of the Comprehensive Educational Improvement and Financing Act ("CEIFA") to adequately promote that end. The Board stated, at 58:

> We have concluded that despite the gains made under CEIFA, its implementation has not resulted in the provision of a thorough and efficient education to the students of the districts involved in this appeal either in terms of absolute adequacy or in comparison with the wealthier suburban districts. We have also concluded, as did the Court in Abbott II, that a new approach is needed if the students of these districts are to be afforded an educational opportunity that satisfies the mandate of the New Jersey Constitution. *However, our conclusions in this regard do not lead to the relief that the appellant districts are seeking.*

The final sentence is telling. It states that, although petitioners therein were seeking Abbott status, relief other than that sought was appropriate. In differentiating the Bacon districts from the Abbott districts, the State Board wrote, 59:

> We do not believe that merely providing the appellant districts with the same fiscal resources that are provided to the Abbott Districts will ensure that the students of these districts are in fact afforded the educational opportunity to which they are entitled. While poor, the districts involved

> here are not identical to the districts that have been classified as Abbott Districts. The very fact that they are not urban means that they face a unique set of circumstances that are different from those confronting the poor urban districts.
>
> * * *
>
> ...in many instances, different approaches will be required than those utilized in poor urban districts if the deficits in education now being provided by the appellant districts are to be corrected. Hence, regulatory requirements to ensure accountability may differ from those applicable to the Abbott Districts, and the fiscal resources to support the necessary educational inputs may not be the same. In our view, an assessment of the educational needs and the identification of the approaches that will successfully address those needs is a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed.

In so holding, the State Board began the process of crafting a new cause of action. The Board elaborated, 62:

> ...we have found that ensuring that the students in these districts are provided with a thorough and efficient education cannot be accomplished merely by granting monetary relief to the appellant school districts. To the contrary, the starting point for remedying the educational deficits shown by the record is to assess the educational needs of the students in each district and identify the approaches that will effectively address those needs.
>
> ...in many instances, different approaches will be required than those utilized in poor urban districts if the deficits in the education now being provided by the appellant districts are to be corrected. Hence, regulatory requirements to ensure accountability may differ from those applicable to the Abbott districts, and the fiscal resources to support the necessary educational inputs may not be the same. In our view, an assessment of the educational needs and the identification of the approaches that will successfully address those needs

> is a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed.

The Board then defined the new remedy and directed the Commission to implement same, 63:

> We therefore direct that, under the Commissioner's supervision, the Department of Education begin immediately to develop a design for a needs assessment to be performed in each of the districts involved in the litigation before the Commissioner. In addition to assessing the adequacy of the educational inputs and programming currently being provided, we direct that the design proposed to us include elements that will identify the unique educational needs of the students in those districts requiring additional programs to address them.

Accordingly, the State Board fashioned a new remedy for the Bacon districts. But was the remedy to be exclusive to that case and to those districts? The State Board answered that question, 64-65:

> In deciding this appeal, we cannot ignore the fact that there are students in other school districts not involved in this litigation who are suffering similar educational inadequacies and whose communities we do not have adequate resources to address those inadequacies. To do so would be a denial of our obligations under the New Jersey Constitution and our responsibility for the supervision of public education in this state. N.J.S.A. 18A:4-10. See Englewood Cliffs v. Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993). See also Bd. of Educ. V. Bd. of Educ., 170 N.J. 323 (2002). Furthermore, awarding piecemeal relief to some districts while ignoring others would be to contribute to the perpetuation of a fragmented system that does not conform to the constitutional mandate.

In so holding, the State Board expressed a clear intention to extend its new remedy to other school districts. Consequently, I **FIND and CONCLUDE** that the State

Board of Education has created a new remedy for school districts who believe they are underfunded, namely, a Needs Assessment.

Respondent's second argument is that petitioners have failed to state a claim under the T&E clause of the New Jersey Constitution. In so arguing, the Department attempts to impose upon petitioners the burden of meeting the standards required for Abbott qualification.

The problem with this argument is that the State Board specifies in Bacon that the concept of Thorough and Efficient Education is in flux and must be reevaluated. The Board stated, 68:

> In short, it is essential at this point to reexamine the meaning of a thorough and efficient education and to establish a unified system for the provision of such an education. We believe that, as the head of the Department of Education and the body responsible for education policy, we must take responsibility for redefining the meaning of a thorough and efficient education in educational rather than financial terms.

Accordingly, the Abbott analysis the Department offers has no relevance to this proceeding. While the State Board did note that poverty will play a role in the reconfigured concept of Thorough and Efficient Education (Bacon, 66), the economic analysis utilized in Abbott cases is no longer dispositive. As the Board stated, monetary relief is not enough (Bacon, 62).

The State Board left it to the Commissioner to redefine the educational system (Bacon, 69). In so doing, the Board charged the Commissioner with developing, inter alia, the qualifying standards for a Needs Assessment. I make no finding at this time what standards would be applied in determining the petitioners are entitled to a Needs Assessment. Indeed, the Commissioner may well still be in the process of developing such standards. I also make no determination as to what such a Needs Assessment would consist of. That matter likewise must await regulatory action.

I **FIND and CONCLUDE** only that in Bacon, the State Board created a cause of action for a Needs Assessment that exists outside the Abbott process. Nothing in the record before me shows that the right to a Needs Assessment is limited at this time. Absent appropriately promulgated regulatory limitations and/or further action by the State Board and/or a Court of appropriate jurisdiction, I **FIND** that any school district believing it cannot provide its students with a T&E education because of inadequate local resources may seek a Needs Assessment.

Accordingly, the petition sets forth a cause of action upon which relief may be granted, and the Department's motion to dismiss must be **DENIED.**

ORDER

I **ORDER** that respondent Department of Education's Motion to Dismiss be **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.

10/17/06
DATE

BRUCE M. GORMAN, ALJ

/sd

433-06

TOWNSHIP OF HOWELL, MAYOR OF HOWELL AND COUNCIL OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, AND JAMES WASSER, SUPERINTENDENT OF SCHOOLS, MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner sought a determination by the Commissioner declaring null and void the establishment by respondent Board of revised school attendance boundaries which took effect in September 2006. Petitioners alleged that the school district has been arbitrary and capricious in their establishment of attendance areas; that attendance areas were not determined in accordance with standards set forth in the district's policy; and because the attendance plan has resulted in an arbitrary and inefficient transportation operation and plan. Respondent Board filed motion to dismiss the petition for lack of standing and for failure to comply with the 90-day rule. Petitioners filed a motion to amend the petition to include additional parties who are parents and students within the school district.

The ALJ identified standing as the threshold issue in this matter, and found that Howell Township – and the Mayor in his official capacity – lack standing to challenge the respondent's school attendance boundaries. Further, the ALJ found that: petitioners' appeal of the current Board policy on attendance – adopted in May of 2004 – and the Student Attendance Plan for 2006-2007 – approved by the Board in September of 2005 – were filed out of time; petitioners have presented no evidence to justify relaxation of the 90-day rule is this case; and petitioners' February 2006 challenge to a November 2005 revision of the Student Attendance Plan for 2006-2007 should be dismissed as moot. The ALJ denied petitioners' motion to amend the petition to include additional petitioners, and dismissed the appeal.

The Commissioner adopted the Initial Decision and dismissed the Petition of Appeal.

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.

12/05/06

OAL DKT. NO. EDU 2427-06
AGENCY DKT. NO. 79-3/06

TOWNSHIP OF HOWELL, MAYOR OF HOWELL AND COUNCIL OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, AND JAMES WASSER, SUPERINTENDENT OF SCHOOLS, MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioners' exceptions and respondents' reply, both duly filed in accordance with *N.J.A.C.* 1:1-18.4 following extensions granted pursuant to *N.J.A.C.* 1:1-18.8.

In their exceptions, petitioners urge the Commissioner to reject the conclusions of the Administrative Law Judge (ALJ), reiterating their prior arguments that: they have standing to pursue this matter; their petition is not time-barred; and their motion to amend the petition by adding new parties should have been granted. Petitioners renew their contention that they are themselves citizens and taxpayers; that they have in their official capacity a *parens patriae* interest in protecting the general public; and that they – together with the parents and students who sought to be added to the petition – were prepared to present evidence of negative educational impact on

students and neighborhoods as well as detrimental impact on taxpayers. (Petitioners' Exceptions at 4-6) They further repeat that the 90-day rule – which in the ALJ's view barred both the initial petition and the attempted addition of new parties – must be relaxed where its strict application would effectively insulate from Commissioner review the adoption, implementation or continuation of a policy that implicates students' constitutional right to a thorough and efficient education, and constitutes a matter of fundamental concern to the public.[1] (*Id.* at 2-4, 6).

In reply, respondents urge adoption of the Initial Decision in its entirety, likewise renewing their prior arguments before the ALJ. Specifically, respondents counter that the 90-day rule should not be relaxed in this instance due to the nature of the matter in dispute, the absence of unusual or compelling circumstances justifying petitioners' late filing, and the prejudice that would inure to the district if it were forced to litigate at this point in time (Respondents' Reply at 2-4). They again contend that petitioners should not be allowed to amend their petition to add new parties, citing the resulting prejudice to the district; the fact that the proposed parties and their claims could and should have been identified long ago; and the lack of specificity in the proposed parties' supporting certifications so as to demonstrate the requisite standing (*Id.* at 6-8). Finally, they reiterate that petitioners lack standing to pursue this matter – and hence to claim entitlement to a plenary hearing – because: they have alleged no actual or

[1] During the course of their discussion, petitioners also object to the ALJ's dismissal of their challenge to the revised 2006-07 attendance plan as moot, contending that the revised plan *did* affect school attendance and the ALJ should not have ruled as he did based solely on exhibits submitted with the Motion to Dismiss. (Petitioners' Exceptions at 3-4)

imminent harm to the Township of Howell or its Mayor[2] or Council; they have demonstrated no right to pursue the interests of third parties, the arguments they raise to this effect having already been rejected in *Carteret, supra,* and *Stubaus, supra*; and their claims are far too speculative, conjectural and unsubstantiated to establish the detrimental impact judicially required to confer standing.[3] (*Id.* at 8-11)

Upon careful review and consideration, the Commissioner concurs with the ALJ that this matter must be dismissed. Like the ALJ – for the reasons expressed in the Initial Decision – the Commissioner finds that the named petitioners lack standing to pursue the matter, and cannot now attempt to cure this deficiency by adding new petitioners who – even assuming the requisite standing – could and should have brought their claims long ago. The Commissioner further agrees with the ALJ – for the reasons stated and in the interest of prudence in the event of a reversal on appeal on the question of standing – that the petition is filed well out of time, with no relaxation of the filing deadline warranted, as to all aspects of the 2006-07 attendance plan other than the limited revision adopted on November 21, 2005; and that petitioners' challenge to that revision, although timely, is moot because no meaningful relief could result from it even if petitioners were to prevail. Finally, the Commissioner concurs that, in light of these holdings, it is unnecessary to reach respondents' motion to dismiss the petition with respect to claims against the district superintendent.

---

[2] Respondents note that the petition was brought by the Mayor in his official capacity and contains no allegation of harm to him has an individual taxpayer, urging that he not be allowed to infer such a claim at this point in proceedings. (Respondents' Reply at 9)

[3] In reply to petitioners' statements regarding the ALJ's dismissal of their challenge to the revised 2006-07 attendance plan as moot, respondents point out that none of the students named in the certifications submitted in support of petitioners' motion to amend the petition are affected by the narrow revision to the 2006-07 attendance plan adopted on November 21, 2005, so that petitioners have additionally not alleged any facts in support of their claim. (Respondents' Reply at 4-5)

Accordingly, for the reasons well and fully expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2427-06
AGENCY DKT. NO. 79-3/06

TOWNSHIP OF HOWELL, MAYOR OF HOWELL AND COUNCIL OF THE TOWNSHIP OF HOWELL,
Petitioners,
v.
FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY AND JAMES WASSER, SUPERINTENDENT OF SCHOOLS,
Respondents.

Thomas G. Gannon, Esq., for petitioner (Hiering, Hoffman & attorneys)
Nathanya G. Simon, Esq., and **Marc H. Zitomer,** Esq., for respondents
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 21, 2006 Decided: October 5, 2006

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioners, Township of Howell and its Mayor, Joseph D. DiBella, representing the residents and students who attend respondent Freehold Regional High School District schools, request the Commissioner of Education to enjoin and declare null and void the actions of respondents establishing school attendance boundaries to take effect in September 2006. Petitioners allege that the school district regulation and the attendance areas are arbitrary and capricious since they were not determined in accordance with standards set forth in the district's policy and because the attendance plan has resulted in an arbitrary and inefficient transportation operation and plan. Petitioners filed their Petition of Appeal with the Commissioner of Education on February 7, 2006, and the matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2006, for hearing as a contested case. The matter was assigned to the undersigned on April 27, 2006, and a prehearing conference was scheduled for May 25, 2006. At that prehearing conference, the parties identified threshold legal issues to be addressed by motions and a schedule for the submission of such motions was agreed to by both parties.

Respondents filed a Motion to Dismiss the Petition of Appeal on June 16, 2006 (R-1, R-2 and R-3). Petitioners filed a Motion to Amend the Petition of Appeal on July 12, 2006 (P-1 and P-2), seeking to name additional petitioners as parties. Petitioners also filed a response to respondents' Notice of Motion to Dismiss on July 18, 2006 (P-3). Petitioners then filed Opposition to Respondent's Motion to Dismiss (R-4) as well as Opposition to Amend the Petition of Appeal on August 3, 2006 (R-5 and R-6). Even though oral argument was requested, I concluded that it was not necessary and I closed the record with respect to this matter on August 21, 2006.

FACTUAL DISCUSSION

The petitioners in this matter are the Township of Howell, a municipal corporation of the State of New Jersey located in Monmouth County, and its Mayor, Joseph D.

DiBella. In their Petition, which was filed with the Commissioner of Education on February 17, 2006, the petitioners contend that they represent the residents and students who attend Freehold Regional High School District schools.

The petitioners seek a determination by the Commissioner declaring null and void the establishment by respondent Board of Education of school attendance boundaries which are to take effect in September 2006.

For purposes of deciding the various motions, I accept the following facts as undisputed based on the submissions of the parties.

Respondent school district is the largest high school district in the state with six high schools and over 1,500 employees educating approximately 12,000 students. The school district consists of the Townships of Colts Neck, Freehold, Howell, Manalapan and Marlboro, and the Boroughs of Englishtown, Farmingdale and Freehold. Respondent operates Freehold High School, Howell High School, Manalapan High School, Marlboro High School, Freehold Township High School and Colts Neck High School.

Petitioners assert that students who live in the Township of Howell comprise 28% of the total district enrollment, and that presently over 600 students who are residents of the Township of Howell attend Colts Neck High School. Petitioners contend that the Attendance Area Plan, which is the subject of this proceeding, will maintain Howell Township students at Colts Neck High School for a minimum of the next four school years.

On or about June 15, 2006, respondents filed a Motion to Dismiss the Petition of Appeal for lack of standing on the part of the petitioners and for failing to comply with the 90-day rule (R-1, R-2 and R-3). On or about July 11, 2006, the petitioners filed a Motion to Amend the Petition to include additional parties who are parents and students within the Freehold Regional High School District and who allege they are affected by respondents' 2006-2007 Student Attendance Boundary Plan (P-1 and P-2).

The Board of Education of respondent school district has adopted a policy known as Policy 8110 (R-3, Exhibit A), which requires the Board to establish school attendance boundaries annually upon the recommendation of the superintendent. Policy 8110 was last revised on May 10, 2004.

The respondent Board of Education adopted the Attendance Boundary Plan for the 2006-2007 school year at its meeting on September 12, 2005. This changed some of the attendance boundaries from those established for the prior school year. Because of questions raised about some of the projected numbers utilized, the Board approved a revision to the student attendance plan on November 21, 2005, only as to those students in a specific section of Howell Township who will remain in the attendance area for Freehold Township High School.

The 2006-2007 Student Attendance Boundary Plan only affects incoming ninth grade students and students already in attendance at a particular high school will remain in that high school for the duration of their high school education (R-3, Exhibit C, para 7).

LEGAL DISCUSSION AND ANALYSIS

I will address the motions of the parties in the order in which they were received.

1. Respondents' motion to dismiss the petition for lack of standing.

Respondent contend that the Township of Howell and its Mayor lack standing to pursue this matter on behalf of third parties who are residents of the Township of Howell. In order to have standing, a party must have a sufficient stake in the outcome of the litigation such that there is a substantial likelihood that the party will suffer harm in the event of an unfavorable decision. N.J.A.C. 6A:3-1.2 is consistent with this holding, stating that interested persons who may bring a complaint before the

Commissioner are those who will be substantially, specifically and directly affected by the outcome of a controversy.

Petitioners rely on a series of cases holding that the concept of standing should be liberally construed, particularly in public interest and group litigation, referring to South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983); Booth v. Township of Winslow, 193 N.J. Super. 637 (App. Div. 1984). In the Mount Laurel Township case, the court observed that the need for a "liberal approach" to standing is especially important in Mount Laurel litigation, and held that any organization that has the objective of securing lower income housing opportunities in a municipality has standing. Id. at 337. In the Booth case, the court held that where the question of standing is at least debatable, rather than debate that issue it is "preferable in the public interest to settle the constitutional questions presented on their merits." Id. at 637. However, I was unable to find any case which supported the applicability of these holdings to the types of claims being made by the petitioners herein.

Respondents rely on Borough of Carteret v. Department of Education, OAL Dkt. No. EDU 8564-04 (Aug. 26, 2005) affirmed by the Commissioner (Dec .27, 2005) www.state.nj.us/njded/legal/index.html. In that case, it was specifically held that the Mayor and Borough lacked standing to challenge the refusal of the Department of Education to designate the school district as an Abbott district. This allegedly resulted in a disparate and burdensome tax levy on the borough's taxpayers.

As stated in Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001), in order for a party to have a standing, the party must have a sufficient stake in and real adverseness with respect to the subject matter, and be harmed by an unfavorable decision. The court also stated that litigants, generally, do not have standing to assert the rights of third parties. Ibid. Further, in Stubaus, the court stated that a government agency's parens patriae interest in protecting the general public, standing alone, is insufficient to support standing to challenge and exercise of power by another agency of the government. Id. at 49.

I agree with the respondents that the Borough of Carteret case presented a more compelling scenario than that of the present petitioners in this matter. In that case there were allegations of a direct and specific impact upon the borough's taxpayers. In the present case, the petitioners allege in the Petition of Appeal that the student attendance plan results in a negative impact on all students attending Howell and Colts Neck High Schools, frequent student and neighborhood dislocation, lack of stability and continuity for neighborhood residents, students suffering a lack of identity and sense of community, overcrowding in Howell High School and overenrollment in Colts Neck High School, inefficient transportation and operation plan and detriment to the students' educational experience. Respondents contend that these alleged impacts are speculative and are limited to a very small portion of the taxpayers and residents of the Township of Howell. What is more significant for deciding this motion is that there is no allegation of any actual or imminent harm caused to the Township or its Mayor.

Therefore, based on the foregoing discussion, and for the reason that the petitioners will suffer no harm as a result of the complained-of actions by respondents, I **FIND** that the petitioners, Township of Howell, and its Mayor, Joseph D. DiBella, lack standing to pursue this matter and their petition should be dismissed.

2. Respondent's motion to dismiss the petition as time-barred.

Since my initial decision is a recommendation to the Commissioner, and a since there is the possibility that the Commissioner may disagree with my determination regarding petitioners' lack of standing, I believe it is prudent to address the other motions in this matter.

N.J.A.C. 6A:3-1.3(i) provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order

> provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The 90-day rule is a regulatory provision which has the effect of a statute of limitations. It has been reviewed and approved by the courts as an essential element in the proper and efficient administration of the school laws because it provides a measure of repose and stability. See, Kaprow v. Bd. of Educ. of Berkeley Tp., 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 90 days.

In Count III of the Petition of Appeal, the petitioners challenge the Board of Education's Policy 8110. This policy, in its present form, was revised and adopted on May 10, 2004, and has remained unchanged since that date. It is clear that the petitioners' challenge to Policy 8110, filed with the Commissioner on February 17, 2006, is far out of time, and I so **FIND**. Therefore, I **CONCLUDE** that petitioners' challenge to Policy 8110 contained in the Petition of Appeal should be dismissed.

The Student Attendance Plan for the 2006-2007 school year was approved by the Board of Education on September 12, 2005 (R-3, Exhibits C and D). On November 21, 2005, the Board of Education approved a revision to the Student Attendance Plan for the 2006-2007 school year (R-3, Exhibit F). That revision changed the plan by reverting to the status quo for students from certain limited areas of Howell Township attending Freehold Township High School. The November 21, 2005, revision of the Student Attendance Plan for the 2006-2007 school year had no impact on the remainder of the plan. Therefore, I **FIND** that petitioners' February 17, 2006, challenge to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on September 12, 2005 (R-3, Exhibits C and D), is out of time and should be dismissed.

Petitioners contend that if it is determined that the Petition of Appeal was not timely filed, this is a matter of significant public interest and there is no prejudice to respondent by allowing this matter to proceed. However, this regulatory limitation will

only be relaxed pursuant to N.J.A.C. 6A:3-1.16 where unusual or compelling circumstances exist causing injustice. See Raymond v. River Edge BOE, 94 N.J.A.R. 2d (EDU) 203, affd, 94 N.J.A.R.2d (EDU) 431. If this matter is of significant public interest, why is it that no parents filed a petition of appeal challenging the Student Attendance Plan within the 90-day period? The prejudice to the respondent school district caused by the delay in pursuing this matter is also obvious.[1] This matter is the very type of situation where the policy of repose and stability is critical for the proper administration and operation of the school district. I **FIND** that petitioners have presented no unusual or compelling circumstances, the existence of which would cause injustice, so as to justify the relaxation of the 90-day time period of N.J.A.C. 6A:3-1.3(i).

With respect to the petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005 (R-3, Exhibit F), I **FIND** that it was filed within the 90-day period specified by N.J.A.C. 6A:3-1.3(i). However, this revision has the effect of causing the Student Attendance Plan for the 2006-2007 school year to revert to the prior year's Student Attendance Plan with respect only to those students in a specific section of Howell Township who will remain in the attendance area for Freehold Township High School. Thus, if the petitioners are permitted to pursue their challenge to the November 21, 2005 revision, and if they were to succeed in their claim that Student Attendance Plan for 2006-2007 with this revision is void and of no effect, the Student Attendance Plan for the prior year would remain in effect and there would be no change.

In Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976), it was stated that there are two basic reasons for the doctrine of mootness.

> 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

[1] See the discussion of the issue of prejudice to the respondent school district in Section 3 of this initial decision.

> engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court.

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy and where the conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983); Barshatky v. Freehold Regional High School District Board of Education, 95 N.J.A.R. 2d (EDU) 73. The courts and the Commissioner of the Department of Education ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources. In re Conroy, supra at 459; Carolyn Henry v. Board of Ed. of the City Wildwood, 1975 S.L.D. 1, 3.

Therefore, I **CONCLUDE** that petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005, should be dismissed as moot.

3. Petitioners' motion to amend to add new parties.

N.J.A.C. 1:1-6.2(a) provides:

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.

In their moving papers, petitioners argue that a motion for leave to amend a pleading is to be liberally granted, especially in matters affecting the public interest. Finderne Mgmt. Co., Inc. v. Barrett, 355 N.J. Super. 170 (App. Div. 2002); Springfield Tp v. Board of Educ., 217 N.J. Super. 570 (App. Div. 1987). Petitioners assert that the

proposed amendment will provide for a representation of individual residents and parents of students who attend respondents' schools, and the relief sought is grounded on the same operative facts as set forth in the petition so there will be no prejudice to respondents with regard to addressing new issues or claims against it. Petitioners argue that the amended pleading will name parties whose claims arose out of the original occurrence or actions of respondent school board and accordingly the amendment should relate back to the date of the original pleading, citing Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300 (1969).

In response to the motion, respondents contend that adding new parties would create undue prejudice to respondents. Respondents point out that the holding in the Finderne case makes it clear that the decision to grant or deny leave to amend is subject to the discretion of the trial court, and denial is required only when there would be prejudice to the other party or the movant was dilatory in prosecution of the claim. Finderne, supra, 355 N.J. Super. at 196.

Respondents further contend that they will be unduly prejudiced by an amendment to the pleadings at this late date, which is approximately five months after the filing of the petition and ten months after the adoption of the Attendance Boundary Plan for the 2006-2007 school year.

The difficulty I have with petitioners' motion to amend the pleadings is that the parties to be added are each asserting individual claims against the respondent school district that should have been asserted at a much earlier date, and which are now untimely if they were to be asserted in a new petition.

The New Jersey Administrative Code is silent as to the issue when an amended pleading relates back. N.J.A.C. 1:1-1.3(a) provides in relevant part:

> This chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are

compatible with these purposes.

R. 4:9-3 of the New Jersey Court Rules provides in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading.

As was stated in Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998), citing R. 4:9-3,

> . . . [N]othing within the doctrine of relation back would permit claims asserted by litigants in one action to relate back to claims asserted by different litigants in a different action.

The claims of the proposed new petitioners are not new claims or claims that were recently discovered by them. Each of these claims existed on September 12, 2005, and on November 21, 2005, when the complained of actions were taken by the respondent Board of Education. The first notice to the respondents that these proposed petitioners were asserting these individual claims occurred on or about July 11, 2006, when the motion to add these individuals as petitioners was submitted by their attorney. This far exceeds the 90-day time limit specified by N.J.A.C. 6A:3-1.3(i) for filing challenges to the actions of a board of education. To allow these new claims to be made by way of an amended petition would be volative of the policy behind N.J.A.C. 6A:3-1.3(i) for expediency in asserting claims against the board of education and for stability and repose. Parents of any students who felt negatively impacted by this attendance plan had the opportunity to challenge the plan within 90 days of its adoption. They should not be given a second opportunity to challenge the plan eight months after its adoption.

In addition, I am satisfied that in light of the current factual situation, the motion to amend the petition should be denied because such an amendment to add new

parties would be prejudicial to the respondent. Respondents' attendance plan was adopted in September 2005, and modified in November 2005. No action was taken against the adopted plan within the 90-day period following its adoption. I **FIND** that the school district has expended significant time, money and resources in planning and budgeting for the 2006-2007 school year in reliance upon the attendance boundary plan. I am satisfied that it will be extremely onerous if not impossible for the district to accomplish and implement any change in the Attendance Boundary Plan for this current school year. Based upon the Certification of Dr. Wasser (R-6), the school district has established a master schedule, established all students' schedules for all of its students in six high schools, established all bus schedules, routes and bus stops, hired and assigned staff for all six high schools, established staff schedules for all six high schools, and allocated classroom and other facilities within each school building to meet the needs of the assigned students. These undertakings have actually begun in operation at the start of the school year and any change in the allocation of students would have a drastic effect and would cause a disruption in the educational process at this point.

In view of the foregoing, and after considering all of the surrounding circumstances, I **CONCLUDE** that it is appropriate to exercise discretion in this matter by refusing to permit the amendment of the petition to add new parties.

Because of the determinations I have made with respect to the foregoing issues, I believe that it is unnecessary to address respondents' motion to dismiss the Petition of Appeal with respect to any claims against James Wasser, Superintendent of Schools.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that the petition in this matter is hereby **DISMISSED** for lack of standing, and that petitioners' challenges to Policy 8110 and to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on September 12, 2005 (R-3, Exhibit C and D), are out of time pursuant to N.J.A.C. 6A:3-1.3(i), and are hereby **DISMISSED**. I further **ORDER** that t petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005, is **DISMISSED** as moot. I further **ORDER** that petitioners' motion to amend the Petition of Appeal to add additional petitioners is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 5, 2006
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-5-06
DATE

Mailed to Parties:

OCT 12 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX:

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

P-1 Petitioners' Notice of Motion to Amend the Petition of Appeal

P-2 Certification of Counsel in Support of Motion with the following attachments:

A. Proposed and Amended Petition of Appeal

B. Certification of individual residents and parents of students who attend respondents' school in Support of Motion to Amend Petition

P-3 Petitioners' Response to Respondents' Notice of Motion to Dismiss

For respondent:

R-1 Notice of Motion to Dismiss the Petition of Appeal

R-2 Letter Brief in Support of Respondents' Motion to Dismiss Petition of Appeal

R-3 Certification of James Wasser dated June 15, 2006, with the following attachments:

A. Board of Education Policy 8110, revised May 10, 2004

B. Minutes of Board meetings of November 21, 2005 and January 9, 2006 (excerpts)

C. Attendance Boundary Plan for 2006-2007

D. Student Attendance Plan, school year 2006-2007 and Minutes of Board meeting of September 12, 2005 (excerpt)

E. Guide to 2005-2006 Attendance Boundaries

F. Minutes of Board meeting of November 21, 2005 (excerpt)

R-4 Reply Letter Brief to Petitioners' Opposition to Respondents' Motion to Dismiss

R-5 Letter Brief in Support of Respondents' Opposition to Petitioners' Motion to Amend Petition

R-6 Certification of James Wasser, dated July 27, 2006

430-06

R.C. and B.C. on behalf of minor children L.D.C. and R.B.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

SYNOPSIS

Petitioners contested respondent's determination that their children were not domiciled in respondent's district during the 2005-2006 school year. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance, based on observations by an investigator that L.D.C. and R.B.C. were living at their grandparents' address in East Orange.

The ALJ found that petitioners have proven by a preponderance of credible evidence that L.D.C. and R.B.C. were domiciled in respondent's school district during the period in question; that the address in East Orange was never a permanent domicile; and concluded that respondent's decision to disenroll petitioners' children must be overturned, and the Board's counterclaim for tuition is without merit.

Upon an independent and thorough review of the record, the Commissioner adopts the Initial Decision as the Final Decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 7153-06
AGENCY DKT. NO. 177-5/06

R.C. and B.C. on behalf of minor children L.D.C. and R.B.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

The record of this matter and the Initial Decision have been reviewed. Although a hearing took place on September 8, 2006, the record does not include a transcript of same. No exceptions have been filed.

For the reasons set forth in the Initial Decision, the Commissioner adopts the Administrative Law Judge's (ALJ) determination that petitioners proved that B.C. and the children never relinquished domicile in Bloomfield, notwithstanding their intermittent stays – over several months – in the East Orange home of B.C.'s parents. Accordingly, the Commissioner adopts the Initial Decision overturning respondent's decision to disenroll the children and dismissing respondent's counter-claim for tuition.

IT IS SO ORDERED.•

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

• This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.*6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07153-06
AGENCY DKT. NO. 177-5/06

R.C. AND B.C. O/B/O MINOR CHILDREN,

L.D.C. AND R.B.C.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Joseph M. Speidel, Esq., for Petitioners

Mark A. Wenczel, Esq., for Respondent (Gaccione, Pomaco & Malanga, attorneys)

Record Closed: September 11, 2006 Decided: October 23, 2006

BEFORE **JAMES A. GERAGHTY**, ALJ:

BACKGROUND

Petitioners, R.C. and B.C., contest the May 3, 2006 decision of the Bloomfield School District Board of Education to disenroll their children, L.D.C. and R.B.C., on

grounds that the children were not domiciled in the district during the 2005/2006 school year. The New Jersey State Department of Education received Petitioners' appeal on May 24, 2006. (Exhibit R-1). The matter was transmitted to the Office of Administrative Law ("OAL") on June 14, 2006. The hearing was held on September 8, 2006, at which Petitioner, B.C., and Robert Presuto, Director of Administrative Services for the Bloomfield School District, testified. Both parties adduced documentary evidence and were represented by counsel. Petitioners' counsel submitted copies of exhibits admitted during the hearing under cover of a letter received September 11, 2006 at the OAL. The record closed that day.

The issues are whether Petitioners' children, L.D.C. and R.B.C., were Bloomfield School District domiciliaries during school year 2005/2006, and if not, whether they are liable for tuition assessment for the period of ineligibility.

LEGAL AUTHORITY

Persons over five and under twenty years of age are entitled to attend public schools without charge if they are domiciled within the school district in which the school is located. N.J.S.A. 18A:38-1. A student is domiciled within a school district:

> 1. . . . when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> ***
>
> 4. A student is domiciled in the school district when his or her parent or legal guardian resides within the district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.

N.J.A.C. 6A:22-3.1(a)1,4.

Where a student's dwelling is located within two or more school districts, ". . . the district of domicile for school attendance purposes shall be that of the municipality to

which the resident pays the majority of his or her property tax . . . ." Id. at section 3.1(b).

There is a substantial body of precedent on domicile. Our Appellant Division has explained:

> Domicile is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, 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 . . . it is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law . . . . And every person, in all circumstances and conditions, is deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired . . .
>
> A person may have several residences or places of abode but he can have only one domicile at a time. Domicile of choice is essentially a question of residence and intention - of factum and animus. It involves an exercise of volition . . . . And he may have his residence in one place, while his domicile is in another . . . . There are certain legal rights and privileges which pertain to "residence" rather than to "domicile." One's "home" may be relinquished and abandoned, while one's "domicile" upon which may depend certain civil rights and duties, may in legal contemplation remain." Kurilla v. Roth, 132 N.J.L., 213, 215 (Sup. Ct. 1944) and authorities there cited.
>
> To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added animus manendi; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless, or until something uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home. Harral v. Harral, 39 N.J. Eq. 279 (E & A 1884).
>
> A change of residence for a special purpose such as taxation benefits, or a period of seasonal residence and obedience to the demands of health, does not necessarily amount to a change of domicile. The burden of proof to establish that a change of domicile has occurred rests upon the party asserting it. In re Michelsohn's Will, 136 N.J. Eq. 387 (Prerog. 1944).

> Domicile is factual, and each case must be evaluated and determined by its own facts and circumstances.

Cromwell v. Neeld, 15 N.J. Super. 296 (App. Div. 1951).

The courts have established criteria to determine which residence constitutes a person's domicile, to wit: (1) physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has the intention to return. Mercadante v. City of Paterson, 111 N.J. Super. 35 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). Thus, the courts seek evidence of a person's intent by reference to "indicia of domicile." F.P. o/b/o N.P. and S.P., Petitioner v. Board of Education of Point Pleasant Beach, Ocean County, Respondent, OAL Docket No. EDU 6951-98 (Commissioner of Education April 13, 1999) citing Matter of Unanue, 225 N.J. Super. 326 (Law Div. 1991).

A school board may recover tuition from the parents of child found ineligible to attend a school in its district. N.J.S.A.18A:38-1(6)(2). The tuition is 1/180th of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. Ibid.

FACTUAL DISCUSSION

The documents and testimony adduced at the hearing reveal the following:

Petitioners, R.C. and B.C., have resided with their children, L.D.C. and R.B.C., at an address on Ampere Parkway in Bloomfield, New Jersey, since 1998. The house was purchased owned by husband/father, R.C., and his mother, T.C., to facilitate purchase financing because B.C., his wife, had a poor credit rating.

In February 2006, Respondent received information that L.D.C., a student attending school in the Bloomfield School District, actually resided in East Orange, New Jersey. (Exhibit R-1). The District conducted an investigation which entailed a "stake

out" by a compliance officer at Petitioners' Bloomfield address from 2:30 to 4:00 p.m. on March 16 and 23, 2006. Neither L.D.C. nor her brother, R.B.C. was seen entering that location. On March 29, 2006, he conducted another stake out at the same location from 6:30 a.m. to 7:40 a.m. A young male was seen entering the location during that stake out. On March 30, 2006, the investigator staked out the East Orange Williams Street address owned by Petitioner B.C.'s parents. Both students were observed leaving the house with an older male who drove them to Bloomfield High School where L.D.C. exited, and then to the Ampere Parkway Bloomfield address where R.B.C. exited the vehicle. The vehicle registration was the same as that which dropped off the male child at the Ampere Parkway address during the previous stake out. There were subsequent stake outs on March 31, April 3, April 4, and April 5, 2006 where comparable behavior was observed. The investigator reported the results to Mr. Robert Presuto, the Bloomfield School District Director of Administrative Services accordingly. (Exhibit R-2).

On the strength of the investigator's report, the School District recommended disenrollment of the children to the School Board because they were not domiciled in Bloomfield. The District afforded Petitioners the opportunity to meet with the School Board on May 2, 2006. Petitioner B.C. attended the hearing and testified, although not under oath, that she resided at her mother's East Orange address intermittently from the summer of 2005 through April 2006 since she was separated from her husband. However, she declined to explain the circumstances claiming to have been intimidated by so many "blue suits" at the School Board meeting. Specifically, she did not disclose that she was having marital difficulties. Therefore, since her absences from Bloomfield and her children's movements to and from the East Orange address were not satisfactorily explained, the Bloomfield School Board apparently found B.C.'s evasive explanations to be outweighed by the objective observations of the investigator. The Board concluded that the children's domicile was East Orange and that they should be disenrolled from the Bloomfield School District. Petitioners appealed to the New Jersey State Department of Education on May 16, 2006. (Exhibit R-3).

At the September 8, 2006 OAL hearing, B.C. testified that when she and her husband married in 1993 they lived with her parents in East Orange until they were able to buy their Ampere Parkway, Bloomfield residence in 2000. Both parents work, B.C.

for State Farm Insurance, and R.C. as an auto mechanic in Newark. He also moonlights as a mechanic in addition to his regular employment. Both R.C. and B.C. pay the mortgage and taxes on their Bloomfield home. The children have been attending the Bloomfield schools since 2001. B.C. testified that she and her husband began having marital difficulties during 2005. She separated from her husband and returned to live temporarily with her parents in East Orange. She testified that she and her husband wished to resolve their difficulties and it was never their intention to permanently separate or to divorce. They never filed a divorce action. At this time, B.C. left most of her personal belongings at the couple's Bloomfield residence. She brought to East Orange clothing and personal items such as a person would need while traveling. Her children accompanied her but did not stay in East Orange continuously. Rather, they returned to their father on occasion depending largely on their parents' work schedules. On those occasions when R.B.C. stayed with his mother in East Orange, his father would pick him up and drive him to school. Sometimes he was dropped off at his Bloomfield home for his father to drive him to school. During this period, both children's personal items including most toys remained at the Bloomfield home. Like their mother, they brought only clothing and other personal items that they would need for a temporary sojourn in East Orange. B.C. testified that she and her children returned home to Bloomfield for the holidays in December 2005. Thereafter, she and the children resumed their intermittent living arrangements between Bloomfield and East Orange.

At some point in February or March 2006, Petitioners learned through acquaintances at their church of a marriage counseling seminar known as the Family Life Weekend to Remember to be held during April 2006 in Burlington, Massachusetts. Petitioners attended beginning April 7, 2006 through April 9, 2006. (Exhibit P-2). Apparently the seminar or marriage encounter was successful since the couple thereafter reunited permanently at their Bloomfield home.

At the OAL hearing, Petitioner authenticated certain documents evidencing her intent to return to her Bloomfield home. For example, her driver's license and vehicle registration state her address as Ampere Parkway in Bloomfield. (Exhibit P-3). On cross-examination, she produced her prior driver's license which likewise showed her

address at the same location. (Exhibit P-3). Petitioners' Capital One credit card was issued to them jointly at their Bloomfield address. (Exhibit P-4). Petitioners' auto insurance bill likewise shows their address as Ampere Parkway in Bloomfield. (Exhibit P-5). Finally, Petitioner B.C.'s pay vouchers from April through August 2006 similarly show her address as Ampere Parkway in Bloomfield. (Exhibit P-6). Petitioner testified that she received all of her mail at her Bloomfield residence.

There were some indicia that Petitioners' children resided in East Orange. Their daughter, L.D.C., received a magazine subscription at her grandmother's East Orange address. Her brother's emergency contact card identified both his parents at Bloomfield and her grandparents at East Orange. (Exhibit R-4).

FINDINGS AND CONCLUSIONS

Petitioner, B.C., testified credibly concerning the circumstances of her temporary separation from her husband, R.C., and their attempts, finally successful, to resolve their differences. During this process, Petitioner, B.C., and her children sojourned temporarily at B.C.'s parents' East Orange home where she and her husband had lived prior to 2000 when they moved to Bloomfield. Petitioners together paid the mortgage and taxes on their Bloomfield home. The OAL received no evidence that either Petitioner contributed in any way to B.C.'s parents' residential expenses, either mortgage or taxes, if any, in East Orange. Also, B.C. and her children's personalty remained for the most part in Bloomfield. Although the School Board's conclusion that Petitioners had changed their children's domicile during the 2005/2006 school year was reasonable as it was grounded on the fruits of the investigator's observations as well as B.C.'s elliptical testimony during the May 2006 School Board meeting, nevertheless, all the credible testimony and documentary evidence contradicts this conclusion. Rather, the evidence shows strongly that neither Petitioner ever intended to change their permanent residence even if B.C. and her children resided intermittently in East Orange. Accordingly, I **FIND** as a matter of fact that B.C. and her children, L.B.C. and R.B.C., at all times relevant resided at what was their permanent home and principal establishment in Bloomfield and to which, whenever absent, they intended to and in fact

did return. Neither Petitioner ever did or said anything that evidenced an intention to move from that location permanently. There are no facts which suggest that any of the parties acquired a new domicile. B.C. never relinquished her Bloomfield residence.

Based on the substantial weight of the evidence adduced at the OAL, I **CONCLUDE** that Petitioners' Ampere Parkway residence in Bloomfield was their permanent abode to which they always intended to return even if temporarily absent, and that this intent is corroborated by extensive indicia all of which militate in support this conclusion that Petitioners and their children have been and continue to be domiciled in Bloomfield, New Jersey. I further **CONCLUDE** that Petitioners' children, L.D.C. and R.B.C., though temporarily residing in East Orange during the 2005/2006 school year, nevertheless were domiciled in Bloomfield, New Jersey during that time. Accordingly, the Bloomfield Board of Education decision to disenroll Petitioners' children is not supported by the weight of the evidence and must be overturned. So too, the School Board's counterclaim for tuition reimbursement is without merit.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and legal authority, I **DECIDE** this matter in favor of Petitioners and **ORDER** that their appeal should be and hereby is **GRANTED,** and that Respondents' counterclaim is dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/23/2006
DATE

JAMES A. GERAGHTY, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/23/06
DATE

Mailed to Parties:

OCT 24 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioners:

B.C., Petitioner

For Respondent:

Robert Presuto, Director of Administrative Services, Bloomfield School District

Exhibits

For Petitioners:

P-1	Deed to Ampere Parkway residence
P-2	Marriage Encounter Brochure
P-3 (collective)	B.C. driver's license, vehicle registration, and insurance card
P-4	B.C. and R.C. credit card bill
P-5	B.C. auto insurance bill
P-6	B.C. State Farm pay vouchers

For Respondent:

R-1	Residency Referral
R-2	Investigator Report
R-3	Appeal Notice and related Disenrollment Notices

425-06

#425-06

S.H., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her nephew, S.B., is ineligible to attend West Orange Township schools because she failed to demonstrate a family or economic hardship which would render the parent unable to support or provide care for the child, pursuant to *N.J.S.A.* 18A:38-1(b). Respondent seeks tuition reimbursement for the alleged period of ineligible attendance. Petitioner failed to appear at hearing scheduled for October 16, 2006, at which the Board presented its proofs on the counterclaim for tuition reimbursement, which were admitted into evidence.

The ALJ found that since no proof was offered to dispute the Board's contention, S.B.'s parent failed to demonstrate that she is incapable of supporting or providing care for her son due to family or economic hardship, and concluded that S.B. is not entitled to a free education in West Orange Township schools. The ALJ further concluded that the Board is entitled to recover tuition pursuant to *N.J.S.A.* 18A:38-1(b)(2), and granted the Board's application for reimbursement in the amount of $15,457.28, plus $77.51 per day for each day S.B. attends school in the district after October 16, 2006.

Upon a full and independent review of this matter, including timely filed exceptions submitted by counsel for the previously *pro se* petitioner, the Commissioner is compelled to reject the Initial Decision and remands the matter to the OAL for a hearing on the merits. The Commissioner concluded that in view of the particular circumstances described in petitioner's exceptions, it would be contrary to the interests of justice to deprive the petitioner of the opportunity to have the merits of her case decided.

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 1, 2006

OAL DKT. NO. EDU 9150-06
AGENCY DKT. NO. 180-5/06

S.H., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions on behalf of the previously *pro se p*etitioner, filed by Matthew E. Przywozny, Esq., were submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 as were reply exceptions on behalf of the Board and these submissions were fully considered by the Commissioner in reaching her determination herein.[1]

Exceptions on behalf of petitioner, in pertinent part, state:

> This matter was scheduled for a hearing before Judge Paone on October 16, 2006. Unfortunately, Mrs. Hunter failed to appear for the hearing as she mistakenly believed it to be on another day. Nevertheless, Judge Paone gave Mrs. Hunter until October 27, 2006 to submit objections on which date the record was to close.
>
> Mrs. Hunter came with her husband to see me on the afternoon of October 25th at which time I tried to make sense of what has transpired with this case up to this point. ***I promptly sent the materials to Judge Paone via overnight delivery in hopes that they would be considered.

[1] It is noted that the Board's reply exceptions urge the Commissioner to reject petitioner's exceptions as untimely given that the Administrative Law Judge's (ALJ) decision was issued on October 27, 2006 and petitioner's exceptions were not received by the Board until November 14, 2006. However, the Commissioner observes that *N.J.A.C.* 1:1-18.4, in pertinent part, specifies: "[w]ithin 13 days *from the date the judge's initial decision was mailed to the parties*, any party may file written exceptions *with the agency head*." (emphasis added) Here the record indicates that the ALJ's decision was mailed to the parties on October 30, 2006. As such, petitioner's exceptions, filed with the Agency on November 8, 2006, are well within the allotted regulatory timeframe. Respondent Board's receipt of petitioner's exceptions operates to trigger the running of the regulatory timeline for the filing of reply exceptions (*N.J.A.C.* 1:1-18.4(d)).

> Although Judge Paone acknowledges receipt of the letter and documents on October 27, 2006, *** it appears that he had filed his decision in the morning of the 27th and that the package arrived in the afternoon. ***
>
> It is understandable that Judge Paone reached that conclusion as he was unable to consider the affidavit of S.B.'s biological mother wherein it (sic) she explains that she does not have a permanent residence and is unable to support her son. He was not able to consider [the] statement of Sherell Hunter wherein she confirms that she is a West Orange resident who is S.B.'s guardian.
>
> If Judge Paone's ruling, although reasonable based upon the lack of any meaningful record, is not overruled, Mrs. Hunter will be unable to enroll S.B. in any school, as he does not have a permanent residence in any other School District. (Petitioner's Exceptions at 1-2)

Upon her independent review of the record and full consideration of counsel's exceptions on behalf of petitioner, the Commissioner is compelled to reject the Initial Decision of the Administrative Law Judge (ALJ) and return this matter to the OAL for a hearing on its merits. Notwithstanding petitioner's failure to appear on the scheduled hearing date, in view of the particular circumstances here, the Commissioner concludes that it would be contrary to the interests of justice to deprive petitioner of the opportunity to have the merits of her case decided.

Accordingly, the Initial Decision of the OAL is rejected and this matter is remanded to the OAL for adjudication on its merits. Petitioner is cautioned, however, that should she again fail to appear on a scheduled hearing date without just cause and prior notice to the ALJ, no further opportunities to pursue this matter will be accorded her.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9150-06
AGENCY DKT. NO. 180-5/06

S.H., ON BEHALF OF MINOR CHILD,
S.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,
Respondent.

S.H., pro se

Stephen J. Christiano, Esq., for the respondent

Record Closed: October 16, 2006 Decided: October 27, 2006

BEFORE **JOSEPH PAONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H. appeals the determination of respondent Board of Education of the Township of West Orange (Board) that S.B., petitioner's nephew, is ineligible to

attend the West Orange Township schools because she failed to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child. N.J.S.A. 18A: 38-1(b). Respondent requests tuition reimbursement for the alleged period of ineligible attendance.

By letter of October 12, 2005, the Board notified petitioner of its determination. On October 27, 2005, the Commissioner received an appeal from S.B.'s mother. The New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau) responded and advised S.B's mother that the appeal must be initiated by petitioner, S.H., with whom her child resides. On May 12, 2006, the Board advised petitioner that due to the failure to file an appeal, S.B. would be disenrolled as of May 19, 2006. On May 19, 2006, the Commissioner received an appeal from petitioner. On July 19, 2006, an Answer was filed on behalf of the Board. On August 9, 2006, the Bureau transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for October 16, 2006, and notices were mailed to the parties and to the attorney for the Board. Petitioner did not appear on the hearing date. No message was received in regard to her nonappearance. The hearing went forward and the Board presented its proofs on its counter-claim for tuition reimbursement. On October 16, 2006, correspondence was sent to petitioner advising her that the Board's proofs had been admitted into evidence and offering her the opportunity to file any objections by October 27, 2006. No submissions were received from petitioner and the record closed on that date.

FINDINGS OF FACT

In September 2005, S.B. was enrolled in West Orange High School, which is in the Board's district. On October 12, 2005, the Board advised petitioner that it decided at its October 10, 2005, to deny S.B. admission to its school district because S.B.'s parent failed "to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child." Since no proof was offered to dispute the Board's contention, I am compelled to **FIND** as fact that S.B.'s parent failed

to demonstrate that she is incapable of supporting or providing care for S.B. due to a family or economic hardship.

Josefa Lopez, Registrar for the school district, testified that the per pupil cost to the school district was $13,287 during the 2005-2006 school-year and $13,951 during the 2006-2007 school year. (R-1). These costs are undisputed. She further testified that S.B. was enrolled in September 2005 and continues to attend school in the district.

CONCLUSIONS OF LAW

> Public schools shall be free to . . . [a]ny person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements . . . . If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.
>
> [N.J.S.A. 18A:38-1(b)(1)]

I **CONCLUDE** that S.B. is not entitled to a free education by the Board because S.B.'s parent failed to provide the board with sufficient proof of the parent's "family or economic hardship."

The Board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). "Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance . . . ." Ibid. Lopez testified that the total annual per pupil cost for the 2005-2006 school-year was $13, 287. The total annual per pupil cost for the 2006-2007 school-year is $13,951. The per diem rate for the 2006-2007 school-year is $77.51. S.B. was ineligible to attend West Orange High

School during the 2005-2006 school-year and he has accumulated 28 days of ineligible attendance during the 2006-2007 school year. Accordingly, I **CONCLUDE** that the total due the Board as of October 16, 2006, the date of the hearing, is $15,457.28.

ORDER

I hereby **ORDER** that the Board's decision to remove S.B. from its school district is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is hereby **GRANTED** in the amount of $15,457.28, plus $77.51 per day for each day S.B. attends school in the district after October 16, 2006.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 27, 2006
DATE

JOSEPH PAONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 27, 2006
DATE

Mailed to Parties:

OCT 30 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Josefa Lopez

Exhibits

For Petitioner:

None

For Respondent:

R-1 Tuition calculation sheet for S.B.

424-06

#424-06

THOMAS MORRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured Special Education teacher, appealed the district's withholding of his salary increment for the 2005-2006 school year because of an alleged act of corporal punishment. Respondent contends that petitioner engaged in conduct unbecoming a teacher when he struck a student on the wrist with a ruler, and that its action in withholding his salary increment was reasonable and within its statutory authority.

The ALJ found, *inter alia*, that: the petitioner has not met his burden in demonstrating that the district's action was arbitrary or capricious; the petitioner's version of the incident – in which he denies striking the student with a ruler – is not sustainable; and the evidence indicates that petitioner engaged in an act of corporal punishment. Accordingly, the ALJ affirmed the withholding of petitioner's salary increment.

Upon a full and independent review of the record, the Commissioner agrees with and adopts the ALJ's findings that respondent had a reasonable basis for its conclusion that petitioner engaged in an act of corporal punishment in violation of *N.J.S.A.* 18A:6-1. Accordingly, the Commissioner adopts the Initial Decision upholding respondent's action of withholding petitioner's increment, and the petition is dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 1, 2006

OAL DKT. NO. EDU 9472-05
AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Initial Decision, petitioner's exceptions and respondent's reply to the exceptions have been reviewed. Upon independent evaluation, the Commissioner adopts the Initial Decision as the Final Decision in this case.

Petitioner claims that the withholding of his increment for the 2005-2006 school year was improper, because it was based on false allegations that he hit a student with a ruler. The complaining student, one of his classmates, the school nurse, and the principal testified for respondent; petitioner testified on behalf of himself; statements and reports taken from the principal, the school nurse, the non-complaining student and a crisis teacher were entered into evidence.

At the outset, the Commissioner notes that unless the Administrative Law Judge's (ALJ) findings of fact are arbitrary and capricious, she must accept them, where they involve credibility determinations, as they do in this case. *H.K. v. State of New Jersey, Department of Human Services, Division of Medical Assistance and Health Services, and Atlantic County Department of Human Services,* 184 *N.J.* 367, 384 (2005) (it is not for us or the agency head to

disturb that credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing, citing *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 587 (1988)). *See also, N.J.S.A.* 52:14B-10(c) (indicating that the head of an agency "may not reject or modify any findings of fact as to issues of credibility . . . unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.").

In the present case, the ALJ found credible the testimony of both the student that petitioner had allegedly hit (E.A.), and another student who had been sitting close by and had corroborated the allegation that petitioner had hit his classmate with a ruler. The ALJ further found that the students' accounts were both reasonably consistent with each other and consistent with certain undisputed facts, such as E.A.'s misbehavior prior to the incident, and the welt on E.A.'s arm – consistent with a blow by a ruler – which was observed shortly after the incident by the school nurse, the principal and the crisis teacher, Mr. Rochester.

In contrast, petitioner did not offer adequate support for his theory that E.A. inflicted the welt on himself, and blamed it on petitioner, in order to extract revenge for disciplinary actions petitioner took on the prior school day when E.A. allegedly bit another student. Neither the nurse nor the principal recalled a biting incident, and there is no indication in the record that petitioner had satisfied his burden to request – before or during the hearing – any records from respondent that pertained to an alleged biting.

Similarly, petitioner offered nothing more than speculation to support his hypothesis that the welt on E.A.'s arm, which was observed by respondent's witnesses, was self-inflicted. Petitioner's argument in his second exception – that the Commissioner should conclude that E.A. hit himself on the arm based solely on the amount of time between the

incident and E.A.'s meeting with crisis teacher Rochester – is without merit. Moreover, there are conflicting accounts in the record as to the amount of time that had passed between the incident, reported as having occurred at about 9:25 a.m., and E.A.'s meeting with Rochester.

In light of the foregoing, the Commissioner agrees with and adopts the ALJ's findings that respondent had a reasonable basis for its conclusion that petitioner engaged in an act of corporal punishment in violation of *N.J.S.A.* 18A:6-1. For the reasons set forth in the Initial Decision, the Commissioner further agrees that petitioner failed to meet his burden to show that respondent acted arbitrarily or capriciously in withholding petitioner's increment as a sanction for such unbecoming conduct.

Accordingly, the Commissioner adopts the Initial Decision upholding respondent's action of withholding petitioner's increment. The petition is dismissed.

IT IS SO ORDERED.•

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

• This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.*6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9472-05
AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Eugene G. Liss., Esq., for Petitioner

Arsen Zartarian, for respondent
(Perry L. Lattiboudere, Esq., General Counsel, attorneys)

Record Closed: April 17, 2006 Decided: October 17, 2006

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 10, 2005, the respondent, the State Operated School District of the City of Newark ("District" or "respondent") advised the petitioner, Thomas Morris ("petitioner" or "Morris") that it was withholding his salary increment for the 2005-2006 school year because he engaged in conduct that was unbecoming a teacher. On June 20, 2005,

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9472-05
AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eugene G. Liss., Esq., for Petitioner

Arsen Zartarian, for respondent
(Perry L. Lattiboudere, Esq., General Counsel, attorneys)

Record Closed: April 17, 2006 Decided: October 17, 2006

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 10, 2005, the respondent, the State Operated School District of the City of Newark ("District" or "respondent") advised the petitioner, Thomas Morris ("petitioner" or "Morris") that it was withholding his salary increment for the 2005-2006 school year because he engaged in conduct that was unbecoming a teacher. On June 20, 2005,

petitioner filed a Verified Petition with the Commissioner of Education, appealing the action of the respondent. An Answer was filed by the respondent on June 29, 2005.

On August 12, 2005, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. A hearing was held on and concluded on March 16, 2006. Post hearing submissions were filed on April 18, 2006. At the request of the undersigned, the time for the issuance of the Initial Decision was extended to October 15, 2006.

FACTS

Based on the record, I **FIND** the following **FACTS**:

Petitioner is a tenured Special Education teacher in the District. He was hired by the respondent in 1994. During the 2003-2004 school year, petitioner was assigned to the District's 18th Avenue School. E.A. was a student in the petitioner's class in the 2003-2004 and 2004-2005 school years. Petitioner knew E.A. as a baby because his mother worked for the District's Camden Street School. E.A. was classified as Emotionally Disturbed with Attention Deficit Disorder and Oppositional Behavior. He had problems with his teachers, classmates and the principal. He would fight, throw objects and hit his classmates. His trouble was frequent.

On September 10th of the 2004-2005 school year, E.A. was in his classroom throwing tennis balls at his classmates. Petitioner's directive to E.A. to stop was ignored. Indeed, E.A. proceeded to the petitioner's desk and started touching the petitioner's belongings. He picked up a stapler and opened it whereupon petitioner told him to put it down. Petitioner told E.A. to give him the stapler. Instead of doing as told, E.A. began to move the stapler around on the desk.

E.A. testified that he had his head down and his arm on the petitioner's desk. Petitioner threatened to hit him with a ruler that he was holding, he didn't lift his head on the count of three. Petitioner then counted to three and when he did not do as directed,

petitioner hit him on his left arm with the side of the ruler. E.A. told the petitioner that he was "going to tell the principal." Petitioner responded that he should "bring it on." E.A. then said he would tell his stepfather and petitioner again said to "bring it on."

E.A. left the classroom for the principal's office. While enroute, he saw Mr. Rochester (Rochester), the Crisis Counselor. He told him about the incident and Rochester took him to the School Nurse, Doris Austin (Austin). (P-2). Austin observed a red mark on E.A.'s arm. She recalls that E.A. told her that the petitioner hit him with a ruler. E.A. was not crying but was upset. Austin applied an ice pack for comfort and to reduce swelling. Thereafter, she prepared an incident report. (R-5). Austin acknowledges that the mark could have been due to something other than a ruler.

Under cross examination, E.A. denied throwing or touching any tennis balls. He admitted that he was forced to leave the 18th Avenue School because he was accused of setting three fires. However, he denies starting the fires. He was enrolled in the Renaissance Program at the Morton Street School, an alternative school. He was required to leave that program after he alleged that an Aide struck him. His allegation was not believed. He is now enrolled at the Samuel Berliner School, also an alternative school.

H.W. was seated next to E.A.'s assigned seat. He observed E.A. acting out, throwing tennis balls at the class and playing with a "big" stapler on the petitioner's desk. He also heard E.A. curse at the petitioner. The petitioner hit E.A. on his arm because he was acting out.

H.W. did not recall E.A. biting anyone on the day before the incident. Nor did he recall seeing E.A. with the petitioner's tape dispenser or the TV's remote control. When confronted with his written statement, he acknowledged that it stated that E.A. had a tape dispenser and the remote control.

Barbara Ervin, ("Ervin") Principal at the 18th Avenue School, observed a two and half inch red welt on E.A.'s arm. E.A. told her that petitioner hit him with a ruler. Pursuant to Board policy, she called the Division of Youth and Family Services. (R-3).

She had those involved prepare an incident report. (R-1, R-2). Ervin recounted that E.A. is emotionally disturbed and very active. He would curse students and teachers, leave the classroom without permission, fight and lie. In this instance, E.A. admitted being at the petitioner's desk touching his "stuff". He also admitted that he was non-responsive to the petitioner's directives. Ervin also testified that she did not include the petitioner's version of the events in her statement. (R-1). Petitioner denied hitting E.A. She also recounted that all teachers are trained in orientation on how to deal with discipline issues and are given written materials on the subject. (R-4). Indeed, she had spoken to the petitioner on a previous occasion about a similar situation involving another student.

Due to continuous behavioral problems, E.A. was subsequently transferred to a more restrictive program at an alternative school.

Petitioner recounted that in the year prior to the incident, E.A. was in his class. The class consisted of twelve students and an aide. E.A. wanted to be the center of attention and would be a distraction to other students. E.A. is very talented and has many abilities. Despite his talents and abilities, he would curse, walk out of class, overturn desks and chairs, pick fights and tease other students. In response to this behavior, he attempted to lower the emotional level by using humor.

On the first day of the instant school year, E.A. bit a student on the shoulder. He took the student to the nurse. He told E.A. that he would report the biting to the principal. E.A. told him to go "F----" himself and called him a "White M---F----." He escorted the student home, fearful that E.A. would "jump" him. He reported the incident to Ervin and called E.A.'s mom.

His classroom was set up in a "U" shape. In response to the biting incident, he seated E.A. next to his desk. On the morning of the incident, E.A. was throwing tennis balls, cursing and swinging a stapler in the air. E.A. grabbed the tape dispenser and he tussled with him for the stapler. Thereafter, E.A. grabbed the remote control and he attempted to get it from him. At this point, the students in the classroom were laughing.

The two of them had become a spectacle. He believes that E.A. was angry because he had spoken to Ervin and his mother about the biting incident.

E.A. left the classroom saying he was going to the office. Petitioner called security and reported that E.A. had left class. Petitioner denied having a ruler on his desk or hitting E.A. He also denies that E.A. had a welt mark on his arm when he left the classroom. Further, he denies telling E.A. to "bring it on."

After the incident, petitioner said he was reassigned to the Administrative Office at the Sussex Avenue School. The Division of Youth and Family Services investigated the matter and found that physical abuse was not substantiated pursuant to N.J.S.A. 9:6-8.21.

DISCUSSION

N.J.S.A. 18A:29-14 provides that:

> Any board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the actions of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

In contesting a salary increment withholding, a teacher has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or

induced by improper motives. Kopera v. West Orange Board of Education, 60 N.J. Super 288, 294 (App. Div. 1960).

Petitioner aptly notes that there is no single definition of the term unbecoming conduct. In Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957), it was held that the touchstone of a charge of unbecoming conduct is a teacher's fitness to discharge the duties and functions of one's office or position. Further, unfitness to remain a teacher may be shown by a single incident if sufficiently flagrant, but it is best evidenced by a series of incidents. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); Redclay v. State Board of Ed., 130 N.J.L. 369, 371 (Sup. Ct.) aff'd 131 N.J.L. 326 (E&A 1944).

Corporal punishment is defined in N.J.S.A. 18A:6-1 which provides:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> 1. To quell disturbance, threatening physical injury to others;
> 2. to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
> 3. for the purpose of self-defense; and
> 4. or the protection of persons or property.

In Craze v. Allendale Board of Ed., 1938 S.L.D. 585, 586, the Commissioner of Education defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." Thus, a teacher's use of force or fear or unnecessary and inappropriate physical contact in dealing with students constitutes corporal punishment.

In determining whether corporal punishment has been used by a teacher, the Commissioner of Education has recognized that there is a need to examine the testimony of children with great caution, especially when pupil witnesses are offered to support the alleged corporal punishment charges. In the Matter of the Tenure Hearing of Anne Boyd, Matawan – Aberdeen School District, OAL Dkt. No. EDU 6394-91. In In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 SLD 185, the Commissioner discussed the burden of proving a charge of corporal punishment, it was held:

> . . . The circumstances under which the episode occurred, its provocation, the nature of the incident, itself, the age of the pupil, the teacher's records, his attitude and the prognosis for his continued effective performance and usefulness in the school system. . . . each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem. . . (at 188).

In this matter, petitioner denies using a ruler to hit E.A. He admits tussling with EA to get the tape dispenser from him. While the alleged incident took place in an open classroom, only one student, H.W. testified that he saw Morris strike E.A. Petitioner contends that H.W. was a friend of E.A. and thus had a motive to lie. Further, H.W.'s written statement made contemporaneously with the event does not say that petitioner hit E.A. with a ruler. Rather, in that statement H.W. wrote that petitioner hit E.A. with the tape dispenser.

The determination credibility herein is crucial to a charge of conduct of unbecoming. Creditability contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency and the manner in which it hangs together with other evidence. Carbo V. United States, 314 F.2d 718 (9th Cir. 1963). It has been held that testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself and 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); State v. Taylor, 38 N.J. Super 6 (App. Div. 1965).

Respondent disputes that E.A. and H.W. had ulterior motive. It contends that interest and motive rest with the petitioner who stands to suffer pecuniary loss as well as a blemish on his teaching record. Further, it argues that petitioner's defense requires an illogical "leap of faith" to believe that: (1) E.A. is lying, possibly to retaliate for "getting him in trouble"; (2) E.A. intimidated the other student witness into corroborating the lie; (3) that E.A. might have injured himself; (4) that there was no ruler on his desk, (5) and he is unaware of how E.A. sustained an injury consistent with a ruler slap.

Respondent further argues that the Principal and the school nurse testified that they were not aware of any biting incident. Thus, there was no need for any "revenge". Respondent does not dispute that E.A. was a troubled student prone to "misconduct." It notes that E.A. admitted that he was no angel and misbehaved in his class. He also admitted to being removed from school for allegedly setting fires. However, in this case, E.A.'s testimony is corroborated by H.W. who was an eyewitness. H.W. was not intimidated by E.A. Indeed, H.W. now attends the East Orange school system and has not seen E.A. since the end of last school year.

Respondent contends that petitioner has not met its burden of showing that the denial of the salary increment was arbitrary or capricious. Kopera v. Board of Education of West Orange, 60 N.J. Super 288 (App. Div. 1960). Respondent asserts that the decision to withhold an increment does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act." Kopera, 1960-61 S.L.D. at 62. The only question for the Commissioner is whether the district "had a reasonable basis for its factual conclusion." 60 N.J. Super at 295. Indeed, it has been observed that:

> [A school district has no duty] to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14.

[Reilly v. Board of Ed. of the Twp. of Parsippany-Troy Hills, 1989 S.L.D. 1830, 1843, citing Colavita v. Hillsborough Township Bd. of Ed, 1983 S.L.D. (Nov. 3, 1983)].

There, the Court held that "the decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the legislature to the board." (Id.; citing Board of Ed. of Bernards Twp. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 321 (1979).

Based on the record, I **FIND** that the petitioner has not met the burden of demonstrating that the District's action was arbitrary or capricious. I am satisfied that the respondent had a reasonable basis for its conclusion that the petitioner had engaged in an act of corporal punishment. This incident was provoked by E.A.'s acting out to such an extent that the petitioner and E.A. had become a spectacle. All control of the classroom was surrendered to E.A.'s outlandish conduct. However, E.A. was a 12 year old emotionally disturbed student. Despite his disability, he appears to be engaging, thus able to enrapture others. He was fully aware of what he was doing. Unfortunately, his acting out was tolerated for too long and eventually escalated to the point where he was removed from the school.

While I am empathetic to the petitioner's position on that day, I **FIND** that his version of the incident is not sustainable. Neither H.W., Austin or Ervin recalled the biting incident which petitioner asserts was the motive for E.A.'s accusation. The welt mark was consistent with a touching by a ruler and H.W. was an eyewitness. While H.W.'s written statement was inconsistent with his oral testimony, I am satisfied that he witnessed inappropriate physical contact.

Based on the whole record, I am persuaded by the evidence that petitioner engaged in an act of corporal punishment and thus I hereby **AFFIRM** the withholding of his salary increment.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 17, 2006

DATE

IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/17/06

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 19 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses

For Petitioner

Thomas Morris

For Respondent

E.A.

H.W.

Daris Austin

Barbara Ervin

Exhibits in Evidence

P-1	Statement of H.W.
P-2	Statement of Gregory Rochester
R-1	Incident Report
R-2	Memorandum 9/6/04
R-3	Corporal Punishment Memorandum
R-4	Article – Use the Environment to Prevent Discipline Problems

423-06

OAL DKT. NO. EDU. 7631-06
AGENCY DKT. NO. 155-4/06

L.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of the notification sent to the petitioner by OAL on October 24, 2006, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, the petition is dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

The Board's counterclaim is, therefore, deemed to be admitted and petitioner is hereby ordered to pay tuition for the period of M.G.'s ineligible attendance in the District's schools on the basis of 1/180 of the total annual per pupil cost multiplied by the number of days of ineligible attendance.

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06
Date of Mailing: 12/04/06

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

422-06

422-06
OAL DKT. NO. EDU 6318-06
AGENCY DKT. NO. 242-7/06

J.O. on behalf of minor child R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating Jo Ellen Basaman, Assistant Superintendent, to sign the agreement on its behalf. Nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Ms. Basaman or another individual to sign on behalf of same. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille Edaf

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6318-06

AGENCY DKT. NO. 242-7/06

J.O. ON BEHALF OF R.O.,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Steven J. Sico, Esq., for the petitioner

Robin R. McMahon, Esq., for the respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: October 19, 2006 Decided: October 19, 2006

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 23, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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 settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OCTOBER 19 2006
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Receipt Acknowledged:

10-24-06
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 25 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

Agreement + Release

This Agreement is made this 19th day of October 2006 between Jyoti + Ashok OBerai + the East Brunswick Board of Education ("Boa

Whereas the parties are desirous of resolving a dispute regarding the residency of Rishi + Ridhima OBERAI, children of Jyoti + Ashok OBERAI ("OBERAI" or "Parents"),

Now Therefore in consideration of the Mutual Covenants contained herein, the Board + OBERAI agree as follows:

1. The OBERAIs shall pay the Board the amount of $10,110 as tuition for ~~Rishi~~ Ridhima for the 2005-06 school year.

2. The payment referenced above shall be made as follows:

a) $500 within 7 days, or October 27, 2006, which payment shall be held in escrow by the Board upon formal Board approval of this Agreement.

b) $500 per month thereafter, with the first payment due December 1, 2006;

c) Final payment shall be made upon the earlier of closing on the Carteret property or June 15, 2007

3. Parents shall complete + return to the Office of the ~~Assistant Superintendent~~ Business Administrator with the initial payment a registration form, in the form attached hereto, which shall be completely filled out together with a copy of the contract to sale to the Carteret

property.

4. All payments shall be made to the Office of the Business Administrator, 760 Route 18, East Brunswick, NJ 08816.

5. Parents shall update their registration form upon expiration of ~~their~~ the lease on 11-5 Civic Ctr. Drive, East Brunswick or no later than August 2007

6. If any payment required hereunder is not made within 15 days of the due date, then the Board shall have the right, on notice to Jyoti Oberai's counsel, Steven Sico, to file this agreement as a consent judgment for the balance then due.

7. This agreement serves as a release by the Board with respect to all issues regarding tuition & residency through the 2006-07 school y

8. This agreement shall be subject to the approval of the Board.

9. The petition shall be withdrawn by the OBERAI's upon board approval

10. This agreement shall be typed & executed by the parties, which may be in counterparts. the agree

We agree to the above terms and conditions:

Jyoti Oberai

Jyoti OBERAI

ASHOK OBERAI

For The Board:

Jo-Ellen Basaman

Jo-Ellen Basaman,
Assistant Superintendent

411-06

R.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board not to issue his child a laptop computer for the 2005-2006 school year, pursuant to a district policy regarding student laptops with which the petitioner refused to comply; specifically, that petitioner declined to pay the $50 annual premium required to cover accidental damage and fire/theft/loss insurance on the computer. Petitioner argued that the district was required to provide the computer to his daughter pursuant to *N.J.S.A.* 18A:34-1.

The ALJ found, *inter alia*, that the facts of this matter indicate that the laptop computer does not qualify as a supply mandatory to successful completion of the classroom curriculum, and that M.H.'s grades did not suffer from lack of access to the laptop computer. The ALJ concluded that the respondent's action in refusing to issue M.H. a laptop for use during the 2005-2006 school year was reasonable and permissible because her parents refused to comply with district computer use policy, and dismissed the petition with prejudice.

The Commissioner concurred with the ALJ for the reasons stated in the Initial Decision, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

11/28/06

411-06

OAL DKT. NO. EDU 1538-06
AGENCY DKT. NO. 330-11/05

R.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply and counter exceptions – submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in her determination of this matter.

Petitioner first excepts to the Administrative Law Judge's (ALJ) determination that in order for a particular item to constitute a "supply" within the intendment of *N.J.S.A.* 18A:34-1 – requiring its provision to students free of charge – it is first necessary to establish whether the item was "mandatory" or "integral" to classroom instruction. Petitioner maintains such a determination is not dispositive. Rather, he argues, "once material is made a basic part of the regular classroom instructional activities, as in the instant matter, then such materials must be provided for free." (Petitioner's Exceptions at 1) Notwithstanding this, petitioner argues that – contrary to the finding of the ALJ – the record here establishes that the laptop computers were "a basic, fundamental, mandatory and integral part of the education program conducted in the Respondent schools." (*Id.* at 2)

Petitioner next charges that the ALJ's reasoning that M.H. could have used the school's computers in the library or her own home computer to obtain the information available to students who paid for insurance fails to recognize that in addition to not being issued a school laptop, M.H. was not issued an access code for the 2005-06 school year. Thus, even assuming computer hardware in the library or on her own computer was available to her, "she did not have the same ability to completely use the school district's full technology resources that were available to the students who paid the insurance premium due to the school's refusal to issue her an access code." (*Id.* at 3)

Finally, petitioner submits that the ALJ's decision failed to address the provisions of *N.J.S.A.* 18A:20-25, which requires a board to maintain insurance: a responsibility which he avers cannot, in turn, be transferred to students by "administrative fiat." (*Id.* at 4)

In reply, the Board charges that petitioner has provided no support whatsoever for his conclusion that "once material is made a basic part of the regular classroom instruction activities, as in the instant matter, then such materials must be provided for free." To the contrary, it argues, *N.J.S.A.* 18A:34-1 makes no mention of "material" which a board must furnish free of charge for use by pupils. Rather, this provision clearly and unambiguously imposes such an obligation only for "textbooks" and "other school supplies." The Board urges that:

> [i]t is obvious that an optional learning tool such as the laptop computer issued by the Pascack Valley School District ***is not a textbook or equivalent to required textbooks. Indeed, required textbooks are components of an approved curriculum that meets the New Jersey Core Curriculum Content Standards. District issued laptop computers are not a component of the New Jersey Core Curriculum Content Standards.*** Similarly, computer hardware, such as a district issued laptop computer, is not synonymous with consumable school supplies. A court or state agency cannot amend the clear and unambiguous language of

> *N.J.S.A.* 18A:34-1 to include an item that does not meet the requirement established by the Legislature.
> (Board's Reply Exceptions at 2)

The Board further points out as significant the fact that it neither required students to pay for laptops nor did it charge a use fee. Rather, the insurance toll was just a cost effective mechanism for parents to pay the expense of damage or loss to the computer which they otherwise would be solely responsible to bear. (*Id.* at 3)

As to petitioner's argument that the school issued laptops were a "basic, fundamental, mandatory and integral part of the educational program in the district," the Board observes that the core curriculum content standards do not require districts to "provide instruction on computers and information literacy and technology education through the issuance of a laptop computer or provide access to the school district's computer network from home". (*Ibid.*) Further, to the extent M.H. needed a computer to assist her in her schoolwork, she had access to computers in the school library and her own personal computer. It points out that M.H. was not penalized because she did not have a school issued laptop and access code, and that her grades for the 2005-2006 school year were comparable to those she achieved during the 2004-2005 school when she had a laptop and those she received during the 2003-2004 school year before the implementation of the laptop initiative. Therefore, it urges that the ALJ correctly concluded:

> [t]hough it may have been less convenient for M.H. to not have had use of a district laptop her performance combined with the fact that she retained all the privileges of any other student otherwise not participating in the e-learning initiative, clearly shows that the laptops were not [an] integral part of her curriculum. (Initial Decision at 5; Board's Reply Exceptions at 4)

As to petitioner's claim that *N.J.S.A.* 18A:20-25 is applicable to this matter, the Board professes that this assertion is without merit, instead reasoning:

> [w]hile *N.J.S.A.* 18A:20-25 requires a school district to maintain insurance against loss or damage caused by fire, other coverage is discretionary. This statute had nothing to do with the payment of the insurance premium for the district issued laptop computers. Rather, the intent of *N.J.S.A.* 18A:20-25 is to ensure that school districts are protected against property loss or damage caused by fire.
>
> Indeed, the imposition of the $50.00 fee to cover the cost of the insurance premium is a viable method to protect parents from paying much higher costs if the Board issued laptop computer is damaged, lost, or stolen. Boards of education are, in fact, permitted to assess reasonable fees to cover the costs of damage or loss to district property. *N.J.S.A.* 18A:37-3. If boards of education were not permitted to recoup such expenses, taxpayer dollars would regularly be spent to pay for the loss and damage of such property caused by students. Not only would this be a drain on district resources, but it would also minimize students' responsibility for the care and protection of district property in their possession.***(Board Reply Exceptions at 6)

In conclusion, in light of petitioner's filing of exceptions, the Board urges it was compelled to file cross exceptions renewing its arguments advanced in papers below that this matter should be dismissed on procedural grounds which were not addressed by the ALJ in her decision. Specifically:

1) The matter is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(i), as a consequence of petitioner's failure to file within 90-days from the implementation of the laptop program;

2) Because petitioner previously signed the laptop agreement and paid the insurance fee, this claim is barred by the equitable doctrine of laches; and

3) Since – effective with the 2006-07 school year – the Board will issue laptop computers and an access code to students even if they do not purchase insurance coverage, petitioner here fails to state a claim upon which relief can be granted.

Upon careful, independent review of the record and finding petitioner's exceptions without merit, the Commissioner agrees with the conclusion of the ALJ that the Board's imposition of a $50 accidental damage, theft or loss insurance premium and agreement to pay a $100 deductible for insurance claims as a condition of participation in the district's laptop program was not violative of the district's duty to provide M.H. a free public education pursuant to the New Jersey Constitution, Article VII, Section IV, Paragraph 1 and *N.J.S.A.* 18A:38-1.[1]

Accordingly, the recommended decision of the OAL is adopted – for the reasons stated therein – and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/28/06

Date of Mailing: 11/28/06

[1] Based on the record before her, the Commissioner finds that the ALJ was correct in declining to dismiss this matter on procedural grounds.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01538-06

AGENCY DKT NO. 330-11/05

R.H. ON BEHALF OF M.H.

Petitioner,

v.

PASCACK VALLEY REGIONAL BOARD OF EDUCATION

Respondent.

Robert T. Tessaro, Esq., appearing for Petitioner

Rodney T. Hara, Esq. appearing for Respondent
(Fogarty & Hara, attorneys)

Record closed: August 31, 2006 Decided: October 16, 2006

BEFORE **CARIDAD F. RIGO**, ALJ

STATEMENE OT THE CASE AND PROCEDURAL HISTORY

The Petitioner appeals the decision of the Pascack Valley Regional Board of Education (hereinafter Pascack or Respondent), not to issue his minor child a laptop computer for the 2005-2006 school year, pursuant to a policy contained in the Respondent's Student Laptop Manual (hereinafter Manual) with which the Petitioner refused to comply. The Petitioner filed a verified petition of appeal with the Commissioner of Education challenging the Respondent's decision, pursuant to N.J.A.C. 6A:3-1.3(d) on or about November 17, 2005. The Petitioner alleges that the Respondent violated its' obligation to provide M.H. with a free public

education in accordance with the N.J. Constitution by refusing to issue her a laptop. The matter was determined to be a contested case pursuant to N.J.A.C. 1:1-3.1 and 1:1-8.2, and the matter was transmitted to the OAL on January 24, 2006.

A telephone pre-hearing conference was held by the undersigned ALJ on May 15, 2006. The parties agreed that the matter should be decided by summary decision cross-motions, as no material facts are in dispute. The parties filed their respective briefs and reply briefs. The record closed on August 31, 2006.

STATEMENT OF FACTS

1. The Respondent operates a 9th through 12th grade regional high school district for the residents of the Borough of Hillsdale, Borough of Montvale, Township of River Vale, and Borough of Woodcliff Lake.

2. The district contains two high schools, Pascack Hills High School and Pascack Valley High School.

3. At all relevant times, the minor child, M.H., attended Pascack Valley High School, and will complete the 2006-07 school year (her senior year) at Pascack Valley High School.

4. In the Spring of 2004, the Respondent approved an e-learning initiative which involved the issuance of Sony Vaio laptop computers to all students and teachers in the district.

5. To facilitate implementation of the learning initiative, the district also promulgated a Manual which contains the rules and regulations for the use of the laptops as well as use instructions.

6. Certain educational software is installed in each laptop, which is used by the student for testing, homework assignments and other communications between the student and teachers.

7. Students are also issued an access code so that they may remotely access the district's computer network through their assigned laptop.

8. In order to obtain a district issued laptop, the student and his or her parent/guardian must initial and sign the Laptop Agreement Form (Form), a part of the Manual; the following provisions of which is in dispute;

    a. I/We understand that each laptop includes accidental damage coverage as well as fire/theft/loss insurance. I will be responsible for an annual premium payment of $50.00 for this coverage. This payment is included with this form.

    b. I/We understand that the fire/theft policy includes a $100.00 per incident deductible that will be paid by the parent.

9. M.H. and her parents initialed and signed all portions of the Form, including the above provisions, and paid the $50.00 insurance premium for the 2004-05 school year.

10. M.H. completely initialed and signed the Form for the 2005-06 school year, but M.H.'s parents declined to initial the above provisions, or pay the $50.00 annual premium, though they did initial all other provisions and signed the Form.

11. As a result the Respondent declined to issue M.H. a laptop computer and access code for the 2005-06 school year.

12. M.H.'s parents were advised of this decision on or about October 17, 2005.

LEGAL ANALYSIS

The Petitioner contends that the Respondent violated its obligation to provide M.H. with a free public education, in violation of the New Jersey Constitution, Article VIII, Section IV, Paragraph I, and N.J.S.A. 18A:38-1, when it declined to issue M.H. a laptop computer and access code for the 2005-06 school year due to her parents' refusal to pay the annual insurance premium required by the Manual. Regrettably, there is no New Jersey case law on point regarding this type of issue, nor does the non-binding case law that the Petitioner has cited provide any realistic guidance on the matter. However, a common sense interpretation of the plain meaning of N.J.S.A. 18A:34-1 yields an answer.

N.J.S.A. 18A:34-1 reads as follows:

> Textbooks shall be selected by the recorded roll call majority vote of the full membership of the board of education of the district and *they [textbooks] and other school supplies shall be furnished free of cost for use by all pupils in the public schools* and money therefore shall be appropriated and raised annually in each school district in the same manner as other school moneys are appropriated and raised in the district. [emphasis added]

The plain meaning of N.J.S.A. 18A:34-1 is clear as both parties agree; schools may not charge fees for the use of "textbooks" or "supplies". The question then becomes, whether a district issued laptop computer qualifies as a "supply" within the meaning of the statute, because clearly a computer cannot be considered a "textbook" though it may contain software to access digital textbooks.

In Parsippany-Troy Hills Ed. Ass'n v. Parsippany-Troy Hills Bd. of Educ., the Appellate Division upheld the Commissioner of Education's determination that a school district could charge a fee for non-mandatory, behind the wheel driver education that was not offered outside normal school hours. 188 N.J. Super. 161 (App. Div. 1983), certif. denied, 94 N.J. 527 (1983). In that decision, the Appellate Division additionally noted the Commissioner's determinations in Willett v. Colts Neck Twp. Bd. of Educ., 1966 S.L.D. 202, 206 and I/M/O the Appeals of Black Horse Pike and Sterling Reg. Sch. Dist. Bd. of Educ., 1973 S.L.D. 130, aff'd 1973 S.L.D. 138. Those cases held that it is impermissible for schools to charge fees for activities that were an "integral part of classroom instruction", meaning participation in the activities was mandatory for successful completion of the classroom curriculum. The court in Bd. of Educ. of Asbury Park v. Asbury Park Educ. Assn., further held that certain extracurricular activities could be an integral part of a child's education; however, it declined to define which activities were integral. 145 N.J. Super. 495 (Chancery Div. 1976), aff'd in part, rev'd in part, 155 N.J. Super. 76 (App. Div. 1977). Though none of these cases are remotely on-point, they make clear that the threshold for deciding what a school may and may not charge fees for the use of, or participation in, depends

on whether the questioned item/activity falls within the meaning of "integral" or "mandatory" to classroom instruction. The issue is whether a laptop computer qualifies as a supply to mandatory to successful completion of the classroom curriculum. The facts here strongly indicate that it is not.

The e-learning initiative adopted by the Respondent is both laudable and forward thinking and will undoubtedly provide a great benefit to participating students in the future. However, the development of these types of programs is still in its infancy as the Petitioner acknowledges, and their use is neither commonplace, nor practical for most public educational institutions. The vast majority of public schools still use printed text books, and "traditional" classroom supplies. This court declines to define what a "traditional" classroom supply may be, but it is obvious, given the relative rarity of e-learning programs, that laptop computers are not "traditional" classroom supplies. That being the case, this court can only conclude that under these circumstances a laptop computer is not integral to classroom instruction, the statute does not apply to their use, and that schools may require the parents of a student to pay the reasonable cost to insure the computer from fire/theft or other damage.

If the circumstances of this matter had indicated that the use of a computer were absolutely essential to M.H.'s successful completion of the classroom curriculum (i.e. mandatory participation), this court may decide differently. Though she did not have a district issued laptop, M.H. retained full access to the computers located in the school's library, and her own personal computer at home. She had access to printed textbooks and supplies, enabling her to complete her classroom assignments. Lastly, her grades remained comparable to her prior two years at the Respondent's high school. Though it may have been less convenient for M.H. to not have had use of a district laptop her performance combined with the fact that she retained all the privileges of any other student otherwise not participating in the e-learning initiative, clearly shows that the laptops were not an integral part of the curriculum. The Petitioner is

essentially requesting the expansion of N.J.S.A. 18A:34-1 to place the laptops within its scope, and this court declines to grant that request.

Moreover, as a policy matter, public schools are not required to provide their students with the best education possible, they are only required to provide a "thorough and efficient" free public education. Here M.H. received a thorough and efficient free public education as required by the N.J. Constitution of 1947.

CONCLUSION

Petitioner refused to comply with a mandate contained in the Manual requiring the parent or guardian of the student to whom the computer is issued to pay an annual premium for insurance against accidental damage, theft or loss of the computer, and for a per-incident deductible for insurance claims. As a result, the Respondent refused to issue the M.H. a laptop or network access code for the 2005-2006 school year. This court hereby **CONCLUDES** that the Respondent's action in refusing to issue M.H. a Sony Vaio laptop for use during the 2005-2006 school year was reasonable and permissible because of her parent's refusal to comply with the Manual. The Respondent did not fail to provide the Petitioner's daughter with a free public education, in violation of Article VIII, Section IV, Paragraph I of the New Jersey Constitution and N.J.S.A. 18A:38-1. 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 (45) days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 16, 2006
DATE

CARIDAD F. RIGO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 17 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

409-06

D.D. on behalf of minor child N.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her daugher, N.D., was not domiciled in respondent's district during the 2003-2004 and 2004-2005 school years. Respondent counterclaims for tuition reimbursement in the amount of $40,801.33 for the alleged period of ineligible attendance, based on observations by an investigator that D.D. was living at an address in Kearny.

The ALJ found that petitioner has proven by a preponderance of evidence that N.D. was domiciled in respondent's school district during the period in question; that the address in Kearny was never a permanent domicile; and concluded that respondent was required to provide N.D. with a free public education. The ALJ ordered that respondent's counterclaim for tuition be denied.

Upon an independent and thorough review of the record, the Commissioner adopts the Initial Decision as the Final Decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 27, 2006

OAL DKT. NO. EDU 5991-04
AGENCY DKT. NO. 134-4/04

D.D. on behalf of minor child N.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Initial Decision of the Office of Administrative Law (OAL) and respondent's exceptions have been reviewed. The Commissioner is satisfied, as was the Administrative Law Judge (ALJ), that petitioner sustained her burden to show, using the three-pronged test in *Matter of Unanue*, 255 *N.J. Super.* 362, 376 (Law Div. 1991), *aff'd* 311 *N.J. Super.* 589 (App. Div. 1998), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied* 526 *U.S.* 1051, 119 *S.Ct.* 1357, 143 *L.Ed.*2d 518 (1999), that during the period for which respondent demands tuition, she had not intended to change her domicile from Belleville to Kearny.

Respondent's references, in its exceptions, to excerpts from *Matter of Unanue, supra,* are unpersuasive. The ALJ properly weighed all the facts against the three-part standard in *Unanue* and came to a reasoned result. Nor can the hearsay notes taken by respondent's investigator change this determination. The provider of the hearsay was not at the hearing to be questioned about the basis for her opinions about petitioner's residence and/or domicile from Autumn 2004 to February 2005. Furthermore, as the ALJ stated, petitioner's (and her dogs') use

of her boyfriend's residence did not, under the total facts of this case, establish that she intended to change her domicile from Belleville to Kearny.[1]

The Commissioner accordingly adopts the Initial Decision as the Final Decision in this matter. Respondent's determination that N.D. was not eligible to receive a free public education in Belleville during the period in question is reversed and its counterclaim for tuition is denied.

IT IS SO ORDERED.[2]

Lucille Edley

COMMISSIONER OF EDUCATION

Date of Decision: 11/27/06

Date of Mailing: 11/28/06

[1] Nor do the statements respondent's investigator took from the crossing guard and bus driver add anything to the facts already considered by the ALJ.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5991-04
AGENCY DKT. NO. 134-4/04

D.D. ON BEHALF OF MINOR CHILD, N.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

Respondent.

D.D., pro se

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: October 18, 2005 Decided: October 12, 2006

BEFORE **RICHARD McGILL**, ALJ:

D.D. (hereinafter sometimes "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Belleville (hereinafter "respondent") in regard to her daughter, N.D.

Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition on April 20, 2004, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. On May 4, 2004, respondent filed an answer and counterclaim. The matter was transmitted to the Office of Administrative Law on June 24, 2004, for determination as a contested case. A hearing was conducted on October 18, 2005, at the Office of Administrative Law in Newark, New Jersey.

ISSUES

The main issue in this proceeding is whether N.D. was eligible to attend respondent's public schools during the 2003-2004 and 2004-2005 school years. More specifically, the question is whether N.D. was domiciled within respondent's school district during these two school years. Since petitioner established to respondent's satisfaction that N.D. was domiciled within the school district as of the end of February 2005, there is no question as to disenrollment. The final issue is whether respondent's counterclaim for tuition reimbursement should be granted.

SUMMARY OF EVIDENCE

Respondent's first witness was Bruce Morgan, who is employed by respondent as a domicile investigator. Investigator Morgan described his investigation, which began in March 2004. D.D. gave an address on L. Street in Belleville for N.D. Shortly before 8:00 a.m. on several dates in March through May 2004, Investigator Morgan observed a vehicle which he traced to D.D. arrive at L. Street. When the school bus arrived, N.D. got out of D.D.'s vehicle and boarded the school bus.. Since N.D. was a special education student, the school bus picked her up in front of the address given by

D.D. The school bus then took N.D. to a private school. During his observations, Investigator Morgan never saw D.D.'s vehicle at the address on L. Street significantly before the arrival of the bus. When the bus dropped N.D. off after school, N.D. went into the residence at the address provided by D.D.

During the course of his investigation, Investigator Morgan followed D.D. to her place of employment and from there to an apartment on A. Terrace in Kearny. Investigator Morgan made numerous observations of D.D.'s vehicle at this address in the evening and during the early morning hours. Investigator Morgan observed D.D.'s name on the door bell. Investigator Morgan concluded that D.D. and N.D. resided at the address in Kearny.

Respondent's second witness was Dr. Edward Kliszus, who is respondent's superintendent of schools. Dr. Kliszus explained the reimbursement calculation. During the 2003-2004 school year, the tuition for placement in the Windsor School was $200.06 per day. For 180 days, the tuition was $36,010.80. For the 2004-2005 school year, the tuition was $46.51 per day. For 103 days through February 14, 2005, the tuition was $4,790.53. The total amount sought by respondent as reimbursement is $40,801.33.

Petitioner did not deny any of Investigator Morgan's observations or contest the tuition calculation. Rather, petitioner explained that the address on L. Street in Belleville is her mother's home, which petitioner still considers to be her permanent residence. Petitioner and N.D. each have their own bedrooms at the address on L. Street. Further, petitioner's important mail is sent to the address on L. Street. Petitioner's boyfriend lived at the address on A. Terrace in Kearny. Although petitioner spent a great deal of time at her boyfriend's apartment, she viewed the arrangement as temporary in nature. The utility bills were placed in D.D.'s name only because her boyfriend's credit was very poor. Subsequently, D.D. moved to an address in Belleville with her boyfriend in February 2005.

FINDINGS OF FACT

All of the witnesses were believable. Investigator Morgan's observations and the calculation by Dr. Kliszus were essentially undisputed. Petitioner's explanation was also credible including her testimony to the effect that she viewed the address on L. Street in Belleville as permanent in nature and the one on A. Terrace in Kearny as a temporary arrangement.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. D.D. lived at her parents' home on L. Street in Belleville from 1984 to 1996.

2. D.D. moved to another location in Belleville in 1996.

3. After D.D.'s father became ill, she moved back to her parents' home.

4. D.D.'s father is now deceased, and her mother still lives in the home on L. Street in Belleville.

5. D.D. and her daughter, N.D., have their own bedrooms in the home on L. Street in Belleville.

6. D.D.'s important mail is sent to the address on L. Street.

7. The address on L. Street is on D.D.'s driver license, her vehicle registration, her automobile insurance, her tax returns, various credit card statements and court papers.

8. D.D. was registered to vote in Belleville.

9. D.D. views the address on L. Street in Belleville as her permanent home.

10. D.D.'s boyfriend rented an apartment on A. Terrace in Kearny, New Jersey.

11. A lease for the apartment ran from August 1, 2003, to August 31, 2004. D.D. is not on the lease.

12. Three dogs belonging D.D. are mentioned on the lease.

13. The electric, gas and telephone utilities were placed in D.D.'s name because of her boyfriend's poor credit.

14. D.D. stayed in her boyfriend's apartment extensively from or about August 2003 to February 2005.

15. D.D. viewed the living arrangement in the apartment as temporary in nature and not her permanent home.

16. In February 2005, D.D. and her boyfriend moved to a location in Belleville.

17. The tuition for N.D. during the 2003-2004 school year would be $36,010.80.

18. The tuition for N.D. for the 2004-2005 school year through February 14, 2005, would be $4,790.53.

LAW AND ANALYSIS

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. v. Manville Bd., 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. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L. Ed.2d 518 (1999). The court further stated as follows:

> "Home is the place where a person dwells and which is the center of his domestic, social and civil life." . . . "[T]he overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home . . . as well as the central fulcrum of her life must here be found to converge . . ." in that location found to be her domicile. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.
>
> A person may establish a domicile in one place and then *acquire a* second residence. This does not lead to multiple domiciles, for it "is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home.'". . . If a person maintains multiple residences it may become necessary to determine which one is the true domicile. Various approaches to this problem have been used by New Jersey courts.
>
> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicil, and his motive in doing so is immaterial." . . . In accordance with this principle it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. . . . Additionally, it has been held that a change of domicile "may be made to avoid taxation . . . [or some other motive], so long as the necessary ingredients for establishment of the new domicile are present." . . . Even a change of domicile predicated on a desire to avoid a forced heirship statute has been upheld when the change was supported by other indicia of a new domicile, ...
>
> It is clear, therefore, that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile.

> Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite subjective intent be present since domicile is "very much a matter of the mind—of intention." . . . "Where there are multiple residences . . . domicile is that place which the subject regards as his true and permanent home." . . .
>
> "When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile." . . . In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. [Id., at 374-76 (citations omitted)].

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

Preliminarily, it may be noted that since N.D. is a child, her domcile is that of her mother, D.D. There is no real dispute that D.D. and therefore N.D. were domiciled on L. Street in Belleville prior to the move to the apartment on A. Terrace. Thus, the main question in this case is whether D.D. changed her domicile from L. Street in Belleville to A. Terrace in Kearny. The factors to consider are whether there was an actual and physical taking up of abode on A. Terrace, whether D.D. had an intention to make her home on A. Terrace permanently or at least indefinitely and whether D.D. had an intention to abandon her old domicile on L. Street.

The first question is whether there was an actual and physical taking up of abode in the apartment on A. Terrace. It is undisputed that D.D. stayed in her boyfriend's apartment extensively during the period of time in question. In fact, respondent's investigator observed D.D.'s vehicle at A. Terrace in the evening and early morning

hours during the period in question and never at L. Street during that time. It follows that there was an actual and physical taking up of abode by D.D. at her boyfriend's apartment on A. Terrace.

The second and third factors are related in that one concerns the intention to make the new abode the person's domicile and the other concerns the abandonment of the old domicile. Here, D.D. continued to use L. Street in Belleville for important purposes such as her driver license, vehicle registration, automobile insurance, tax returns, voter registration, credit cards and court papers. In contrast, D.D.'s name was not on the lease for the apartment on A. Terrace, and the utilities were in her name only out of necessity. These circumstances along with D.D.'s credible testimony indicate that D.D. intended to maintain her domicile on L. Street in Belleville. Further, D.D. did not intend to change her domicile to A. Terrace in Kearny.

Under the circumstances, I **FIND** that D.D. has proven by a preponderance of the evidence that N.D. was domiciled in respondent's school district during the 2003-2004 and 2004-2005 school years. Therefore, I **CONCLUDE** that respondent was required to provide N.D. with a free public education during the period in question.

A counterclaim for tuition reimbursement may be granted when there is a period of ineligible attendance in a public school. Here, there was no period of ineligible attendance by N.D. Therefore, I **CONCLUDE** that the counterclaim for tuition reimbursement must be denied.

Accordingly, it is **ORDERED** that:

1. Respondent's determination that N.D. was ineligible to receive a free education in respondent's public schools during the period in question is reversed.

2. Respondent's counterclaim for tuition is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 12, 2006
DATE

RICHARD McGILL, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on

10/12/06
DATE

M. Kathleen Duncan/ch

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 19 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

D.D.

For respondent:

Bruce Morgan
Dr. Edward Kliszus

EXHIBIT LIST

P-1	Photocopy of D.D.'s driver license	Evidence
P-2	Photocopy of vehicle registration	Evidence
P-3	Automobile insurance declarations for July 13, 2003, to July 13, 2004	Evidence
P-4	Amended declarations for July 13, 2003, to July 13, 2004	Evidence
P-5	Photocopy of first page of D.D.'s U.S. Individual Income Tax Return for 2003	Evidence
P-6	Apartment lease	Evidence

P-7	Letter dated March 24, 2004, from Bergen County Probation to D.D.	Evidence
P-8	Photocopies of credit card statements from Fleet	Evidence
P-9	Photocopies of credit card statements from Capital One	Evidence
P-10	Photocopies of credit card statements from Cross Country Bank	Evidence
P-11	Photocopies of credit card statements from Providian	Evidence
P-12	Ordinance 7-15.1 of Town of Kearny	Evidence
P-13	Photocopy of Insurance Identification Card	Evidence
R-1	Memo dated March 2, 2004, from Frank Romano to Faith Palo	Evidence
R-2	Memo dated March 4, 2004, from Bruce Morgan to J. Kraemer	Evidence
R-3	Memo dated March 9, 2004, from Bruce Morgan to J. Kraemar	Evidence
R-4	Letter from Willie Brooks	Evidence

R-5	Statement of Maureen McNish	Evidence
R-6	Statement of Elizah Reeves	Evidence
R-7	Memo dated March 27, 2004, from B. Morgan to J. Kraemer	Evidence
R-8	Letter dated April 8, 2004, from Frank Pomaco to D.D.	Evidence
R-9	Notes concerning D.D. from April 12, 2004, through March 5, 2005	Evidence
R-10	Letter dated March 7, 2005, from Mark A. Wenczel, Esq., to Kearny Post Office	Evidence
R-11	Student Registration Form dated June 2, 2004	Evidence
R-12	Photocopies of three envelopes sent certified mail, return receipt requested from Gaccione, Pomaco & Malanga to D.D.	Identification
R-13	Certification of records of electric and gas bills	Evidence
R-14	Certification of records of telephone bills	Evidence
R-15	Certification of tuition and transportation fees	Evidence
R-16	Calendar of 2004-2005 school year for Belleville Public Schools	Evidence

410-06

#410-06

SHARON WHALEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured secretary in respondent's district – challenged the respondent board's refusal to accept her offer of resignation at a time when tenure charges of unbecoming conduct were pending against her. The charges involved petitioner's theft of money orders submitted by applicants for substitute teaching certificates, and were held in abeyance at petitioner's request during a criminal investigation by the Essex County Prosecutor's Office. Petitioner pled guilty to the criminal charges, and entered a pretrial intervention program which was conditioned upon petitioner's immediate and irrevocable forfeiture of her employment with the Board.

The ALJ found, *inter alia*, that: petitioner does not deny the substance of the conduct which resulted in her indictment on criminal charges; petitioner submitted a letter of resignation to the Board on the same day that she entered her guilty plea on the criminal charges; and the judicial forfeiture order is binding on the petitioner. The ALJ concluded that petitioner forfeited her position as a result of her acceptance into a pretrial intervention program; that the Board is under no obligation to accept her resignation in good standing; and ordered summary decision in favor of respondent.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board has no obligation whatsoever to take any action with respect to petitioner's resignation, stressing that as a consequence of the imposed conditions of her pre-trial intervention program, petitioner does not now – nor will she ever in the future – have an employment relationship with the Board. The Commissioner dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 28, 2006

OAL DKT. NO. EDU 1164-06
AGENCY DKT. NO. 306-11/05

SHARON WHALEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in making her determination herein.[1] [2]

Petitioner's exceptions support the Administrative Law Judge's (ALJ) finding that petitioner forfeited her position with the District as of June 6, 2005, and thus – as of that date – the parties' employment relationship was severed. She does, however, charge that the Initial Decision fails to reconcile this finding with the fact that, subsequent to this time, respondent has continued to treat petitioner's employment status with the District "as an indefinite suspension without pay pending resolution of the criminal matter." (Petitioner's Exceptions at pages 5-6,

[1] Although petitioner's submission was erroneously captioned "Brief in Support of Petitioner's Request for Clarification of the Initial Decision of the Administrative Law Judge," it is obvious that this filing was intended as Exceptions to the Initial Decision and it was, therefore, accepted as such. Petitioner is cautioned to in the future take care with the titling of materials, as there is no authorization for the acceptance by the Agency of any document other than "Exceptions" in connection with an Administrative Law Judge's Initial Decision.

[2] It is noted that petitioner's *faxed* submission – some 60 pages in length – included a copy of the Petition of Appeal, the Initial Decision, and a number of additional documents which were part of her filings below. As these are materials which are always included in the record before the Commissioner, it is unnecessary for parties to provide additional copies with their exceptions, particularly when transmitting by facsimile.

quote at page 6) Petitioner claims that the District's continued reporting of this status to potential employers has "unjustly interfered with [her] prospective economic advantage" by preventing her from securing gainful employment in her field. (*Id.* at page 8)

Also left unresolved in the ALJ's decision, petitioner maintains, is the status of the District's tenure charges against her. She advances that, consistent with the ALJ's finding that she forfeited her position on June 6, 2005, the District lacks authority to pursue these charges, as the maximum penalty which could be imposed as a consequence of her being found guilty of the charges is dismissal from her employment – an event which has already transpired. (*Id.* at page 6)

Upon her full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board has no obligation to take any action whatsoever with respect to petitioner's resignation because, as of June 6, 2005, – as a result of the Order of the Superior Court Judge entered on that date with regard to the conditions of her entry into the Pre-Trial Intervention Program (PTI)[3] – petitioner forfeited her position with the Irvington Board of Education and was forever prohibited from seeking or accepting employment with any governmental entity in the State of New Jersey. Therefore, her employment relationship with the Board was *immediately* terminated as of that date. The Commissioner observes that the record indicates apparent confusion on the part of the parties as to the interplay of petitioner's forfeiture and the legal consequences of whether she does or does not successfully complete the PTI Program. The Commissioner stresses that petitioner's forfeiture of her position

[3] PTI is a probationary type of program that enables an individual who meets certain requirements (*N.J.S.A.* 2C:43-12(e)) to avoid the prospect of a conviction if he or she successfully completes the program. When an individual is accepted into this program, he or she receives a stay of prosecution. In most cases, individuals complete the program and, subsequently, receive the benefit of dismissal of all charges. If, however, an individual does not successfully complete the program, the indictment is returned to the court trial calendar for a full disposition. (See *N.J.S.A.* 2C:43-12 & 13, *R.* 3:28)

and prohibitions of employment with any governmental entity in the State were conditions of her *entry* into PTI, not her *successful completion* of PTI. Consequently, these imposed conditions are irrevocable and will in no way be altered by the eventual outcome of her participation in this program. Inasmuch as petitioner does not now, nor will she ever in the future, have an employment relationship with the Board of Education of the Township of Irvington, the District's tenure charges against her, which were placed in abeyance in January 2005 pursuant to *Ott v. Board of Education of the Township of Hamilton*, 160 *N.J. Super.* 333 (App. Div. 1978), have been rendered moot.[4]

Accordingly, the Initial Decision of the OAL – as expounded upon herein – is adopted as the final decision in this matter, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/28/06

Date of Mailing: 11/28/06

[4] These charges were not certified to the Commissioner but were proceeding at the preliminary District level at the time of placement in abeyance.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1164-06
AGENCY DKT. NO. 306-11/05

SHARON WHALEY,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF IRVINGTON,
Respondent.

John A. Boppert, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Raymond L. Hamlin, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: October 13, 2006 Decided: October 16, 2006

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a tenured secretary challenging a school district's refusal to accept her offer of resignation. While tenure charges against her were pending but unadjudicated, petitioner Sharon Whaley ("Whaley") sought to resign in good standing

from her tenured position as school secretary. Meanwhile, as a condition of entering into a pretrial intervention program, Whaley agreed to forfeit her employment in the district. Nonetheless, she contends that Irvington must either act on her resignation or give her back pay.

For the reasons that follow, an employee cannot voluntarily resign from a position that she has forfeited as a result of criminal proceedings.

Procedural History

On November 6, 2005, Whaley filed her petition with the Commissioner of Education. Irvington filed its answer on December 1, 2005. Subsequently, on January 10, 2006, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Prior to hearing, both parties filed cross-motions for summary decision. Whaley filed her supporting brief, together with various exhibits, on August 31, 2006. Irvington filed its opposing papers on September 27, 2006. The OAL heard oral argument on October 13, 2006.

Findings of Fact

All of the material facts are undisputed. **I FIND** the following facts. From the papers on file with the Office of Administrative Law, **I FIND** the following facts:

Sharon Whaley began her employment in the district on August 16, 1989 and attained tenure in the position of secretary. On January 7, 2005, Irvington served disciplinary charges on Whaley seeking her removal for conduct unbecoming a public employee. Irvington alleged that Whaley had illegally converted money received in her employment capacity to her personal use. Because of a pending criminal investigation arising out of the same circumstances, Whaley invoked her Fifth Amendment right against self incrimination and requested that the disciplinary charges "be held in

abeyance pending a decision in the related criminal matter". Irvington acceded to Whaley's request to delay certification of tenure charges[1].

As a result of its criminal investigation, on January 26, 2005, the Essex County Prosecutor's Office obtained a three-count indictment charging Whaley with official misconduct, theft by deception and forgery. Specifically, the indictment charged that, in January through April 2001, while acting in the course of her employment, Whaley had accepted money orders submitted by applicants for substitute teaching certificates and illegally converted the funds for her own use. Consequently, Irvington exercised its right to suspend Whaley without pay pending resolution of the criminal charges[2].

Significantly, Whaley does not deny the substance of the conduct that forms the basis of the criminal charges against her. In a signed statement made to an investigator from the Essex County Prosecutor's Office on April 13, 2004, Whaley admitted that she misappropriated money orders entrusted to her care, "not all of them" but "maybe one a week or once a month," because she needed the money. Before going to trial, Whaley pled guilty to the charges and entered a pretrial intervention program on June 6, 2005. As a condition of her acceptance into pretrial intervention, Whaley agreed to "immediately forfeit her position with the Irvington Board of Education and not seek reinstatement." (Emphasis in the original).

On June 6, 2005, the same date that she entered her guilty plea, Whaley submitted a letter to Irvington director of human resources, purportedly "tendering my resignation effective immediately." However, the Board never accepted her resignation by formal vote and takes the position that further action on its part is unnecessary. At the time of oral argument Whaley was still under criminal indictment and had not yet fully satisfied the requirements of her pretrial intervention program.

---

[1] In Ott v. Board of Education of the Twp. of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) certif. denied, 78 N.J. 336 (1978), the Appellate Division affirmed the trial's courts order restraining a board of education from certifying tenure charges to the Commissioner until disposition of related criminal charges.

[2] See N.J.S.A. 18A:6-8.3

abeyance pending a decision in the related criminal matter". Irvington acceded to Whaley's request to delay certification of tenure charges[1].

As a result of its criminal investigation, on January 26, 2005, the Essex County Prosecutor's Office obtained a three-count indictment charging Whaley with official misconduct, theft by deception and forgery. Specifically, the indictment charged that, in January through April 2001, while acting in the course of her employment, Whaley had accepted money orders submitted by applicants for substitute teaching certificates and illegally converted the funds for her own use. Consequently, Irvington exercised its right to suspend Whaley without pay pending resolution of the criminal charges[2].

Significantly, Whaley does not deny the substance of the conduct that forms the basis of the criminal charges against her. In a signed statement made to an investigator from the Essex County Prosecutor's Office on April 13, 2004, Whaley admitted that she misappropriated money orders entrusted to her care, "not all of them" but "maybe one a week or once a month," because she needed the money. Before going to trial, Whaley pled guilty to the charges and entered a pretrial intervention program on June 6, 2005. As a condition of her acceptance into pretrial intervention, Whaley agreed to "immediately forfeit her position with the Irvington Board of Education and not seek reinstatement." (Emphasis in the original).

On June 6, 2005, the same date that she entered her guilty plea, Whaley submitted a letter to Irvington director of human resources, purportedly "tendering my resignation effective immediately." However, the Board never accepted her resignation by formal vote and takes the position that further action on its part is unnecessary. At the time of oral argument Whaley was still under criminal indictment and had not yet fully satisfied the requirements of her pretrial intervention program.

---

[1] In Ott v. Board of Education of the Twp. of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) certif. denied, 78 N.J. 336 (1978), the Appellate Division affirmed the trial's courts order restraining a board of education from certifying tenure charges to the Commissioner until disposition of related criminal charges.

[2] See N.J.S.A. 18A:6-8.3

Conclusions of Law

Based on the forgoing facts and the applicable law, **I CONCLUDE** that Whaley has forfeited her position as a result of her acceptance into the pretrial intervention program and Irvington is under no obligation to accept her resignation in good standing.

Claiming that she had a right to resign from her secretarial position prior to the adjudication of tenure charges, Whaley asserts that the Board's refusal to act on her resignation is arbitrary, capricious and unreasonable. She relies on N.J.A.C. 6A:3-5.6, which provides that, "where tenure proceedings 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 a charged parties certificate as it deems appropriate." That provision is inapplicable here, since Whaley does not hold any educational certificates. Moreover, the rule does not recognize any inherent right to resign, but merely allows the Commissioner to refer the matter to the educational licensing authority once a teacher has resigned.

Further, Whaley argues that she had a legal obligation to submit her resignation in order to comply with the conditions of her pretrial intervention program. Petitioner, however, confuses "resignation" with "forfeiture." Resignation implies the voluntary and knowing relinquishment of employment rights, including tenure. See O'Toole v. Forestal, 21 N.J. Super. 394 (App. Div. 1986). Normally, it is accomplished by the voluntary offer of resignation and acceptance of that offer by the school board. Forfeiture, on the other hand, reflects that "the circumstances surrounding a criminal conviction bear directly on an employee's competency and capacity to do his or her job or to perform any other job for the state." State v. Timoldi, 277 N.J. Super. 297, 300 (App. Div. 1994); see also Moore v. Youth Correctional Institute, 119 N.J. 256, 271 (1990).

Here, of course, the forfeiture was not the result of a criminal conviction, but rather a condition imposed for entry into a pretrial intervention program. There was

nothing that Irvington could or should have done to implement what the Court had already ordered. The judicial forfeiture order is binding on Whaley and took effect as soon as it was entered by the Superior Court judge..

Order

It is **ORDERED** that summary decision is granted in favor of Irvington denying Whaley's request for relief.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 16, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 16, 2006
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 17 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

404-06

AGENCY DKT. NO. 355-9/06

IN THE MATTER OF JOHN CHILDRESS,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EAST GREENWICH,	:	DECISION
GLOUCESTER COUNTY.	:	

On October 17, 2006, the Commissioner of Education (Commissioner) rendered a decision concurring with the September 27, 2006 recommendation of the School Ethics Commission (Commission) that the respondent Board member be suspended from office, effective upon filing of the Commissioner's decision, for failure to attend the Board member training required by *N.J.S.A.* 18A:12-33. Such suspension was to have remained in effect until the respondent completed the New Jersey School Boards Association training for new board members on October 24, 2006; provided, however, that if the required training was not completed, the respondent would be summarily removed from office.

Subsequently, by letter dated November 2, 2006, the Executive Director of the School Ethics Commission advised respondent – and the Commissioner – that the Commission had voted on October 24, 2006 to vacate its prior decision finding respondent in violation of the School Ethics Act because: 1) the Commission was now satisfied that respondent did, in fact, file a reply to the Commission's Order to Show Cause, although the Commission had not previously received it; and 2) because it had allowed other Board members who replied in a manner similar to respondent to attend the October training session without a finding of violation.

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of October 17, 2006 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06

Date of Mailing: 11/21/06

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

November 2, 2006

Mr. John Childress
297 Katie Court
Mickleton, NJ 08056

Subject: Vacate Decision for Failure to Attend Training
School Ethics Commission Docket No. T05-06

Dear Mr. Childress:

Please be advised that the School Ethics Commission, at its meeting on October 24, 2006, voted to vacate its decision finding you in violation of the Act for failing to attend training so long as you attended the October 24, 2006 training session. The Commission determined that you had responded to the Order to Show Cause and copied the Superintendent, but the Commission never received your response. Having been satisfied that you sent a response, the Commission voted to vacate the decision against you since the other board members who had responded similarly were allowed to attend the October training session. By copy of this decision, I am informing the Director of the Office of Controversies and Disputes to request that she do what is necessary to vacate the Commissioner's decision as well.

Thank you for your attention to this matter.

Sincerely,

Lisa James-Beavers
Executive Director
School Ethics Commission

LJB/MET/training/correspondence/Childress vacate
c: Kathleen Duncan
Board Secretary
Mark Stanwood
Walter Meyer, NJSBA

403-06

OAL DKT. NO. EDU 11351-04
AGENCY DKT. NO. 293-8/04

NANCY WIRKMAA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that Term 7 specifically conditions this agreement on approval of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating – as specified in Term 8 – the Board's President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, this matter is hereby remanded to the OAL for revision of the settlement agreement consistent with the concerns set forth above.

IT IS SO ORDERED.*

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06
Date of Mailing: 11/20/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11351-04

AGENCY DKT. NO. 293-8/04

NANCY WIRKMAA,

Petitioner,

v.

RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

Jennifer Borja, Esq., for petitioner
(Timothy R. Smith and Associates, L.L.C., attorneys)

Paul H. Green, Esq., Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: October 9, 2006 Decided: October 13, 2006

BEFORE **DIANA C. SUKOVICH,** ALJ:

On August 24, 2004, petitioner, a School Nurse employed by respondent, filed a petition with the State Department of Education (DOE) requesting reimbursement of certain legal fees and costs by respondent, pursuant to N.J.S.A.18A:16-6.1. The DOE

transmitted the matter to the Office of Administrative Law on October 27, 2004 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

Scheduled hearing dates were adjourned at the requests of the parties for various reasons. Throughout the proceedings, telephone and settlement conferences were conducted. The parties ultimately reached a resolution of the matter and an executed Stipulation of Settlement and Release (Stipulation) was filed. This judge subsequently requested, via telephone communicatons, clarification regarding whether the parties intended that the matter be finalized by the issuance of an Initial Decision Settlement or a petitioner withdrawal. Those communications were memoralized by a letter dated October 2, 2006 from this judge to counsel, which letter advised that if responses were not received with seven days, an Initial Decsion would issue. No replies were received, and the record is deemed closed on October 9, 2006. Attached herewith is a copy of the Stipulation.

Having reviewed the terms of the Stiuplation, I **FIND** that the parties voluntarily have agreed to the terms and conditions of the settlement, as evidenced by the signatures contained thereon, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the Stipulation and that these proceedings be and are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 13, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10-18-06
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 2006
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 211
South Orange, NJ 07079
Attorney for Petitioner,

NANCY WIRKMAA Petitioner, RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOA-11351-2004 Agency Reference No.: 293-8/04 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Ramapo-Indian Hills Regional School District Board of Education (the "Board") with administrative offices located at 9331 George Street, Franklin Lakes, New Jersey 07417 and Nancy Wirkmaa (the "Petitioner"), whose address is 113 Lakeshore Drive, Oakland, New Jersey 07436. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on September 18, 2003, Petitioner was employed as a school nurse by the Board; and

WHEREAS, on that date, Petitioner was charged with a criminal action for certain acts alleged to have occurred while Petitioner was in the employ of the Board; and

WHEREAS, on June 3, 2003, the criminal complaint against Petitioner was downgraded and dismissed by the Waldwick Municipal Court; and

WHEREAS, Petitioner filed a Petition of Reimbursement with the Commissioner of Education on or about June 16, 2004, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Ten Thousand Dollars ($10, 000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to her from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Petitioner, in consideration of this Agreement, herby release the Board, individually and collectively; and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with her own independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Reimbursement.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE BOARD OF EDUCATION:

By: _____
Thomas J. Madigan, Board President

Date: August 15, 2006

By: _____
PAUL H. GAKEN, Witness
AN ATTORNEY AT LAW OF NEW JERSEY

PETITIONER:

_____
Nancy Wiedmaa

Date: 7/24/06

Sworn and subscribed to before me this
24th day of July, 2006

_____
Notary Public

MICHELLE LYNN LUCENTI
A Notary Public of New Jersey
My Commission Expires 2/15/2011

402-06

OAL DKT. NO. EDU 2859-06
AGENCY DKT. NO. 149-4/06

MELISSA MEEHAN AND JOHN AND RENEE MEEHAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that that the Board President and the Board Secretary/School Business Administrator signed the Settlement Agreement and General Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating these individuals to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement.[1]

[1] It is noted that subsequent to the issuance of his Initial Decision here, but prior to the transmission of the file to the Commissioner, the Administrative Law Judge received a letter, dated October 27, 2006, from petitioner John Meehan withdrawing the Petition of Appeal in accordance with term 2. of the parties' agreement. In that Mr. Meehan is only one of three petitioners involved in this matter, the Commissioner cannot accept a request for withdrawal signed solely by him.

Accordingly, this matter is hereby remanded to the OAL for revision of the settlement agreement consistent with the concerns set forth herein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06

Date of Mailing: 11/20/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2859-06

AGENCY DKT. NO. 149-4/06

MELISSA MEEHAN AND JOHN AND RENEE MEEHAN,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

Melissa Meehan, petitioner, pro se

John and Renee Meehan, petitioners, pro se

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: October 25, 2006 Decided: October 25, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10/25/06
DATE

RICHARD F. WELLS, ALJ

Receipt Acknowledged:

10/27/06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

RECEIVED

2006 OCT 25 A 10:40

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300
8000 Midlantic Drive
Mount Laurel, N.J. 08054
(856) 234-6800
Attorneys for Respondent, Washington Township Board of Education

MELISSA MEEHAN, JOHN MEEHAN and RENEE MEEHAN,	:	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY
Petitioners,	:	OFFICE OF CONTROVERSIES AND DISPUTES
vs.	:	
	:	OAL DKT. NO. EDUOS-02859-06
WASHINGTON TOWNSHIP BOARD OF EDUCATION	:	AGENCY REF. NO.: 149-4/2006
	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent	:	**GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is entered into by and among Melissa Meehan, John Meehan and Renee Meehan (hereinafter collectively referred to as "Petitioners"), and the Washington Township Board of Education, a local public school board of education organized under Title 18A of the New Jersey Statutes with its principle offices at 206 East Holly Avenue, Sewell, Gloucester County, New Jersey ("Board").

WHEREAS, Melissa Meehan is former student of the Washington Township School District ("School District"), having graduated from the Washington Township High School in June, 2006; and

WHEREAS, a dispute arose as to the eligibility of Melissa Meehan to attend school in the School District pursuant to N.J.S.A. 18A:38-1; and

WHEREAS, on March 28, 2006 the Board determined that Melissa Meehan was ineligible to attend the Washington Township High School; and

WHEREAS, on or about May 5, 2006 the Petitioners filed a Petition of Appeal with the Commissioner of Education challenging the Board's decision of ineligibility, OAL Dkt. No. EDU-OS-02859-06, Agency Ref. No.: 149-4/2006 ("Petition of Appeal"); and

WHEREAS, in order to resolve any and all disputes between the parties without resort to further time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters involving Melissa Meehan's eligibility to attend school in the School District, as well as any and all claims asserted in or which could have been asserted in the Petition of Appeal; and

WHEREAS, the parties have, in resolving this matter, also agreed to a mutual General Release which, without limitation, covers all claims involving Melissa Meehan's attendance in the School District; and

WHEREAS, this Agreement and the execution and implementation of same shall not be construed or considered an admission of liability or wrongdoing by the Petitioners or the Board, its present and former board members, officers, employees, agents and servants.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Petitioners and the Board **AGREE AS FOLLOWS:**

1. The Petitioners shall pay to the Board Eight Thousand Seven Hundred Twenty-Six dollars and Ninety-Three cents ($8,726.93) on or before October 10, 2006. The settlement check shall be made payable to the "Washington Township Board of Education" and delivered to the Board's Central Administrative Offices at 206 East Holly Avenue, Sewell, New Jersey. This payment shall be in full and final settlement of all claims for tuition due for the attendance of

Melissa Meehan at the Washington Township High School for the 2004-2005 and 2005-2006 school years, and any other costs or fees arising from or associated with Melissa Meehan's attendance in the School District.

2. It is understood and agreed that the hearing for the Petition of Appeal was scheduled for September 28, 2006 before Administrative Law Judge Richard F. Wells, and that said hearing was postponed due to the pending settlement agreement between the parties. Upon payment of the settlement amount, the Petitioners shall withdraw the Petition of Appeal filing with the Commissioner of Education with prejudice. If the payment set forth in paragraph 1 above is not made, this Agreement is null and void, and the Petition of Appeal shall proceed on a new date as determined by the Office of Administrative Law.

3. The Petitioners and Board mutual agree to **RELEASE, WAIVE AND FOREVER DISCHARGE** each other from any and all claims in law or in equity, whether known or unknown, arising from or relating directly or indirectly to Melissa Meehan's attendance in the School District, including but not limited to any claims of tuition for her attendance during the 2004-2005 and 2005-2006 school years.

John Meehan 10/9/06
John Meehan Date

Richard Gerber
Richard Gerber, Board President Date
Washington Township Board of Education

Renee Meehan 10-6-06
Renee Meehan Date

Margaret Meehan 10/16/06
Margaret Meehan, CPA Date
Board Secretary/School Business Administrator
Washington Township Board of Education

Melissa Meehan 10/9/06
Melissa Meehan Date

442-06

#442-06

WILLIAM DAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former teacher in respondent's district – alleged that the Board improperly terminated him on contractual notice when he had already obtained tenure in his position, claiming that he had been employed with the district since 2001. Respondent asserted that petitioner never acquired tenure because he did not hold the requisite teaching certificate until October 2003, having been employed prior to that time under a county substitute certificate.

The ALJ found, *inter alia*, that: the facts in this matter are essentially undisputed and summary decision is appropriate; petitioner did not obtain a provisional certificate until October 2003; petitioner's substitute teaching assignments prior to that date may not accrue toward tenure; petitioner's certificate of eligibility to seek provisional employment is not an appropriate certificate for the purpose of tenure accrual; and therefore petitioner has not acquired tenure pursuant to *N.J.S.A.* 18A:28-5. The ALJ denied petitioner's appeal for re-employment with back salary and benefits.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its contractual right to terminate petitioner's employment and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 8, 2006

OAL DKT. NO. EDU 9689-06
AGENCY DKT. NO. 222-6/06

WILLIAM DAVIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision have been reviewed. No exceptions were filed.

Petitioner taught in respondent's district in various capacities from September of 2001 to the end of the 2005-2006 school year. On May 15, 2006, he was advised via notice from respondent that he would not receive a contract to return for the 2006-2007 school year. He maintains that at the time of that notice he had already attained tenure, and that the non-renewal was improper.

Because the material facts were and are not in dispute, the matter proceeded in the Office of Administrative Law (OAL) as a summary disposition. The Commissioner adopts the Administrative Law Judge's (ALJ) determination that summary decision in favor of respondent is appropriate.

The undisputed facts reveal that petitioner was first employed by respondent in September 2001 and served as a substitute teacher. From September 2001 until December 2002 he worked solely under a county substitute credential. He received a certificate of eligibility to seek employment as a teacher in December 2002. However, he continued to work as a substitute through the end of the 2002-2003 school year.

In October 2003 the respondent district offered petitioner a teaching position and sent to the Board of Examiners of the New Jersey Department of Education the required paperwork to obtain a provisional elementary school teaching certificate for petitioner, which certificate was issued in October 2003. Petitioner continued to teach in respondent's district and received a standard certificate with an endorsement in elementary education in November 2004.

As set forth in the Initial Decision, *N.J.S.A.* 18A:28-5 identifies the requirements for the achievement of tenure. It states in pertinent part that:

> The services of all teaching staff members employed in the position of teacher . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . ., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause . . .after employment in such district or by such board for:
>
> (a) Three consecutive calendar years . . . ;
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> (Emphasis added.)

At the outset, the Commissioner notes that until October 2003, petitioner was not a "teaching staff member," as required by *N.J.S.A.* 18A:28-5. The term "teaching staff member" is defined in *N.J.S.A.* 18A:1-1 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 . . . .
>
> (Emphasis added.)

As the ALJ explained, the certificate of eligibility (CE) to seek employment in the provisional teaching program, which petitioner received in December 2002, was not the equivalent of any of the certificates identified in *N.J.S.A.* 18A:1-1.

Moreover, as a substitute teacher, petitioner was not "in [a position] which required him to hold appropriate certificates issued by the board of examiners." *N.J.S.A.* 18A:28-5.[1] Petitioner's employment was allowed by *N.J.S.A.* 18A:16-1.1, which permits districts to hire persons to act in the place of absent employees. Under the terms of that statute, such surrogate employees may not accrue tenure while acting in the absent employee's stead. Thus, under *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:16-1.1, petitioner could not have attained tenure until October 2006, three years after he commenced the regular teaching position that did require an appropriate certificate from the board of examiners.

Accordingly, the Commissioner adopts the determinations of the ALJ that summary disposition is appropriate, and that petitioner had not achieved tenure at the end of the 2005-2006 school year when he received notice that he would not be offered a contract for the next school year. The petition is therefore dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/11/06

[1] *See also, Spiewak v. Board of Educ. of Rutherford,* 90 *N.J.* 63, 74 (1982) (By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. (Emphasis added.))

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

443-06

#443-06SEC

AGENCY DKT. NO. 444-12/06

IN THE MATTER OF DEBORAH FOX,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WEST WILDWOOD,	:	DECISION
CAPE MAY COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby suspended from the board if she fails to attend the December 9, 2006 training session and summarily removed from office if she fails to attend the January 6, 2007 training session.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/11/06
Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T11-06**
DEBORAH FOX	:	
West Wildwood Board of Education	:	**DECISION FOR FAILURE**
Cape May County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Deborah Fox was newly elected or appointed in April 2005 to a local school board or charter school board and therefore, had until April 2006, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, through correspondence dated August 9, 2006, because you are a member of a non-operating district, the Commission provided you with the opportunity to attend half of the one-day training on October 24, 2006; and

WHEREAS, the Commission has been notified by the New Jersey School Boards Association that you did not attend the October 24, 2006 training; and

WHEREAS, the Commission issued an Order on November 1, 2006, directing Deborah Fox to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Fox did not respond to the Order; and

WHEREAS, the Commission notified Ms. Fox that the Commission would discuss this matter at its November 28, 2006 meeting; and

WHEREAS, Ms. Fox has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Deborah Fox violated the N.J.S.A. 18A:12-33 of the School Ethics Act if she fails to attend the December 9, 2006 training session and recommends that the Commissioner of Education impose a penalty of suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 29, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on November 28, 2006.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. EDU 09689-06

AGENCY DKT. NO. 222-6/06

WILLIAM DAVIS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

Harold N. Springstead, Esq. (Springstead and Maurice), for petitioner

Mark A. Tabakin, Esq. (Weiner Lesniak) for respondent

Record Closed: October 12, 2006 Decided: October 26, 2006

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On May 15, 2006 the Englewood Board of Education (Respondent/District) sent Mr. William Davis (Petitioner) a letter stating that the District would not be offering him employment for the 2006-2007 school year. On June 19, 2006 the appellant filed a Petition of Appeal with the Commissioner of Education. The petition alleged that Mr. Davis had been employed with the

District since 2001; that he advised the respondent that he had served the statutory time to qualify for tenure; and that the District refused to offer him employment for the 2006-2007 school year in violation of his tenure and seniority rights. The petitioner asserted that the actions of the District were arbitrary, unreasonable and illegal. The appeal sought the re-employment of the petitioner as a tenured teaching staff member; back pay and benefits and such other relief as was deemed appropriate. On June 30, 2006 the respondent filed its answer with the Department of Education. In its answer it asked that the petition be denied; that it be awarded attorney's fees and costs of suit, and other relief that the Commissioner deem appropriate. The respondent asserted that: "the Petitioner never acquired (and could not acquire) tenure because Petitioner did not have the requisite teaching certificate from the State of New Jersey until October of 2003. Therefore, Petitioner did not meet the three-year and one-day service requirement to achieve tenure prior to his non-renewal."

The matter was forwarded to the Office of Administrative Law (OAL) on September 11, 2006 and assigned to ALJ Cohen on September 26, 2006. A telephone conference was held on October 12, 2006 at which time it was determined that the matter should be decided on the papers that had previously been submitted.

ISSUES

1. Whether the matter can be decided on Summary Decision.
2. Whether the petitioner had obtained tenure.
3. Whether the respondent had violated the petitioner's tenure and seniority rights.

STATEMENT OF FACTS

1. From November 2001 through June 2002 the petitioner worked as a long term substitute teacher, teaching bi-lingual science.

2. From September 2002 through December 2002 Mr. Davis worked as an intermittent substitute teacher.

3. In December 2002 the petitioner was issued a Certificate of Eligibility.

4. From January through March 2003 Mr. Davis worked as a long term substitute teacher for 8th grade English in the District.

5. From March 2003 through June 2003 he was assigned as a long term substitute teacher in Mathematics.

6. On September 24, 2003 the petitioner was enrolled in the Provisional Teacher Program.

7. In October 2003 Mr. Davis was issued a provisional certification.

8. The petitioner signed a contract in October 2003 to teach Related Arts and to supervise the In School Suspension Program for the 2003-2004 school year.

9. In October 2004 the petitioner was issued the Standard Teaching Certification.

10. The petitioner signed contracts as a regular teacher for the 2004-2005 and 2005-2006 school year.

11. On May 15, 2006 the Board sent a letter to the petitioner stating that they would not be renewing his teaching contract for the 2006-2007 school year.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

In accordance with the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.12.5, any party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. To grant a motion for summary decision, it must be examined whether "the papers and discovery...together with the 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).

A motion for summary decision is similar to summary judgment found at R. 4:46-2. The motion for summary judgment "shall be served with briefs, a statement of material facts, with or without supporting affidavits." R. 4:46-2(a). "The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue, together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Ibid.

The Supreme Court has held that when deciding a motion for summary judgment:

> [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 America, 142 N.J. 520, 540 (1995).]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). Thus, the critical question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533.

In this matter there is no genuine issue of material fact.

II. Acquisition of Tenure

Teachers in New Jersey have a statutory right to tenure provided they meet certain requirement. Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962), cert. den. 371 U.S. 956 (1963). The criteria under which teachers achieve tenure is outlined in N.J.S.A. 18A:28-5 which provides:

> The services of all teaching staff members ... which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, **excepting those who are not the holder of proper certificates in full forced and effect**, shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding year; or

> (c) the equivalent of more than three academic years within a period of any four consecutive academic years . . .
>
> [Emphasis added]

A "teaching staff member" is defined at N.J.S.A. 18A:1-1 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 qualification, 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. [Emphasis added].[1]

In order to achieve tenure, the petitioner must meet the following conditions: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 73 (1982). The petitioner claims that a portion of his service prior to the 2003-2004 school year should be included in calculating his time for accruing tenure. He cites Ellicott v. Bd. Of Educ. 251 N.J. Super. 242, 347-348 for the proposition that he completed the requirements for certification under the terms of the Certificate of Eligibility issued in December 2002. The petitioner points to language in the opinion which states that:

> Thus, tenure is achieved by a teaching staff member who serves the probationary period either in a specifically designated 'position,' such as a teacher, or in 'positions which require them to hold appropriate certificates..' While 'position is not defined by the act, 'teaching staff member' is defined as a staff member who holds

[1] A standard certificate is a "permanent certificate issued to candidates who have met all requirements for State certification." N.J.A.C. 6:11-4.1. A provisional certificate is "a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. An emergency certificate is "a substandard one-year certificate issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially sighted, and teacher of the deaf and hard of hearing." N.J.A.C. 6:11-4.3.

> 'office, position or employment' which requires that he or she 'hold a valid...certificate. Id. at 348.

Based on this language he contends that: "at all times he taught under an appropriate certificate for the position for which he was hired."

Prior to December 2002, the petitioner held a County Substitute Teacher's Certification. He admits that he worked as a substitute teacher during the 2001-2002 and 2002-2003 school years. Under the tenure statute, time spent as a substitute teacher does not count toward tenure. . See N.J.S.A. 18A:28-5(a)-(c). The only exception to the tenure statute is the "temporary employment" exception, which, according to N.J.S.A. 18A:16-1.1, is limited to employees hired to take the place of an absent teacher. See Spiewak v. Rutherford Bd. Of Ed., 90 N.J. 63 (1982) quoting Point Pleasant Beach Teachers' Association v. Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980). Since Spiewak, supra, the only statutory exception relating to tenure accrual by teachers is N.J.S.A. 18A:16-1.1, which allows a district to designate some person to act in the place of any absent employee, but that person would not acquire tenure in that office. Thus, according to Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 N.J. Super. 425 (App. Div. 1984), N.J.S.A. 18A:16-1.1 applies when a substitute teacher takes the place of a regular teacher, because of the absence of the regular teacher, whose return is contemplated.

Thus, it would appear that the time used to accrue tenure would have had to begin once the petitioner was issued a Certificate of Eligibility in December 2002. However, as the respondent has pointed out, the Certificate of Eligibility was not activated during the 2002-2003 school year, because Mr. Williams continued to work as a substitute teacher. He did not obtain a regular teaching position until September 2003. At that point his Certificate of Eligibility was activated. This was just the beginning of the certification process. As the Provisional Teacher Program Information and Application Packet (Respondent's Exhibit 1) states: "These certificates provide the opportunity to seek

employment. These are **NOT** TEACHING LICENSES." Once the teacher has accepted an offer of employment, the District must register the teacher in the Provisional Teacher Program and agree to provide support and supervision.

> At that time you will be notified through your employer of any additional documents and/or fees needed to obtain your PROVISIONAL LICENSE...
> Upon successful completion of program requirements, you will need to submit a current Application for Licensure and the appropriate fee to receive your STANDARD LICENSE.

A teacher is not considered a "teaching staff member" within the meaning of N.J.S.A. 18A:1-1, until he obtains his provisional license. The petitioner did not obtain a Provisional Certificate until October 2003. As the respondent pointed out, the petitioner's legal argument, that the time served while he held a Certificate of Eligibility counted toward tenure accrual, is flawed. As pointed out above, a holder of a Certificate of Eligibility is not a "teaching staff member" as defined by N.J.S.A. 18A; 1-1, since he did not hold a valid and effective standard, provisional or emergency certificate. While the petitioner appears to have analogized a "Certificate of Eligibility" to an "Emergency Certificate", there is nothing in the statute or case law that supports that position. As the court pointed out in Zimmerman, supra, 38 N.J. at 72: In order to acquire tenure, "a teacher must comply with the precise conditions articulated in the statute." Based on this standard, the ALJ in Joanne McAneney v. Board of Education of the School District of the Chathams, 92 N.J.A.R. 2d (EDU) 208 (1991) found that a teacher, who taught for 13 years, but did not have the proper instructional certificate, had not attained tenure. The decision was affirmed by the Commissioner who concurred that "the petitioner did not possess the appropriate certificate for service as a supplemental teacher and, therefore, did not meet the precise requirements for acquiring tenure set forth in Spiewak, supra." See also Jennings v. Board of Education of the Borough of Highland Park, 1989 S.L.D. (St. Bd. Feb. 28, 1989) in which an athletic trainer, who taught health courses without the proper health education endorsement, was denied tenure.

I also do not find persuasive the petitioner's argument that he can somehow use his prior teaching time to retroactively grant him seniority and tenure. The fact that he eventually became a regular certificated teacher does not mean that he can tack on the time he spent teaching under a substitute teacher certificate and under a certificate of eligibility. As the ALJ found in Morano v. Board of Education of the Borough of Verona, 1990 S.L.D. (June 27, 1990), affirmed, Commissioner, August 10, 1990, there could be no "retroactive seniority" granted to a teacher who completed all of the prerequisites to be "eligible" to obtain a specific endorsement in a particular subject, but who did not actually have the endorsement. As the ALJ explained:

> To recognize "seniority" based upon "eligibility" for endorsement and authorization to teach a subject would have results including the following: It would erode the authority of the regulatory system. It would result in uncertainty and confusion by, e.g., entertaining the claims of teachers who are unendorsed and unauthorized, that they should be afforded seniority-type rights over teachers who conscientiously secured endorsement and authorization. It would ultimately deny the endorsed and authorized teachers their rights afforded by the statutory and regulatory systems.

CONCLUSION AND ORDER

Based on the briefs and certifications submitted, I **CONCLUDE** that there is no material issue of fact that would require a hearing. Therefore, the matter can be decided on Summary Decision.

I further **CONCLUDE** that the petitioner has not acquired tenure under the terms of the statute.

I therefore **ORDER,** that the petitioner's application for re-employment as a tenured teaching staff member, back salary and benefits be denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/26/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/26/06
DATE

Mailed to Parties:

OCT 27 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

444-06

#444-06SEC

AGENCY DKT. NO. 445-12/06

IN THE MATTER OF ROSEANNE ANTINE,	:	
ROCKLEIGH SCHOOL DISTRICT, BERGEN	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Further, the Commissioner admonishes the respondent for failing to attend the required training in her first year of service as a Board member; such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby suspended from the board if she fails to attend the December 9, 2006 training session and summarily removed from office if she fails to attend the January 6, 2007 training session.

IT IS SO ORDERED. *

Lucille Edon
COMMISSIONER OF EDUCATION

Date of Decision: 12/11/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T09-06**
ROSEANNE ANTINE	:	
Rockleigh Board of Education	:	**DECISION FOR FAILURE**
Bergen County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Roseanne Antine was newly elected or appointed in April 2005 to a local school board or charter school board and therefore, had until April 2006, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, through correspondence dated August 9, 2006, because you are a member of a non-operating district, the Commission provided you with the opportunity to attend half of the one-day training on October 24, 2006; and

WHEREAS, the Commission has been notified by the New Jersey School Boards Association that you did not attend the October 24, 2006 training; and

WHEREAS, the Commission issued an Order on November 1, 2006, directing Roseanne Antine to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Antine responded to the Order and indicated that she failed to attend the October 24, 2006 training due to a business commitment that she could not cancel; and

WHEREAS, the Commission notified Ms. Antine that the Commission would discuss this matter at its November 28, 2006 meeting; and

WHEREAS, Ms. Antine has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Roseanne Antine violated the N.J.S.A. 18A:12-33 of the School Ethics Act if she fails to attend the December 9, 2006 training session and recommends that the Commissioner of Education impose a penalty of suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 29, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on November 28, 2006.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

447-06

#447-06SEC

AGENCY DKT. NO. 407-11/06

IN THE MATTER OF ARETHA DOOLEY-MALLOY,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION **V.** **ARETHA DOOLEY-MALLOY** **NEWARK CITY BOARD** **OF EDUCATION** **ESSEX COUNTY**	:	**BEFORE THE SCHOOL** **ETHICS COMMISSION** **Docket No.: D07-06** **DECISION FOR FAILURE TO** **FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Aretha Dooley-Malloy is a Vice Principal for the Newark City School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Dooley-Malloy files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Aretha Dooley-Malloy violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

446-06

#446-06SEC

AGENCY DKT. NO. 405-11/06

IN THE MATTER OF CHRIS CASTANO,	:	
JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, HUDSON COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D16-06**
CHRIS CASTANO **JERSEY CITY COMMUNITY CS** **HUDSON COUNTY**	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Chris Castano is a member of the Board of Education for the Jersey City Community Charter School and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Castano files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Chris Castano violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

448-06

#448-06SEC

AGENCY DKT. NO. 410-11/06

IN THE MATTER OF STEVEN COLE,	:	
STATE-OPERATED DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF NEWARK, ESSEX COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Mr. Cole's comments to the Commission's recommended penalty, in pertinent part, stated

> ***I have been employed as a school administrator for twenty (20) years. Throughout my tenure, I have never failed to adhere to my job responsibilities nor have I failed to file required disclose statements of any kind. Over the past year, I have had additional personal pressures that may have led to the late submission. My wife was recently diagnosed with breast cancer and has to undergo chemotherapy and ultimately surgery. With the decline of my wife[`s] health, I have been taking on the duties to care for my autistic child alone. It has been a difficult year for me personally, however, I continued to have a successful year professionally as a school administrator, as a father to two children and as a mentor to young students of Newark.
>
> While these personal difficulties do not excuse a failure to adhere to the statutory code, I submit to you that given my past performance record, the fact no such infraction of this kind has ever been brought against me in twenty (20) years and the personal difficulties I have had over the past year, should excuse me from any penalty of reprimand.

Upon her review – notwithstanding Mr. Cole's violation of the School Ethics Act as a result of his untimely filing of the requisite disclosure statement – under the particular circumstances in this matter, the Commissioner cannot agree with the Commission that any

penalty against him is warranted. However, Mr. Cole is hereby directed to insure that all future requisite submissions are filed in a timely fashion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D06-06**
STEVEN COLE NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Steven Cole is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 4, 2006,

WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Steven Cole violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

449-06

#449-06SEC

AGENCY DKT. NO. 403-11/06

IN THE MATTER OF LAWRENCE CHIARAVALLO	:	
ACADEMY CHARTER HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (SEC), forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.[1] No comments were filed by the respondent, but the required disclosure statement was filed on November 8, 2006.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille Tudor

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

[1] The Commissioner notes that the name "Chris Castano" was erroneously inserted into the second paragraph of the SEC's findings in its decision concerning Mr. Chiaravallo.

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D18-06**
LAWRENCE CHIARAVALLO ACADEMY CHARTER HIGH SCHOOL: MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Chris Castano is a member of the Board of Education for the Jersey City Community Charter School and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Chiaravallo files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Lawrence Chiaravallo violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 408-11/06

IN THE MATTER OF TRACIE HURST,	:	
NORTHFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D01-06**
TRACIE HURST NORTHFIELD BOARD OF EDUCATION ATLANTIC COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Tracie Hurst is a member of the Board of Education for the Northfield School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 5, 2006,

WHEREAS, the school official filed an answer indicating that her delinquency was not intentional, but that she had the disclosure statement returned several times because it was incomplete ; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Tracie Hurst violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

450-06

#450-06SEC

AGENCY DKT. NO. 412-11/06

IN THE MATTER OF MARY JO WALILKO,	:	
MINE HILL SCHOOL DISTRICT, MORRIS	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D19-06**
MARY JO WALILKO MINE HILL BOARD OF EDUCATION MORRIS COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Mary Jo Walilko is a member of the Board of Education for the Mine Hill School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 3, 2006,

WHEREAS, the school official filed an answer indicating that she leads an extremely busy life due to family responsibilities; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mary Jo Walilko violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 406-11/06

IN THE MATTER OF DAVID WRIGHT,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06

Date of Mailing: 12/13/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D10-06**
DAVID WRIGHT **NEWARK CITY BOARD OF EDUCATION** **ESSEX COUNTY**	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, David Wright is a Principal for the Newark City School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Wright files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that David Wright violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini /pjb

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

452-06

AGENCY DKT. NO. 404-11/06

IN THE MATTER OF DELISA BRAZILE,	:	
ACADEMY CHARTER HIGH SCHOOL,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D17-06**
DELISA BRAZILE ACADEMY CHARTER HIGH SCHOOL: MONMOUTH COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Delisa Brazile is a member of the Board of Educationl for the Academy Charter High School and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Brazile files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Delisa Brazile violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

454-06

AGENCY DKT. NO. 402-11/06

IN THE MATTER OF DAWN POPE,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF SOMERDALE, CAMDEN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, particularly in light of respondent's prior violation of the same provision. The Commissioner additionally admonishes the respondent for her disregard of the law, which has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby removed as a member of the Somerdale Board of Education, effective upon filing of this decision.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06

Date of Mailing: 12/13/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION **V.** **DAWN POPE** **SOMERDALE BOARD OF EDUCATION** **CAMDEN COUNTY**	:	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket No.: D03-06** **DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Dawn Pope is a member of the Board of Education for the Somerdale School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, last year on December 20, 2005, the Commission found Ms. Pope in violation of the Act and recommended to the Commissioner of Education a penalty of reprimand for Ms. Pope's failure to file a disclosure within the designated timeline; and

WHEREAS, on January 31, 2006, the Acting Commissioner of Education concurred with the penalty of reprimand and Ms. Pope was reprimanded; and

WHEREAS, the appropriate penalty for the violation is removal since Ms. Pope was reprimanded last year for her late filing of a disclosure statement and she has failed to file a disclosure statement this year;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dawn Pope violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

458-06

#458-06

OAL DKT. NO. EDU 3570-06
AGENCY DKT. NO. 9-1/06

S.V., on behalf of minor children, H.W., D.A. and K.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06

Date of Mailing: 12/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3570-06

AGENCY DKT. NO. 9-1/06

S.V., O/B/O H.W., D.A., and K.V.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

S.V., petitioner, pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: October 12, 2006 Decided: November 9, 2006

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner filed a petition with the Commissioner of the State Department of Education (DOE), on January 6, 2006, regarding a dispute with respondent pertinent to the continued enrollment of H.W., D.A., and K.V., his minor children, in respondent's school district. Respondent filed an answer and counterclaim on February 14, 2006. The DOE transmitted the matter to the Office of Administrative Law on March 29, 2006 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A hearing scheduled on July 17, 2006 was adjourned because of petitioner's unavailability. The parties appeared for a hearing on September 8, 2006. A hearing commenced at that time. The parties conferred during the proceedings and reached a resolution of the matter. The terms of the settlement were placed on the record. Subsequent to additional communications, an executed Stipulation of Settlement and Minutes of a meeting by respondent, on October 9, 2006, evidencing approval of the settlement, were filed on October 12, 2006, on which date the record was closed. Attached herewith are copies of those documents.

I have reviewed the record and terms of the Stipulation of Settlement and pertinent Minutes and **FIND** that the parties have voluntarily agreed to the settlement, as evidenced by the signatures of the parties or their representatives on the settlement, and the settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C.1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 9, 2006
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11-15-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 3570-06
AGENCY REF. NO. 9-1/06

S.V., ON BEHALF OF MINOR CHILDREN, H.W., D.A., and K.V.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws his petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Petitioner's children will be permitted to attend school in respondent's district so long as the requirements of school eligibility under statute and regulations are met.

(4) Petitioner shall pay respondent the sum of $11,400 in full settlement of all tuition charges. The first payment of $5,700 shall be due within 30 days of the approval of this settlement by the Commissioner of Education. The second payment of $2,850 shall be due 30

days after the first payment is due. The third payment of $2,850 shall be due 30 days after the second payment is due.

(5) Petitioner shall have the right to prepay any or all of the above sums.

(6) If petitioner does not make any of the above payments by their due dates, respondent shall be entitled to the entire amount of tuition for the three children for the 2005-2006 school year, less any payments previously made.

(7) This settlement is subject to approval by the Commissioner of Education.

(8) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: 29-Sept-06

Sheldon Vickers, Petitioner

Attest:

Secretary

Board of Education of
The Township of West Orange

By: _____
President

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on October 9, 2006 at 8:00 P.M., at St. Cloud Elementary School, 71 Sheridan Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mr. Petigrow, and seconded by Mrs. Garnes, and adopted by the Board of Education by the following roll call vote:

Stipulation of Settlement: S.V. o/b/o H.W., D.A., and K.V. v. West Orange Board of Education.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 OCT 12 A 9:21

ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

Abstain: None

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on October 9, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 10th day of October 2006.

Mark A. Kenney
Business Administrator/Board Secretary

456-06SEC

AGENCY DKT. NO. 411-11/06

IN THE MATTER OF ROCIO C. DAY,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF GUTTENBERG, HUDSON COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06
Date of Mailing: 12/13/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D15-06**
ROCIO C. DAY GUTTENBERG BOARD OF EDUCATION HUDSON COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Rocio C. Day is a member of the Board of Education for the Guttenberg School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 18, 2006,

WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Rocio C. Day violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

459-06

#459-06

OAL DKT. NO. EDU 10429-06
AGENCY DKT. NO. 321-9/06

H.S.K., on behalf of minor child, S.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edley
COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06
Date of Mailing: 12/15/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10429-06
AGENCY DKT. NO. 321-9/06

H.S.K. o/b/o S.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Hyun Sook Kim, petitioner, pro se

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: November 17, 2006 Decided: November 17, 2006

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for November 17, 2006. The parties appeared and agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11-17-06
DATE

J. HOWARD SOLOMON, ALJ

Receipt Acknowledged:

11-22-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

(1) STIPULATION OF SETTLEMENT

H.S.K. o/b/o S.O., Petitioners, v. Northern Valley Regional High School Bd. of Ed.,	State of New Jersey Office of Administrative Law Agency Ref No. 331-9/06 OAL Dkt. No. EDU 10424-06

The parties in the above-captioned matter have agreed to resolve the above-captioned matter as follows:

1. Petitioners' Residency Petition is hereby ~~dismissed with prejudice~~ withdrawn.

2. Within 30 days of the date of this Stipulation, Petitioners will pay to

Cmt. J-1

Valley an amount equal to 3 months' tuition (2/06 to 11/06 inclusive), calculated on a per diem amount of $77.60. ($1420.00 per month)

3. Petitioners agree to continue to pay this tuition amount for S.O. on an ongoing basis, until s/he meets the tuition-free school attendance standard set forth in N.J.S.A. 18A:38-1(a)(1) by obtaining legal guardianship of S.O.

4. Respondent Northern Valley hereby waives any claims against Petitioners for

(3)

reimbursement for Legal fees.

5. S. O.'s attendance at school in Northern Valley Cold Spring is contingent upon Petitioners' prompt payment of tuition for S.O. as well as S.O.'s ~~[illegible]~~ remaining in ACCEPTABLE ~~good~~ academic & behavioral standing IN ACCORDANCE WITH THE RESPONDENT'S RULES AND REGULATIONS

Northern Valley BOE

By: _____ Raymond R Jacobus
James G. Hosford Jr. Esq. RAYMOND R JACOBUS
Attorney for Northern Valley

Dated: 11/17/06

Kwang Jin Han Hyun Sook Kim

11/17/06 11/17

KWANG JIN HAN HYUNSOOK KIM

Dated: 11/17/06 Dated: 11/17/06

460-06

#460-06SEC

AGENCY DKT. NO. 413-11/06

IN THE MATTER OF DIANE COLE,	:	
MONTAGUE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
SUSSEX COUNTY.	:	DECISION

The record of this matter, the decision of the School Ethics Commission (SEC) – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty – and respondent's communication dated November 5, 2006, conveying a copy of her disclosure statement, have been reviewed. As set forth in the SEC's decision, respondent first filed her required disclosure statement with the Commission on October 2, 2006, substantially later than the date it was due.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06
Date of Mailing: 12/15/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D24-06**
DIANE COLE MONTAGUE BOARD OF EDUCATION SUSSEX COUNTY	:	**DECISION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Diane Cole is a member of the Board of Education for the Montague School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 2, 2006,

WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Diane Cole violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

461-06

OAL DKT. NO. EDU 8101-01
AGENCY DKT. NO. 408-10/01

ADAM E. DRAPCZUK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following advisement. The settlement agreement will be annexed to the Final Decision in this matter and will, consequently, be part of a public document. Thus, while the parties themselves may comply with their accord – in Paragraph 14 of the Settlement – not to disclose the terms of the settlement agreement, the settlement document will be subject to the provisions of the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*

The matter is hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/06

Date of Mailing: 12/18/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 8101-01

AGENCY DKT. NO. 408-10/01

ADAM E. DRAPCZUK,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,

Respondent.

Beth L. Finkelstein, Esq., for petitioner

Mark A. Tabakin, Esq., for respondent
(Weiner A. Lesniak, attorneys)

Record Closed: October 3, 2006 Decided: November 13, 2006

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on November 16, 2001 for hearing pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached settlement agreement and release indication the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Nov. 13, 2006
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

11-15-06
DATE

M Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2001 OCT -3 P 1:58

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Township of Winfield (the "Board") and Adam E. Drapczuk ("Drapczuk"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about August 17, 1998, Drapczuk was employed as the Superintendent of the Winfield Public School District pursuant to a contract of employment, effective August 17, 1998 through June 30, 2002; and

WHEREAS, on or about April 24, 2001, the Board forwarded Drapczuk a letter advising him that the Board did not intend to renew his employment contract; and

WHEREAS, on or about September 18, 2001, the Board adopted a resolution ratifying its previous decision to non-renew Drapczuk's employment contract; and

WHEREAS, Drapczuk filed a Petition for a Declaration Ruling on or about September 29, 2001, asserting that he had not been afforded timely notice of his non-renewal in accordance with N.J.S.A. 18A:17-20.1; and

WHEREAS, the matter was docketed before the Office of Administrative Law as OAL Docket Number EDU-OA-08101-01N; and

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Drapczuk deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and

WHEREAS, the Board and Drapczuk are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board", as used herein, shall at all times mean the Board of Education of the Township of Winfield, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Drapczuk," as used herein, shall mean Adam E. Drapczuk, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. The parties acknowledge and agree that Drapczuk's Employment Contract dated August 13, 1998 terminated on June 30, 2002.
4. Drapczuk shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU- OA-08101-01N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.
5. Drapczuk promises and agrees never to seek re-employment or assert any tenure status or employment with the Board at any time in the future in any capacity.
6. Within thirty (30) business days of execution of the Settlement Agreement by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Drapczuk the lump sum of Seven-thousand, five-hundred dollars ($7,500.00). Drapczuk and the Board acknowledge and agree that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Drapczuk for reinstatement, automatic renewal of his employment contact, reemployment, compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, loss of seniority, loss of pension, loss of salary placement, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Drapczuk's Complaint against the Board now docketed before the OAL as EDU-OA-08101-01N, for, but not

limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, Title 18A of the New Jersey Statutes; Titles 6 and 6A of the New Jersey Administrative Code, the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not. Drapczuk and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Drapczuk or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are Drapczuk's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations, and any rights he may have for indemnification by the Board through his last day of employment, June 30, 2002, pursuant to *N.J.S.A.* 18A: 16-6 and 6.1.

7. Drapczuk hereby acknowledges and agrees that he further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Drapczuk does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect his decision to enter into this Settlement Agreement and General Release.

8. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

9. Drapczuk and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.

10. This settlement is intended as and for damages for any and all possible injuries and Drapczuk hereby waives any and all claims for lost wages, income or future earnings.

11. Should it be determined that any payments made pursuant to Paragraph 6 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any other federal, state or local statute or ordinance, Drapczuk shall be solely liable for and agrees to pay any amount that may be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Drapczuk understands and agrees that his attorney will be provided with a 1099 Miscellaneous form with his payment from the Board. Drapczuk

also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility. Further, Drapczuk understands and agrees that the Board will report the payment made to Drapczuk to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payment is taxable.

12. In any action commenced against by either party to enforce the provisions of this Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

13. Drapczuk specifically acknowledges that the payment referred to in Paragraph 6 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release. Drapczuk agrees that he shall not seek any further amount from the Board other than the amount stated in Paragraph 6.

14. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly any information contained in this Settlement Agreement, except that the parties or their attorney(s) shall not be precluded from disclosing the existence or terms of this Settlement Agreement and General Release when required to do so by law. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Drapczuk and the Board."

15. This Settlement Agreement and General Release contains the full agreement of Drapczuk and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Drapczuk and the Board, which consent must be signed by Drapczuk and the Board, or their duly authorized agents.

16. The waiver by Drapczuk and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

17. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

18. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

19. Drapczuk and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

20. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

21. In entering into this Settlement Agreement and General Release, Drapczuk has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Drapczuk and the Board have hereunto set their hands.

ADAM E. DRAPCZUK

By: _____
Adam Drapczuk

By: _____
Beth Finkelstein, Esq.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD

By: _____
Frederick Viteka, Board President

By: _____
Mark A. Tabakin, Esq.

F:\WP-DATA\LIT\MATTERS\ENG-120 Settlement Agreement2.doc

WINFIELD BOARD OF EDUCATION

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 OCT -3 P 4:58

RESOLUTION
September 19, 2006

BE IT RESOLVED that the Winfield Board of Education approve the settlement agreement and release between Adam Drapczuk and the Winfield Board of Education in the amount of $7500.00.

MOTION MADE BY: Ms. Baker SECONDED BY: Mr. Heuser

The motion was carried by roll call vote as follows:
Yes-Mrs. Fellner, Mrs.Gerhart, Mr. Heuser, Mr. Koomer, Mrs. Vail, Mr. Viteka
No-Ms. Baker
Abstain-Mrs. Byrne
Absent-Mrs. Quinn

I certify the foregoing to be a true and correct abstract of a resolution regularly passed at a meeting of the Board of Education of the Township of Winfield held September 19, 2006 and in that respect is a true and correct copy of its minutes.

Thomas J. West
Board Secretary
Winfield Board of Education

463-06

#463-06

E.A.E. on behalf of minor child S.N.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Bloomfield – contested respondent's determination that her son, S.N.W., was not domiciled in respondent's district during the 2005-2006 school year. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance, based on an investigator's observations of S.N.W. at his grandparents' address in East Orange.

The ALJ found that petitioner admitted that she sent her son to stay with her parents in East Orange after she discovered that her live-in boyfriend was a convicted sex offender. Based on the foregoing, the ALJ concluded that S.N.W. was not domiciled in respondent's district between November 2005 and May 2006; affirmed the residency determination of the respondent; and ordered E.A.E. to pay the district the appropriate per diem tuition rate for the period of S.N.W.'s ineligible attendance.

Upon careful and independent review of the record, the Commissioner rejects the Initial Decision of the OAL for the following reasons: respondent does not challenge the fact that petitioner is domiciled in its district; it is well settled that the domicile of a minor child is determined by the domicile of the parent; and – by virtue of E.A.E.'s undisputed domicile in Bloomfield – her child had a right to a free public education in respondent's district. Accordingly, no tuition is due for S.N.W.'s attendance in Bloomfield schools during the 2005-2006 school year.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 19, 2006

OAL DKT. NO EDU 3893-06
AGENCY DKT. NO. 101-3/06

E.A.E. on behalf of minor child S.N.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, E.A.E., a resident of Bloomfield, initiated this matter when respondent, Bloomfield Board of Education, acted to disenroll her son, S.N.W., from its school district. The record, Initial Decision of the Office of Administrative Law (OAL) recommending that respondent's action be upheld, and respondent's exceptions have been reviewed.[1] After careful consideration and for the reasons set forth *infra*, the Commissioner rejects the Initial Decision.

The Commissioner adopts the Administrative Law Judge's (ALJ) procedural history and relies upon the following undisputed facts:

1. Petitioner is the biological mother of S.N.W., a special needs student.
2. Petitioner has lived in Bloomfield for over four years, and currently resides on W. Avenue in Bloomfield, New Jersey.
3. S.L.W. has been attending school in Bloomfield since at least September 2004.
4. Petitioner's mother and step-father live a few blocks away from petitioner on N. M. Avenue in East Orange, New Jersey.

[1] No transcript of the July 14, 2006 hearing was provided to the Commissioner.

5. Petitioner's mother and step-father have no legal custody or guardianship of S.N.W.
6. During the period of time relevant to this controversy, petitioner often worked afternoons and nights.
7. In or about May 2005, petitioner learned through a Megan's Law notice that her live-in boyfriend was a convicted sex offender.
8. Due to her working schedule and concerns about her boyfriend's background, petitioner allowed S.N.W. to stay with her parents extensively during the 2005-2006 school year. During that school year S.N.W. was seen by respondent's residency compliance officer going to school from the grandparents' house and returning to it after school.
9. Petitioner's boyfriend vacated the W. Avenue residence in April 2006 and stopped trying to return there in May 2006.

At the outset, the Commissioner notes that respondent does not challenge the fact that petitioner was domiciled in its district; it contends that S.N.W. stayed with his grandparents in East Orange during the school year and consequently failed to meet the domicile requirement that would entitle him to a free public education in Bloomfield. However, it is well settled that a minor child does not establish his or her own domicile. Rather, the domicile of the child is determined by the domicile of the parent. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 *U.S.* 30, 48, 109 *S. Ct.* 1597, 1608, 104 *L. Ed.* 2d 29, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 *N.J. Super.* 505, 521-22 (App. Div.1995), *certif. denied*, 143 *N.J.* 325 (1996); *V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286; 25 *Am. Jur.* 2d Domicil § 42 (1996); *Restatement* (Second) Conflict of Laws § 22 (1971).

It appears that S.N.W. spent the majority of his time at his grandparents' residence, due to his mother's work schedule and her boyfriend's history. S.N.W. nonetheless had a right to a free public education in respondent's district by virtue of the fact that his mother, petitioner, was domiciled in that district. *See, also, M.L.P. on behalf of minor child C.L.P. v. Board of Education of the Township of Bloomfield, Essex County,* OAL Dkt. No. EDU 1420-06, Agency Dkt. No. 395-12/05, decided September 19, 2006; *J.M. on behalf of minor child S.C. v. Board of Education of the Township of West Orange, Essex County*, OAL Dkt. No. EDU1061-00, Agency Dkt. No. 347-11/99, decided May 24, 2001.

Since the facts found by the ALJ established petitioner's domicile in Bloomfield, and there was nothing in the record to cast doubt on petitioner's legal custody of S.N.W., S.N.W. must be deemed to have been domiciled in Bloomfield during the 2005-2006 school year and entitled to a free public education there.

The Commissioner directs respondent to continue to enroll S.N.W. in its district, assuming that petitioner is still domiciled there, and denies respondent's request for tuition.[2]

IT IS SO ORDERED. [3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/06

Date of Mailing: 12/20/06

[2] Insofar as the Commissioner finds that S.N.W. is domiciled in Bloomfield, respondent's exceptions are rendered moot.

[3] This decision may be appealed to the State Board of Education, pursuant to N.J.S.A. 18A:6-27 et seq. and N.J.A.C. 6A: 4-1.1 et seq.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03893-06

AGENCY DKT NO. 101-3/06

E.E. ON BEHALF OF S.N.W.

Petitioner,

v.

TOWNSHIP OF BLOOMFIELD BOARD OF EDUCATION, ESSEX COUNTY

Respondent.

E.E. parent of **S.N.W.**, appearing *pro se*

Mark Wenczel, Esq., for respondent (Gaccione, Pomaco & Malanga, Attorneys)

Record Closed: October 16, 2006 Decided: November 21, 2006

BEFORE: **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, E.E. challenges the residency determination made by the Township of Bloomfield Board of Education (hereinafter "Board'). The matter was transmitted to the Office of Administrative Law (OAL) on April 6, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. A hearing was held on July 14, 2006, at the OAL in Newark, New Jersey. Respondent filed a post hearing brief and the Petitioner requested

some time to submit post hearing documentation. The Court, not having heard from the petitioner, closed the record on October 16, 2006.

ISSUE

The issue in this proceeding is whether S.N.W. is domiciled in the Township of Bloomfield, and is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

SUMMARY OF THE TESTIMONY

E.E.

E.E. is the mother of the minor child S.N.W. S.N. W. is 14 years old and will be entering the 9th grade in September 2006. E.E. testified that she lived on Prospect St., in Bloomfield, New Jersey from June 2003 until November 2004. She moved to another location, Watesessing Ave, Bloomfield in November 2004 where she remains to date.

E.E. testified that she lived in Bloomfield in an apartment occupied by herself, her boyfriend and her son (S.N.W.). Some time after living with her boyfriend she received a Megan's Law notice that informed her that the boyfriend was a convicted child molester. Thereafter, she wanted him to vacate her apartment but he refused to leave. The relationship became very difficult. Her boyfriend would harass her causing her to call the Bloomfield police department on him numerous times. However, she never filed a domestic violence complaint so she never obtained a restraining order against him. He finally left the apartment in April 2006. Nevertheless, he continued to harass her a pattern that continued until approximately May 2006.

During this period, she sent S.N.W. to stay with her parents so that he would not be exposed to the boyfriend and potentially be at risk of molestation. E.E. testified that her son stayed at his grandparents in East Orange at least

during the four (4) months she was trying to get the boyfriend out of her apartment.

S.N.W. routinely went to his grandparents' home after school and stayed there until the following morning. If her boyfriend was at the apartment after school, S.N.W. would be sent directly to his grandparents' house and would stay there until either the next morning, or until his mother came home to the Bloomfield apartment. S.N.W.'s grandfather would take him to the Bloomfield bus stop in the morning and in the afternoon he would pick him up at the same bus stop and walk him back to his house in East Orange. This was the routine was followed for most of the 2005-2006 school year because she had a very difficult time evicting the boyfriend.

On cross-examination, E.E. stated that the child lived with his grandparents from November 2005 until May 2006. She said she found out, through her employer, that her boyfriend was a sex offender in May 2005.

Mrs. G. (grandmother)

Mrs. G. testified that she is SNW's biological grandmother and is E.E.'s mother. She lives on N. Maple St., East Orange, New Jersey with her husband, Mr. G., the child's step-grandfather. She stated that S.N.W. goes back and forth between her house in East Orange and his mother's house in Bloomfield. S.N.W. would appear at her house without prior notice and there were times when he would leave her house and go either to his mother's apartment in Bloomfield, or somewhere else. She stated that S.N.W. would sometimes spend days and weeks at their house.

Mr. G. (step-grandfather)

Mr. G. testified that he is S.N.W.'s step-grandfather. He lives on N. Maple St., East Orange with his wife, E.E.'s mother. His grandson often stays with him them, and in the past has stayed with them on and off. He saw the Meagan's

Law flyer with E.E.'s boyfriend's picture on it and called his step-daughter and told her she was living with a child molester. It was then that he took S.N.W. away from E.E. and had him live with them.

Mr. G. further testified that he could not register his grandson in the East Orange school district because he had no guardianship or legal custody of the child. He said that he never reported that the child was staying with them to either the East Orange Board of Education or the Bloomfield Board of Education.

Robert Presuto

Robert Presuto is employed by the respondent as the Director of Administrative Services and Technology and is responsible for residency and truancy. He testified as to the sum of the tuition due for students not residing within the district. During the 2005-2006 academic year when S.N.W. was in the seventh grade the amount of tuition was $7,956.00. (See R-5)

Jeffrey Allyn

Jeffrey Allyn is employed by the respondent school board as the district's residency compliance officer. Mr. Allyn has been in this position for approximately 15 years.

Mr. Allyn testified that he observed S.N.W. leave his grandparents' home on N. Maple Ave., East Orange, in the morning to catch the Bloomfield school bus and go to school. He testified that he saw this occur on numerous occasions throughout the 2005-2006 school year. Specifically, October 31, 2005 and on November 2, 2005, he observed S.N.W. leave the East Orange address at approximately 7:30 a.m., and go to the Bloomfield bus stop and then to school in Bloomfield. He also observed S.N.W. getting off the Bloomfield bus on November 1, 2005. On that date he observed S.N.W. go to his grandparents home in East Orange after school. He conducted a phone check on October 25, 2005 and was told by E.E. that S.N.W. was not home at the Bloomfield address,

2005 and was told by E.E. that S.N.W. was not home at the Bloomfield address, but was in East Orange because he was sick. He further testified that on January 31, 2005, S.N.W. admitted to living with his grandparents on N. Maple Ave., in East Orange.

Mr. Allyn testified that as early as October 2004, he received referrals regarding S.N.W.'s residency. On October 11, 2004, he went to the Bloomfield address and was told that S.N.W. was not there because he had spent the night at his grandparents in East Orange because he had an asthma attack the night before. On the morning of October 19, 2004, he observed S.N.W. arrive at the bus stop at 7:30 a.m. and board a Bloomfield school bus. He concluded, at that time, that the child may have been living in Bloomfield with his mother, but spent a lot of time with his grandparents in East Orange.

However, Mr. Allyn testified as to further observations of similar occurrences on November 7 and 8, 2005, January 13, 26, 31, and June 6 and 12 of 2006. It became obvious to Mr. Allyn that throughout the 2004-2005 and 2005-2006 academic years that S.N.W. resided with his grandparents in East Orange.

On November 4, 2005, Mr. Allyn received a report that someone found a wallet that belonged to S.N.W. Inside the wallet was an ID card listing S.N.W.'s name and address. The address given on the ID card was the N. Maple Ave., East Orange address and the grandparents' telephone number. The card identified E.E. as the person to contact in case of an emergency and it had E.E.'s Bloomfield telephone number.

Lastly, Mr. Allyn testified that the grandparents live only a few blocks away from E.E. and it is an easy short walk.

FINDINGS

Based upon the testimony and documentary evidence presented at the hearing, I **FIND** the following **FACTS**,

E.E., petitioner, has one child, S.N.W. that attends the Township of Bloomfield public schools. Petitioner resides on Watesessing Ave., Bloomfield, New Jersey. Petitioner's parents live on N. Maple Ave., East Orange, New Jersey, a couple of blocks away.

S.N.W. lives with his grandparents. I **FIND** that E.E. sent her son to live with her parents because her live-in boyfriend was a child molester. I **FIND** that E.E. worked afternoons and nights, thus it was convenient and practicable for S.N.W. to live with her parents.

I **FIND** that E.E.'s Section 8 Housing Voucher and Lease Agreement indicates that she began occupancy at the Watessing address on or about November 1, 2004. It further indicates that the apartment was to be occupied by two people E.E., and J.W. (the boyfriend). S.N.W. was not mentioned as an occupant or as a member of the household.

I also **FIND** that petitioner's boyfriend resisted leaving the Bloomfield apartment and only left in April of 2006, this covers the time frame in which the respondent alleges the child was not residing in Bloomfield. I **FIND** credible the petitioner's testimony that even after her boyfriend left the apartment he would continue to harass her and attempt entry into her apartment. It is, therefore, reasonable to conclude that S.N.W. was not residing in Bloomfield with his mother during the time that all this activity took place as the petitioner sent him to live in a safer environment (i.e. with his grandparents). I also **FIND** credible petitioner's parents testimony that from at least November 2005 through May 2006, the petitioner's grandparents had physical custody of the child.

LEGAL DISCUSSION AND CONCLUSION

Respondent school board asserts that S.N.W. was not domiciled within the district during the 2005-2006 school year and, therefore, he is not entitled to a free public education in Bloomfield.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. A person may have multiple residences, but may only have one true domicile at a time. Board of Educ. of Middle Township, Cape May County v. K.K., 93 N.J.A.R.2d (EDU) 461.

Therefore, residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955). As the New Jersey Supreme Court held in Lyon v. Glaser, domicile requires proof of physical presence and the intention to remain there indefinitely. 60 N.J. 259, 264 (1972). Here, even if one were to look at petitioner's statements in the light most favorable to her position, one wonders how long she intended to keep her son out of the Bloomfield residence, since the boyfriend left in April/May of 2006. Evidently the child was to stay at the grandparents home indefinitely or at least until such time as the boyfriend ceased all contact with E.E.

In a proceeding such as this, the parent has the burden of proving by a preponderance of the competent and credible evidence that the child/children in question meet the school district's residency requirements. Here, the Petitioner admitted that she sent her son to live with her parents in East Orange. She

offered nothing more than that. She provided no proof that this was a temporary situation or that something else occurred that interrupted or otherwise lengthened the time she had anticipated her son would be staying with his grandparents. She provided no documentary evidence to indicate that her child resided in Bloomfield. She did provide the items marked P-4, P-7 and P-8, however, said items do not prove domicile. Everything points to the fact that the child was residing in East Orange at minimum from November 2005 through May of 2006

Based upon all of the foregoing and the circumstances of this case, I **FIND** that S.N.W. was not domiciled within the Township of Bloomfield's school district, between November 2005 and May 2006. Therefore, he does not meet the requirements set forth in N.J.S.A. 18A:38-1(a). I therefore, **CONCLUDE** that S.N.W. is not entitled to a free public education in the Township of Bloomfield school district from November 2005 through May 31, 2006.

ORDER

It is hereby **ORDERED** that the residency determination by the respondent is **AFFIRMED**. It is further **ORDERED** that E.E. be assessed at the per diem rate of $43.48 for the number of school days between November 2005 and May 31, 2006.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 21, 2006
DATE

CARIDAD F. RIGO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 22 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

Witnesses:

For petitioner:

E.E.

Mr. G.

Mrs. G.

For respondent:

Jeffrey Allyn

Robert Presuto

EXHIBITS

For petitioner

P-1 NJ Sex Offender Internet Registry (2 pages)

P-2 Marking period warning notice 9/07/05 thru 11/09/05

P-3 Envelope

P-4 Complaint in Juvenile Delinquency

P-5 Bloomfield Township Megan's Law notice

P-6 Letter dated October 15, 2004

P-7 N.J. Public Defender's Reimbursement Agreement

P-8 Superior Court Juvenile Division Summons

For respondent

R-1 Residency Referral dated 10/20/05

R-2 Residency Referrals (4 pages)

R-3 Identification Card

R-4 School Calendar 2006-2006 year

R-5 Notice of Defect in Application Potential Ineligibility

R-6 Registration Checklist

R-7 Bloomfield Public Schools Registration (9 pages)

R-8 Bad Debt Alert

R-9 Notice from Bloomfield Municipal Court

R-10 Bloomfield Primary Contact Information

R-11 Notice for Disenrollment (2 pages)

R-12 Final Disenrollment letter dated March 1, 2006

465-06

OAL DKT. NO. EDU 4207-06
AGENCY DKT. NO. 147-4/06

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JOHN McGOVERN, SCHOOL DISTRICT OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the parties' proposed Stipulation of Dismissal and Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/20/06
Date of Mailing: 12/21/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4207-06

AGENCY DKT. NO. 147-4/06

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JOHN McGOVERN, SCHOOL DISTRICT OF JACKSON TOWNSHIP, OCEAN COUNTY,

---

Ben A. Montenegro, Esq., for the petitioner (School District of Jackson Township, Ocean County)

John McGovern, respondent, pro se

Record Closed: November 30, 2006 Decided: December 1, 2006

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 5, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DECEMBER 1, 2006
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Receipt Acknowledged:

Dec 6, 2006
DATE

Lori Lundy
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 7 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

NOV 14 2006

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Petitioner, Jackson Township School District

2006 NOV 30 A 10:52
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JOHN McGOVERN, SCHOOL DISTRICT OF JACKSON TOWNSHIP, OCEAN COUNTY,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU-4207-06** **AGENCY DOCKET NO.: 147-4/06** **STIPULATION OF DISMISSAL WITH PREJUDICE**

THE PARTIES, having amicably resolved the subject dispute, by Settlement Agreement dated 11/02/06 9/14/06, 2006, hereby stipulate to the dismissal with prejudice of the petition in the subject action.

BEN A. MONTENEGRO
Attorney for Petitioner,
Jackson Township School District

DATED:

DATED: 11/03/06

JOHN E. McGOVERN, Pro Se, Respondent

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Jackson Township School District

2006 NOV 30 A 10:52

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JOHN McGOVERN, SCHOOL DISTRICT OF JACKSON TOWNSHIP, OCEAN COUNTY,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU-4207-06** **AGENCY DOCKET NO.: 147-4/06** **SETTLEMENT AGREEMENT**

THIS AGREEMENT made on this 14th day of September, 2006, by and between **Jackson Township School District** with offices located at 151 Don Connor Boulevard, Jackson, New Jersey 08527 (hereinafter "Jackson")

AND

John E. McGovern with an address of 812 Gilmores Island Road, Toms River, New Jersey 08753 (hereinafter "J.M.").

WHEREAS, Jackson hired J.M. as a non-tenured teaching staff member for the 2005-06 school year pursuant to a July 19, 2005 employee contract; and

WHEREAS, the contract and applicable New Jersey Law required that J.M. provide 60 days written notice of an intent to resign from the position; and

WHEREAS, J.M. ceased employment with Jackson, effective December 8, 2005; and

WHEREAS, Jackson has filed this action under Agency Docket Number 147-4/06 and OAL Docket Number EDU4207-06 for the failure to provide the requisite 60 day notice of intent to resign; and

WHEREAS, for the purpose of avoiding the expense, distraction, distress, and uncertainty of litigation, and to minimize disruption to the District, Jackson and J.M. desire to resolve their differences amicably.

NOW, THEREFORE, Jackson and J.M., intending to be legally bound, and in consideration of these mutual promises, hereby agree as follows:

1. J.M. is guilty of unprofessional conduct for failing to provide 60 days written notice of his intent to resign his position with Jackson in violation of his employment contract and relevant New Jersey Law.

2. J.M. expressly represents he has not been employed as a teaching staff member for any public school since his cessation of employment with Jackson in December 2005.

3. J.M. agrees he shall not apply for employment with or be employed as a teaching staff member in any public school on or before December 31, 2006.

4. There shall be no suspension of the teaching license of J.M. as a result of his failure to provide the requisite 60 written notice of his intent to resign employment with Jackson.

5. Jackson and J.M. hereby expressly release the other, their heirs, executors, administrators, successors or assigns from any and all liability for claims and demands asserted or that could be asserted in any jurisdiction or forum as a result of J.M.'s 2005 employment with Jackson.

6. J.M. agrees to indemnify and hold Jackson harmless against any and all claims, demands, damages, costs and expenses including reasonable attorneys fees for the defense of such claims and demands if said claims or demands are filed by J.M. directly or indirectly via a third party against Jackson arising out of the operation/ management of Jackson's special education program.

7. The parties have negotiated this settlement agreement through counsel for Jackson and the pro se respondent. Pro se respondent consulted with his own private counsel with regard to the settlement in advance of agreeing to its terms. Jackson and J.M. warrant, represent and agree that the terms of the settlement agreement were discussed with counsel of their choice and are voluntarily accepted by the parties.

8. This settlement agreement contains the entire agreement between Jackson and J.M. relating to the pending petition. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except those herein expressly set forth.

9. This settlement agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

WITNESS: JACKSON TOWNSHIP SCHOOL DISTRICT

_____ BY: _____

DATED:

WITNESS:

A.R. Nucifora JOHN E. McGOVERN

DATED: 4/03/04

9. This settlement agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

WITNESS:

JACKSON TOWNSHIP SCHOOL DISTRICT

BY: _____
SUPERINTENDENT

DATED:

WITNESS:

_____

JOHN E. McGOVERN

DATED:

466-06

OAL DKT. NO. EDU 7821-06
(EDU 3682-06 ON REMAND)
AGENCY DKT. NO. 117-3/06

JANICE PAMPLONA AND TODDLERTOWN CHILD CARE CENTER, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/20/06

Date of Mailing: 12/20/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07821-06

EDU 03682-06 (**ON REMAND**)

AGENCY DKT. NO.117-3/06

JANICE PAMPLONA AND TODDLERTOWN CHILD CARE CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Kecia M. Clarke, Esq., for petitioner

Raymond L. Hamlin, Esq., for respondent (Hunt, Hamlin & Ridley, Attorneys)

Record Closed: November 14, 2006 Decided: November 21, 2006

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on July 29, 2006 for determination as a contested case. A hearing was scheduled for April 6, 2006.

On the date of the hearing the parties were able to resolve the matter. On April 28, 2006, the parties submitted the Settlement Agreement indicating the terms of the agreement. On July 27, 2007 the Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL). It stated that: "Upon such review, the

Commissioner observes that an unidentified Individual signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contained a copy of the Board's resolution approving the settlement[1] and further designating this individual to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement." After several telephone calls and correspondence to the Board's attorney, on November 14, 2006, the undersigned received a Resolution from the Board and Settlement Agreement signed by the Board's attorney. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

[1] It is noted that the agreement, on its face, is specifically contingent on such approval.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

11/21/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

11-28-06
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

DEC 1 2006
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

CERTIFIED AS A TRUE C...

RECEIVED
2006 NOV 14 P 2:35
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RECEIVED
2006 APR 28 A 8:32
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Janice Pamplona and Toddler Town v. Irvington Board of Education
Agency Reference Number: 117-3/06

SETTLEMENT AGREEMENT

WHEREAS, this matter having been brought by way of an Emergent Application for Relief as a result of issues which arose concerning the licensing status of the petitioner; and

WHEREAS, the parties acknowledge that Petitioner Janice Pamplona, currently employed in the capacity of Lead Teacher for Petitioner Toddler Town, possesses a Standard Certificate for Eligibility K-5; and

WHEREAS, Janice Pamplona possesses a Bachelor's Degree in accordance with N.J.A.C. 6A:9-11.1 and is a newly hired teacher pursuant to the language set forth in 6A:9-11.1 (a)(2); and

WHEREAS, Janice Pamplona has applied for a Pre-School through Grade Three Certification; and

WHEREAS, the language contained in N.J.A.C. 6A:9-11.1, et seq. and Section II of paragraph 3 (a) and 3 (c)(iii) of the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center, which permits the employment of a teacher who possesses the above referenced qualifications provided said employee completes said requirements within one (1) year;

NOW THEREFORE BE IT RESOLVED that Janice Pamplona, Toddler Town Child Center and the Irvington Board of Education agree to settle the above referenced dispute provided Janice Pamplona, receives a certificate of eligibility from the Department of Education for Pre-School through Grade Three, enrolls in a Department of Education Provisional teacher program and completes the appropriate early childhood education courses and obtain a teacher of preschool through grade three endorsement within one calendar year from the date of her application of March 5, 2006, that her employment at Toddler Town shall remain in effect.

In addition, the Board of Education will not withhold any funding related to Ms. Pamplona's employment during this period unless it is demonstrated that Ms. Pamplona is no longer employed at Toddler Town, is removed from any accredited Department of Education course, withdraws from said course, or fails to obtain the requisite endorsement within the one year time period.

All parties have had the benefit of counsel with respect to this matter and the Court having reviewed the moving papers of petitioner Janice Pamplona, Toddler Town Child Care Center and the opposition from the Irvington Board of Education, acknowledges that the within agreement is fair, equitable and in accordance with current law, the New Jersey Administrative Code and the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center.

It is agreed that the within agreement is subject to Board of Education approval. The failure to approve the within agreement shall not result in the Board of Education's right to withhold payment to Toddler Town for purposes of the within cause of action but would rather return this matter to the Office of Administrative Law for a full adversarial determination.

Toddler Town Child Center
Alvin Spearman, Sr.

Janice Pamplona

Date: April 6, 2006

Irvington Board of Education
Linda Vann-Dupree, President

Raymond L. Hamlin, Esq.
Attorney for IBOE

Honorable Carol I. Cohen, A.L.J.

CERTIFIED AS A TRUE COPY

REGULAR BOARD MEETING April 11, 2006

WALK-ON

JANICE PAMPLONA AND TODDLERTOWN vs. IRVINGTON BOARD OF EDUCATION

RESOLVED, that the Board of Education accepted the recommendation of the Interim Superintendent of Schools and approved the settlement in the matter entitled Janice Pamplona and Toddlertown v. Irvington Board of Education Agency Reference #117-3106, no additional cost to the District.

ACTION:
Motion by: Ahmed Screven, Seconded by Anna Scott
Roll Call: 7 Ayes: Carty, Derisse, Scott, Screven, Witherspoon, Burgess,Vann-Dupree
1 Abstention: Bryant

Date: April 11, 2006

As certified by

Reggie Lamptey
Assistant Superintendent for Finance/Board Secretary

RECEIVED
2006 NOV 14 P 2:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

467-06

AGENCY DKT. NO. 403-11/06

CORRECTED DECISION

IN THE MATTER OF LAWRENCE CHIARAVALLO :
ACADEMY CHARTER HIGH SCHOOL :
MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

The record of this matter and the decision of the School Ethics Commission (SEC), forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.[1] No comments were filed by the respondent, but the required disclosure statement was filed on November 8, 2006.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06
Date of Mailing: 12/22/06

[1] The Commissioner notes that the name "Chris Castano" was erroneously inserted into the second paragraph of the SEC's findings in its decision concerning Mr. Chiaravallo.

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

468-06

#468-06

OAL DKT. NO. EDU 11663-06
AGENCY DKT. NO. 453-12/06

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY,	COMMISSIONER OF EDUCATION
PETITIONER,	DECISION ON MOTION
V.	
PHILIP TULLY,	
RESPONDENT.	

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the Initial Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner is satisfied that the ALJ fully and carefully considered the positions of the parties, and – having done so – correctly concluded that the petitioning Board of Education has established the likelihood of success on the merits necessary to obtain an interim order pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6, suspending respondent from service as a Board member pending the final outcome of this matter.

Accordingly, for the reasons expressed summarily therein – as more fully elaborated during proceedings at the OAL – the Commissioner adopts the Initial Order of the ALJ granting the Board's application for emergent relief. The matter shall now proceed to plenary hearing as the parties deem appropriate, consistent with the order of the ALJ.

IT IS SO ORDERED.*

Isaac Bryant
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06
Date of Mailing: 12/26/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, New Jersey 07102
(973) 648-6076
Fax (973) 648-2358

BARRY E. MOSCOWITZ
Administrative Law Judge

December 12, 2006

John G. Geppert, Jr., Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
10 James Street
Florham Park, NJ 07932

Philip Tully
72 Elmwood Road
Cedar Grove, NJ 07009

Re: ***BOE of Cedar Grove Township, Essex County v. Philip Tully***
OAL Dkt. No. EDU 11663-06
Agency Dkt. No. 453-12/06

Dear Mr. Geppert and Mr. Tully:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Barry E. Moscowitz
Administrative Law Judge

BEM/da
c: William Speziale, Deputy Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11663-06

AGENCY DKT. NO. 453-12/06

BOARD OF EDUCATION OF CEDAR GROVE TOWNSHIP, ESSEX COUNTY,

Petitioner,

v.

PHILIP TULLY,

Respondent.

John G. Geppert, Jr., Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Philip Tully, respondent, pro se

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

THIS MATTER having been opened to the Commissioner of Education by Motion for Emergent Relief

IT IS on this 12 day of DECEMBER, 2006,

ORDERED that Respondent's filing a Notice of Tort Claim against the Board on or about November 30, 2006 constitutes a claim against the Board within the meaning of N.J.S.A. 18A:12-2, which disqualifies him from serving on the Board; and it is further

ORDERED that Respondent is immediately suspended from serving on the Cedar Grove Board of Education pending a full hearing on the merits; and it is further

ORDERED that during the period of Respondent's suspension he shall be precluded from serving as a board member in any way, including but not limited to attending executive session meetings and committee meetings on the Board, and receiving confidential communications, correspondence or packets related to the Board.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

12/12/06
DATE

BARRY E. MOSCOWITZ, ALJ

da

469-06

#469-06

BEVERLY ASARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former social worker and member of the Child Study Team in respondent's district – alleged that the Board improperly eliminated her position in violation of her tenure rights. Petitioner also asserted that elimination of her position constituted a violation of the Board's duty pursuant to N.J.A.C. 6A:14-3.1 (b) to utilize district employees to constitute its Child Study Team. Respondent contended that the abolition of petitioner's position was pursuant to *N.J.S.A.* 18A29-9, and resulted in financial savings for the district.

The ALJ found, *inter alia*, that: although petitioner contended that the Board's action in eliminating her position was a pretext – and that there were other, non-economic reasons for her termination – there was no credible evidence to indicate that the Board acted in anything but good faith; petitioner's position was abolished for reasons of economy, which is entirely within the authority of the Board; and the method by which a district decides to staff a Child Study Team – whether by contracting out those services or by hiring staff – need not be permanent, so long as the provision of the required services comports with applicable law and regulations. Accordingly, the ALJ affirmed the Board's abolishment of petitioner's position.

Upon independent and careful review of the record, the Commissioner adopts the Initial Decision of the OAL for the reasons well stated therein. The instant Petition of Appeal is dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 22, 2006

OAL DKT. NO. EDU 9309-99
AGENCY DKT. NO. 203-7/99

BEVERLY ASARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

On exception, petitioner essentially recasts and reiterates her arguments advanced before the Administrative Law Judge (ALJ) below, *i.e.*, 1) the Board could have saved even more money than it did without eliminating her tenured position, therefore, saving money was not the "true motivation" for the Board's abolishment of her position; and 2) there were reasons other than economic that led to her termination. (Petitioner's Exceptions at 1-2) She charges that the ALJ failed to ascribe due credence, without explanation in his decision, to her testimony and that of her witness – a local union officer – in support of these contentions. (*Id.* at 2)

In response, the Board points out – as recognized by the ALJ – the purely speculative nature of petitioner's argument that the Board could have saved even more money than it did, without eliminating her position, by taking the alternative steps she advocated. The Initial Decision additionally recognized that petitioner presented no legal authority which would obligate the Board to pursue petitioner's suggested course of action. (Board's Reply Exceptions at 1) As to petitioner's

argument with respect to evidence she presented at hearing that she claims established the "pre-textual nature of the abolition of her position", the ALJ clearly stated in his decision that he found petitioner failed to present any evidence of a "credible nature" in support of such a claim. (*Id.* at 2)

The Board therefore urges that the Commissioner adopt the decision of the ALJ "as the Petitioner has failed to provide any legal or factual basis that warrants a reversal of his decision." (*Id.* at 1)

Upon an independent and careful review of the record in this matter and according due deference to the ALJ's credibility determinations,[1] the Commissioner concurs with the ALJ that the Board's action abolishing petitioner's position and contracting with the South Bergen Jointure Commission for the provision of all its child study team services was proper under *N.J.S.A.* 18A:46-5.1, *N.J.A.C.* 6A:14-5.1 and existing case law.

Accordingly, the recommended Initial Decision is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Isaac Bryant

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06

Date of Mailing: 12/26/06

[1] Petitioner's exceptions seek to have the Commissioner arrive at different conclusions from those of the ALJ as a consequence of testimony presented at hearing. It is noted that in challenging the credibility determinations of an ALJ, petitioner bears the burden of presenting transcripts relevant to the exceptions filed so that the Commissioner might assess the judge's findings. Such is the case because the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner, which did not include transcripts of the hearing at the OAL, provides no cause for rejection or modification in this regard.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9309-99

BEVERLY ASARO,

Appellant,

v.

MOONACHIE BOARD OF EDUCATION,

Respondent

Mary J. Hammer, Esq., for appellant
(Bucceri & Pincus, attorneys)

Eric Levine, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: June 30, 2005 Decided: November 17, 2006

BEFORE **JEFFREY A. GERSON,** ALJ:

BACKGROUND AND FACTS

Beverly Asaro was employed by the Moonachie Board of Education as a Social Worker.

Petitioner first became employed by respondent in February 1975 and until June 30, 1989 was a per case/per diem employee. During the school year 1989-90,

petitioner became a contract employee on a part-time basis until June 30, 1999 thereby acquiring tenure in the position of School Social Worker.

In addition to serving as the school social worker for respondent, petitioner also served as a member of the Child Study Team.

On or about July 1, 1997, the LDTC retired from her position requiring Board action.

The Board contracted with the South Bergen Jointure Commission for the provision of a LDTC who services commenced on or about October 1, 1997. In the spring of 1997, the Board did not renew the contract of the school psychologist who was not tenured and entered into a contract with the South Bergen Jointure Commission for the provision of psychological services for the 1997-1998 school year.

On or about August 6, 1998, the Superintendent of the South Bergen Jointure Commission contacted Moonachie's superintendent and advised that the Commission must employ the entire Child Study Team. At the time that letter was received, petitioner was serving as social worker to the Child Study Team with a psychologist and a LDTC provided by the South Bergen Jointure Commission.

On or about April 27, 1999, the Board abolished the position of social worker. Subsequently, the Board entered into a contract with the South Bergen Jointure Commission to provide Child Study Team services to the district.

Petitioner was notified by letter that her position was abolished effective June 30, 1999.

The above are the salient facts with regard to this matter and are not in dispute. Supplementing the above facts was testimony at the time of the hearing from John Tudor, who at the time events stated above was the School Business Administrator for Moonachie and Board Secretary.

Documentation produced by Mr. Tudor supported the Board's contention that the abolishing of the petitioner's position resulted in financial benefits. Petitioner contended that the financial benefits realized by the Board as a result of the elimination of her position could have been attained by other actions though they were not specified nor was there any legal basis for such an argument presented.

Though petitioner contended that the Board's actions in eliminating her position were actually pretextual and that there were other reasons other than economic that led to her termination, there was no evidence presented of a credible nature that could lead to a factual finding that the Board acted in anything other than good faith.

Petitioner, by way of legal argument, contends that once a school district chooses to employ the services of all members of a Child Study Team, they are at that point obligated to continue to provide those services with the employees so chosen until they either retire or voluntarily leave the Board's employment.

THE LAW

A local board of education in New Jersey is required to provide Special Education Services for handicapped pupils. N.J.S.A. 18A:46-5. The basic Child Study Team shall consist of a school Social Psychologist, a Learning Disabilities Teacher and a School Social Worker. N.J.S.A. 18A:46-5.1.

The Legislature has authorized the elimination of teaching positions for reasons of economy and efficiency. N.J.S.A. 18A:28-9 provides:

> Nothing in this title or any other law relating to the 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 administrator or supervisory

> organization of the district or for other good cause upon compliance with the provisions of this article.

Petitioner contends that the case of Vicenzino v. The Board of Education of the Township of Bedminster, 312 N.J. Super 243 (App. Div. 1998) stands for the proposition that a tenured social worker cannot be terminated and replaced by a ESC to perform the duties of a social worker while retaining the rest of the Child Study Team as Board Employees. Petitioner points to N.J.A.C. 6A:14-3.1(b) which provides that all Child Study Team members are to be employees of a District Board of Education. N.J.A.C. 6A:14-5.1 provides the Board with the authority to contract with State Agencies for Child Study Team services, thereby allowing for the provision of Child Study Team services through employees of the State Operated Agency. N.J.S.A. 18A:46-13 allows Boards to provide Child Study Team services either separately or jointly with one or more other Board's of Education or State Agencies, using non-district employees to provide CST services. Vicenzino, supra though holding that a Board may not eliminate one Child Study Team position and contract out for that service, it did also state:

> If the Board were in good faith to eliminate the Child Study Team for reasons of economy and instead, join with one or more board's of education or State agencies to provide for basic Child Study Team services, under N.J.S.A. 18A: 46-5.1, that would be an appropriate decision to make, in that event, the board of education would have complied with N.J.S.A. 18A:46-5.1 and N.J.S.A. 18A:28-9.

At the time of the abolishment of petitioner's position, she was the sole remaining member of the Child Study Team. Based on the law as construed in Vicenzino, supra, there is little merit to petitioner's contention that since respondent violated school law in the prior year for having a mixed Child Study Team, they should now be precluded from benefiting from their own wrongdoing by being mandated to reemploy petitioner. Though maintaining a mixed Child Study Team may not have been in accord with statutory interpretation at the time, there is no reason to permanently deprive the residents of Moonachie from having their Board take advantage of the economies presented by replacing the contracted employees of the Child Study Team.

CONCLUSION

Petitioner's position was abolished by Moonachie Board of Education in the exercise of their judgment for reasons of economy. . . "reduction in force is entirely within the authority of the Board if done for reasons of economy. Klinger v. Board of Education, 190 N.J. Super 354 (App. Div. 1982) cert den. 93 N.J. Super 277 (1983).

If a Board decides to hire their own employees to staff a Child Study Team or, in the alternative, decides to contract out those services in full, neither decision should become forever permanent. If a Board can realize economic benefits from providing the services in a manner which they deem appropriate, and the provision of those services comport with the laws, rules and regulation applicable, the Board shall not be precluded from doing so.

ORDER

It is **ORDERED** that the abolishment of petitioner's position is **AFFIRMED**.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 2006

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/20/06

DATE

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

NOV 20 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

472-06

AGENCY DKT. NO. 405-11/06

AMENDED DECISION

IN THE MATTER OF CHRIS CASTANO, :
JERSEY CITY COMMUNITY CHARTER : COMMISSIONER OF EDUCATION
SCHOOL, HUDSON COUNTY. :

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the required disclosure statement was filed on November 13, 2006.[1]

Upon review, in light of the respondent's filing of the necessary disclosure statement prior to issuance of the Commissioner's decision in this matter, the Commissioner adopts the Commission's recommended penalty of censure, additionally admonishing the respondent for the delaying in filing the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/26/06
Date of Mailing: 12/26/06

[1] The Commissioner was notified of this filing on December 18, 2006, subsequent to issuance of a decision in this matter; hence, it is necessary to issue the within amended decision.

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

AGENCY DKT. NO. 406-11/06

AMENDED DECISION

IN THE MATTER OF DAVID WRIGHT, :

BOARD OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION

NEWARK, ESSEX COUNTY. :

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the required disclosure statement was filed on October 25, 2006.[1]

Upon review, in light of the respondent's filing of the necessary disclosure statement prior to issuance of the Commissioner's decision in this matter, the Commissioner adopts the Commission's recommended penalty of censure, additionally admonishing the respondent for the delaying in filing the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/26/06

Date of Mailing: 12/26/06

[1] The Commissioner was notified of this filing on December 18, 2006, subsequent to issuance of a decision in this matter; hence, it is necessary to issue the within amended decision.

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

470-06

#470-06

OAL DKT. NO. EDU 8771-06
(EDU 2426-06 ON REMAND)
AGENCY DKT. NO. 78-2/06

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, on behalf of LAURA LARSON, JANET HALEY AND MAUREEN KEHOE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06

Date of Mailing: 12/26/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8771-06

AGENCY DKT. NO. 78-2/06

MIDDLESEX TOWNSHIP EDUCATION ASSOCIATION, on behalf of LAURA LARSON, JANET HALEY AND MAUREEN KEHOE,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioners (Oxfeld Cohen, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: November 22, 2006 Decided: December 6, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 17, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

12-6-06
DATE

RICHARD F. WELLS, ALJ

Receipt Acknowledged:

12-7-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

MINUTES OF THE REGULAR MEETING
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION
TUESDAY EVENING, SEPTEMBER 26, 2006

Time and Place of Meeting — Pursuant to notices sent to each member of the Board of Education, the regular meeting was held on Tuesday evening, September 26, 2006 in the High School North Library, 63 Tindall Road, Middletown, New Jersey.

E. Personnel Committee (Joan Minnuies, Chair)
Note: All appointments of the district staff are contingent upon satisfying the requirements of the Criminal History Review.

21). Approval of settlement agreement for the MTEA on behalf of L.L., J.H. and M.K.

2006 NOV 22 A 10:
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This is a certified extract of the official Middletown Township Board of Education minutes of the voting meeting of September 26, 2006. Motion made by Mrs. Walsh, seconded by Mr. Ryan, for **Approval of Personnel Item # 21.** Motion carried on roll call vote:
Ayes: (9) - Mrs. Agin, Mrs. Caminiti, Mrs. Gevarter, Mrs. Minnuies, Mr. Ryan, Mrs. Self, Mrs. Stallmeyer, Mrs. Walsh and Mrs. Diorio.
Noes: (0)

SIGNED: _____
WILLIAM J. DOERING
School Business Administrator/Board Secretary

DATE: November 16, 2006

RECEIVED
2006 NOV 22 A 10:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into on this 18th day of September of in the year 2006, by and between

LAURA LARSON, JANET HALEY AND MAUREEN KEHOE, individuals employed by the Middletown Township Board of Education (hereinafter "PETITIONERS");
and
THE MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, the recognized majority bargaining representative for teachers and secretaries employed by the Middletown Township Board of Education (hereinafter "MTEA");
and
THE MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, a body corporate and politic, on behalf of itself and its agents, administrators, officers and representatives (hereinafter "BOARD");

WHEREAS, PETITIONERS are tenured secretarial staff members employed by the BOARD; and

WHEREAS, PETITIONERS were involved in a confrontation with their building supervisor, former High School North Principal Jeff Simon, on or about September 13, 2005, as a result of which PETITIONERS claim that they became physically ill and suffered from stress and anxiety, necessitating their absence from work for four (4) days on September 13, 14, 15 and 16, 2005; and

WHEREAS, PETITIONERS have been charged with sick days for the above-cited absences; and

WHEREAS, PETITIONERS, by and through the MTEA, have filed a Petition of Appeal with the Commissioner of Education, under Agency Referral Number 78-2/06 and OAL Docket Number EDUOA-02426-2006S, and pursuant to N.J.S.A. 18A:30-2.1, seeking the restoration to their respective sick leave banks of the above-cited days; and

WHEREAS, the BOARD, PETITIONERS and the MTEA have entered into discussions for an amicable and mutually beneficial settlement of all issues between them;

NOW, THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged by all parties hereto, PETITIONERS, the MTEA and the BOARD agree and hereby are agreed as follows:

1. **Restoration of Sick Days:**
In consideration of the provisions of this Agreement, immediately upon receipt of a fully-executed copy of this Agreement, the BOARD shall restore to each PETITIONER's sick leave bank two (2) sick days.

2. **Dismissal of Petition of Appeal:**
PETITIONERS and the MTEA shall withdraw and dismiss the within Petition of Appeal with prejudice immediately upon receipt of a fully-executed copy of this Agreement.

3. **Release and Discharge:**
In consideration of the promises contained herein, PETITIONERS and the MTEA, on behalf of themselves and their assigns and successors, waive and release the BOARD and each and every one of its members, representatives, agents, and past and present employees from any and all claims of any sort whatsoever arising out of the events set forth in the within Petition of Appeal.

4. **No Admission of Liability**:
The parties understand, acknowledge and hereby agree that their Settlement as embodied in this Agreement is not to be construed as an admission of liability on the part of either party.

5. **No Precedent**:
The parties understand, acknowledge and hereby agree that the consideration, terms and understanding set forth in this Agreement is limited to the facts of this matter and is in no way precedent-setting or binding upon any party with regard to any other existing, pending or future claims. For purposes of this Agreement, the parties agree that the actions set forth in the Petition of Appeal constitute extreme and traumatic conduct as defined in Dorfman v. Board of Education of Neptune, 97 N.J.A.R.2d (EDU) 512, and that absent such a level of conduct, Petitioners' claim would be without merit barring any other statutory entitlement to restoration of sick leave.

6. **Execution of Release**:
The parties to this Agreement have consulted with their respective legal counsel regarding the terms and conditions of this Agreement, have carefully read this Agreement, and understand and acknowledge the contents hereof. The parties expressly acknowledge and agree that they each execute this Agreement of their own free will and without duress or undue influence by any individual or entity other than the parties themselves.

7. **Materiality of Provisions**:
The parties mutually acknowledge that each any every provision of this Agreement is material, and the breach of any provision shall be considered a material breach, which would relieve the non-breaching party of its performance obligations.

8. **Effective Date**:
This Agreement and the accrual of all obligations set forth herein shall be effective and binding upon the parties on the date first written above.

9. **Governing Law**:
This Agreement shall be construed under, governed by, and enforceable under the laws of the State of New Jersey.

10. **Entire Agreement**:
This Agreement constitutes the full and complete agreement and understanding between the parties with respect to its subject matter.

11. **Authority to Execute Agreement**:
The signatories to this Agreement affirm and represent that they have authority to execute this Agreement and do thereby bind the party which they represent to this Agreement.

12. **Effectiveness of Terms**:
If any provision of this Agreement shall be deemed unlawful, invalid or unenforceable by any Court or administrative agency of competent jurisdiction, the remaining terms and provisions of this Agreement shall remain in full force and effect and shall remain binding on the parties to this Agreement.

IN WITNESS WHEREOF, and intending and understanding themselves to be legally bound, the parties have executed this Agreement on the date written below.

PETITIONERS

Dated: 8/31/06 ***By:*** Laura Larson
Laura Larson

Dated: 8/31/06 ***Witness:*** Lorraine Schutt

Dated: 8-31-06 ***By:*** Janet Haley
Janet ~~Healy~~ Haley

Dated: 8-31-06 ***Witness:*** Lorraine Schutt

Dated: 8-31-06 *By:* Maureen Kehoe

Maureen Kehoe

Dated: 8-31-06 *Witness:* Lorraine Schutt

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION

Dated: 9-1-06 *By:* Diane Swain

Dated: 9-1-06 *Attest:* Lorraine Schutt

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION

Dated: 9/18/06 *By:* Dawn Diorio

DAWN DIORIO, PRESIDENT

Dated: 9-14-06 *Attest:* _____

WILLIAM J. DOHRING, BUSINESS ADMINISTRATOR / BOARD SECRETARY

473-06

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the City of Camden (Camden) filed a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) placing the Camden High School Basketball Team on probation for two years as the result of an incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006. The incident involved an assault by a Camden player on a member of the Deptford High School team during the post-game handshaking ritual.

The Board argued that the imposition of a team penalty for actions solely attributable to one individual player – who, the Board contends, was appropriately sanctioned by the district – was arbitrary, capricious and unreasonable; not supported by credible evidence; and improperly based upon the past history of the Camden basketball program.

The Acting Assistant Commissioner – to whom the matter was delegated for hearing pursuant to *N.J.S.A.* 18A:4-34 – upheld the NJSIAA's decision, deeming its intent to compel Camden to address systemic flaws and gaps in the supervision and operation of its basketball program to be a reasonable exercise of the NJSIAA's authority and responsibility for oversight of interscholastic athletic activity statewide.

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.

12/28/06

AGENCY DKT. NO. 363-10/06

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	
	:	

For Petitioner, Harvey C. Johnson, Esq. (Wolf, Block, Schorr and Solis-Cohen, LLP)
For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on October 2, 2006, through the filing of a Petition of Appeal by the Camden City Board of Education ("Camden" or "Board"), wherein the Board sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association ("NJSIAA" or "Association") placing the Camden High School Basketball Team on probation for two years as the result of an incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006. Following the Board's correction of technical deficiencies in its petition, submission of the record on appeal, and receipt of the NJSIAA's Answer to the Petition, the parties were directed to proceed with briefing in accordance with *N.J.A.C.* 6A:3-7.3. Camden's brief was duly submitted, and the record

before the Commissioner closed on November 13, 2006, upon expiration of the time for filing of the NJSIAA's responsive brief.[1]

Pursuant to *N.J.S.A.* 18A:4-34, the matter was delegated to the Acting Assistant Commissioner for hearing.

OPERATIVE FACTS

The following facts were found by the NJSIAA, as stated in the July 21, 2006 decision of the NJSIAA Controversies Committee, adopted by the NJSIAA Executive Committee on September 13, 2006:

> 1. At the conclusion of the March 7, 2006 South Jersey Group III boys' basketball championship contest, played at the Voorhees High School gym, Camden player M.M. assaulted Deptford player R.C. while proceeding through the handshaking ritual after that contest.
>
> 2. The conduct of M.M. was unprovoked and resulted in the student being arrested and thereafter being suspended from Camden High School for the remainder of his senior year.
>
> 3. Fortunately, despite the unprovoked assault, there was no involvement of any other team members or the crowd and prompt action by Camden and Voorhees Police personnel prevented any further outbreaks of violence.
>
> 4. The incident occurred while Coach Clarence Turner was at the head of the handshaking line and there is no evidence that he provoked or encouraged the improper conduct by the student.
>
> 5. On March 9, 2006, Camden High School Principal Al Davis submitted a Corrective Action Plan stating that Clarence Turner would no longer be the basketball coach; that the team would not be allowed to participate in post-season playoff games for two years; that

[1] The NJSIAA did file a reply brief, which bore a face date of November 13, 2006 and was received by the Department on November 15, 2006, consistent with the included certificate of service indicating transmission by regular mail. However, Camden's brief was filed on November 3, 2006 via hand delivery, with a proof of service indicating that counsel for the NJSIAA was served on the same day and in the same manner, so that NJSIAA's brief was due on or before November 13, 2006 pursuant to *N.J.A.C.* 6A:3-7.3. Having been thus untimely filed, the NJSIAA's brief is not considered herein, nor are Camden's letter of November 17, 2006 – objecting to the brief's inclusion of past agency decisions adverse to Camden – or the NJSIAA's November 22, 2006 response thereto.

Camden High School would not provide students with support buses to away games and M.M. would no longer attend Camden High School.

6. Prior to the first hearing on this matter on March 31, the Board of Education rescinded all the components of the Principal's Corrective Action Plan except for the action taken against the individual student. Ultimately, at the May 16 hearing, the Board advised that Coach Turner was being retained as the basketball coach.

7. The Athletic Director was never consulted by Principal Davis or by the Board concerning any Corrective Action Plan.

8. While the Committee could not conclude that Coach Turner or any personnel at Camden High School were in any way responsible for the unprovoked assault, the Committee believes that continued scrutiny of that program must be maintained, with extra precaution to prevent any reoccurrence of violence of the type that occurred on March 7, 2006.

(Record on Appeal, Item 22 at 4; Item 27[2])

The following additional facts may be adduced from the record:

1. M.M. was "the star of the basketball team," an "impact player" who does not usually "foul out" but did so in the game in question. (Item 20, Transcript of May 16 Hearing, at 35-36, 39) He is classified as Emotionally Disturbed and is subject to "swift and wide mood swings." (Item 15, Letter Brief to NJSIAA, at 1; Item 20, Transcript of May 16 Hearing, at 27) Although an "aggressive" player in basketball and football, in his participation in sports, he has no history of explosive behavior or conduct of the type that occurred on March 7. (Item 20, Transcript of May 16 Hearing, at 26-28, 31-32) It is unclear whether Coach Turner actually read M.M.'s IEP and behavioral plan – it was not mandatory that he do so – although he would have been privy to it as a teaching staff member, in contrast to non-certificated assistant coaches. (*Id.* at 30, 33-34)

2. The championship game – which Camden lost – lasted for approximately two hours and there were no officially reported incidents of violence or indications of player agitation during that time, nor were any observed by the Camden Athletic Director. (Item 2, Incident Report; Item 20, Transcript of May 16 Hearing, at 14-15, 27) However, the parents of R.C. contended that a number of unaddressed violations occurred, including instances of tripping, punching and elbowing – two of the three involving M.M. – and that these, together with Camden's

[2] This and all subsequent "Item" designations refer to the Record on Appeal.

indifference toward R.C. and his family,[3] evinced an attempt to minimize the seriousness of the situation and avoid its broader implication as an indicator of problems with the basketball program's leadership and eligibility requirements. (Item 7, Letter to NJSIAA)

3. M.M. punched R.C. in the face. R.C. did not retaliate, but responded by trying to get away as M.M. continued to assault him. R.C. was rushed to the hospital, where he was found to have a broken nose and a cut requiring seven stitches. (Item 7, Letter to NJSIAA) M.M. was charged with aggravated assault. (Item 4, News Report)

4. The corrective action plan submitted by Principal Davis (Item 5) was in response to a letter from the NJSIAA, wherein Davis was asked to submit "the course of action which you plan to implement in addressing this situation." In the same letter, the NJSIAA noted that "quick and decisive action" by school administrators and police had limited the violence to the two students involved, that the incident in question was the "sole action of one Camden player," and that the NJSIAA was "confident that the administration of Camden High School [would] take the necessary and proper actions in dealing with this egregious action by this young man." (Item 3, Letter to Principal Davis) Upon receipt of Principal Davis's plan, the NJSIAA indicated that it would be reviewed by the Controversies Committee at the upcoming meeting of March 31. (Item 8, Letter to Principal Davis)

5. Principal Davis's plan had not been previously approved by the Board, which rejected it upon review as too severe and unjustly punitive toward players and personnel who had no role in the incident in question. At the Controversies Committee meeting, the Board proposed to submit instead a modified plan, most likely limited to action against M.M. (Item 10 at 106-109, Transcript of March 31 Hearing) In response to questioning regarding the Board's intentions with respect to Coach Turner, whose tenure was noted to have been marred by several serious incidents, the Board requested time to consider the issue and submit a plan at a later date. (*Id.* at 114-119, 121-22)

6. NJSIAA confirmed that the Controversies Committee would not make a final decision on Camden's corrective action plan until its May 16 meeting, before which it anticipated that the Board would advise as to "what steps it will take concerning the leadership of the basketball program at the school in the future." (Item 11 at 2, Letter to Counsel for Camden)

[3] There is credible testimony on record that Camden school officials did contact the Deptford School District in an attempt to reach R.C.'s family to apologize and inquire about the young man's recovery, but were turned away as a result of Deptford's concerns about sharing R.C.'s personal information with unauthorized third parties. (Item 10, Transcript of March 31 Hearing, at 120-21)

7. In response, on May 9, 2006 the Board submitted a statement of position, wherein it vigorously argued that the "unfortunate incident" of March 7 was the sole responsibility of a single student, classified as Emotionally Disturbed and subject to "swift and wide mood swings," against whom appropriate action had been taken – in terms of both individual punishment and setting an example to the student body – in that he would be removed from school for the remainder of the year and deprived of participation in prom and graduation activities. Reference was made to news stories where: 1) M.M. claimed he thought R.C. was reaching for his hand to fight him, because he said "What, do you want to fight?" during the game, and M.M. and his family apologized; and 2) a Deptford Assistant Superintendent was quoted as urging that the entire Camden school and community not be blamed for the actions of one student. (Item 15, Letter Brief to NJSIAA at 1-3) The Board further argued that no action could properly be taken against Coach Turner as a result of this incident, since he violated no NJSIAA rule or bylaw, could not be held responsible for a student action completely out of his control – one which he neither incited nor instructed – and cannot be implicated in the present based solely on past transgressions for which he has already "served his time." (*Id.* at 4-6)

8. Consistent with its statement of position, the Board submitted to NJSIAA, on May 15, 2006, a corrective action plan consisting solely of removal of M.M. from Camden High School, placing him on homebound instruction for the remainder of the school year and precluding him from participating in any prom or graduation activities. (Item 16, Corrective Action Plan)

9. The Board had previously been advised that if it determined not to continue Coach Turner, he should be allowed to attend the May 16 hearing, with counsel, if he so chose (Item 11, April 25 Letter from Counsel for NJSIAA, at 2); however, upon learning that Camden did intend to continue Turner in his position, counsel for NJSIAA requested that he be produced at hearing. (Item 18, May 15 Letter from Counsel for NJSIAA) Coach Turner did not appear at the May 16 hearing due to "short notice." (Item 17, May 15 Letter from Counsel for Camden; Item 19, Hearing Sign-In Sheet)

10. At the hearing, NJSIAA framed the issue from its perspective as concern that there would be "no changes next year, no efforts made beyond what has been done up to the assault to deal with the whole issue of crowd control and violence***We'd like to zero in on***what steps are going to be taken to prevent this kind of occurrence in the future?" (Item 20, Transcript of May 16 Hearing, at 7-8) The Board responded that crowd control and violence were "not a part of this

incident," and that, indeed, the district had been praised for its control of the situation once the assault occurred; thus, there were no issues of crowd or student body control before the Committee, and the severe punishment meted out to the individual student involved was the appropriate response on the part of the district. (*Id.* at 9-11)

11. The district's sole witness – Athletic Director Mark Pease – testified that the assault was completely unforeseeable, but that his policy is to be prepared for any eventuality through the presence of police officers, who – in this instance – did, in fact, keep the incident from escalating beyond the two participants. He further testified to the importance he places on sportsmanship with his coaches and students, and to his respect for Coach Turner, with whom he has had no problems in the two years he has served as full-time Athletic Director. (Item 20, Transcript of May 16 Hearing, at 16-18, 24-25, 31-32, 37-38)

12. Under questioning from the Committee, Director Pease testified that, for reasons he cannot explain, he is generally left out of decision-making with respect to personnel issues affecting the basketball program (Item 20, Transcript of May 16 Hearing, at 25-26, 28-29), and that, although he is exploring ways of evaluating coaches, the district at present has no official written evaluation mechanism (*Id.* at 24).

Following the hearings on March 31 and May 16, 2006, the NJSIAA Controversies Committee issued a written decision on July 21, 2006 (Item 22) which made findings of fact as set forth above and concluded that the Camden team must be placed on probation for two years, during which time it would not be precluded from competition or qualification for the State championship, but would be required to submit specific progress reports and provide for Athletic Director attendance at appropriate NJSIAA seminars and workshops. It did so because – notwithstanding that the assault in question was found to be attributable solely to M.M., with Coach Turner, the team and Camden personnel having no responsibility for its commission – the NJSIAA deemed it clear from the record that tighter supervision of the Camden basketball program was necessary in light of its history of past problems, the Board's overruling of the official (Principal Davis) responsible for the team's activity under NJSIAA Bylaws, the absence

of mechanisms for supervising and evaluating coaching staff, and the limited-to-nonexistent involvement of the Athletic Director in the conduct of the program. (*Id.* at 5; see also Item 20, Transcript of May 16 Hearing, at 41-42)

Camden duly appealed the decision of the Controversies Committee to the NJSIAA Executive Committee, arguing that probation was not warranted because the team's past history could not be used to justify present punishment when there was no finding of violation of NJSIAA rules by any member of the Camden school administration or basketball team other than M.M. Thus, according to the Board, the decision wrongly punished individuals who were found by NJSIAA itself to have played no role in the incident in question. (Item 24, Letter-Brief of Appeal)

At the September 13, 2006 hearing of the Executive Committee, Camden consistently argued the impropriety of placing its basketball team on probation – regardless of how inconsequential some might have perceived that penalty to be – based on "past history in terms of incidences with Coach Turner" rather than on present facts. The Board proffered: "...in America, you have to define who did something wrong if you're going to punish them***[and]*** in this particular situation, your Controversies Committee and everybody has said that [Camden High School, Coach Turner and Athletic Director Pease] did everything [they were] supposed to do" and that "the only person who did something wrong" was M.M., who was punished by the school district to a degree commensurate with the seriousness of his actions. (Item 26, Transcript of September 13 Hearing, quotations at 10-11) The Executive Committee was unpersuaded, voting unanimously (with one abstention) to adopt the decision of the Controversies Committee (*Id.* at 77), and stressing that the form of probation imposed in

this instance neither prevented team participation in games nor sanctioned any official, but was rather a constructive action aimed at ensuring greater communication and collaboration on the part of the Board, administration and athletic staff in their conduct of the basketball program. The Committee memorialized that decision in a letter of the same date. (Item 27)

CAMDEN'S POSITION ON APPEAL

On appeal before the Commissioner, Camden contends that the final decision of the NJSIAA must be overturned as arbitrary, capricious, unreasonable, and unsupported by substantial credible evidence in the record. Relying largely on arguments made throughout proceedings before the NJSIAA, Camden reiterates that there is neither evidence nor a finding that Camden High School violated any NJSIAA rule or regulation, and that past history cannot be used to find present fault or penalize innocent parties for the unapproved and unexpected acts of one individual. Indeed, the Board proffers, in order to affirm the NJSIAA's decision, the Commissioner "would have to find that the NJSIAA found fault in the entire Camden High School basketball program for the March 7, 2006 incident, essentially placing culpability of (*sic*) this vicious assault on each member of the Camden High School basketball program, its coach, or the school***, [which] review of the record [clearly] indicates***is not the case." (Camden's Brief at 7-8; see also 19-20)

Camden stresses that NJSIAA's own findings expressly exonerated Coach Turner, team members other than M.M., and district personnel from any responsibility for the assault or any violation of regulation, and that its own bylaws (Article IX, Section 3) state that "Unsportsmanlike conduct shall subject *the individual* to disciplinary action

[and the] member school with which the individual is associated may also be subject to disciplinary action if it is found that the member school's policies, actions, or failure to act, *substantially contributed to the individual's conduct.*" (*emphasis supplied by Camden*) Thus, according to Camden, in the absence of a determination that the school or its personnel instructed, provided policy or substantially contributed to a player's unsportsmanlike conduct – which in the case of M.M. was shown to be both unexpected and unpreventable – the school cannot be penalized for that individual player's actions, and the NJSIAA's decision to impose a two-year probationary period on the Camden team is both unsupported by the facts and contrary to NJSIAA regulation. (Camden's Brief at 9-12; see also 14-16, 19-20)[4]

The Board further contends that the NJSIAA improperly based its decision on the Camden team's past history rather than its present innocence, thereby violating the underlying intent of the New Jersey Rules of Evidence, *N.J.R. Evid.* 404(b), "'Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith.' " According to the Board, this rule, which is reflected in decisional law clearly establishing that past wrongs cannot be admitted into evidence and used to prove a defendant's guilt of present charges,[5] recognizes that, while past wrongdoing may be highly probative, it also encourages fact-finders to ignore the facts and issues presently before them and rely instead upon information irrelevant to the current matter, as the NJSIAA did here in punishing

[4] In support of its position on appeal, Camden additionally analogizes this matter to the case of *Nydegger v. Don Bosco Preparatory High School*, 202 *N.J. Super.* 535, 537 (Law Div. 1985), a tort matter wherein it was held that "in the absence of instruction by a coach to one of his players to commit a wrongful act...a coach is not responsible to a player on an opposing team who is injured," and to a recent incident in professional football where a star player was severely penalized for an on-field incident, while no other team members or personnel were punished. (Camden's Brief at 10-12)

[5] The Board cites a number of criminal cases for this proposition. (Camden's Brief at 14)

individuals who played no part in the March 7, 2006 incident based solely on the team's past history. (Camden's Brief at 12-16; see also 19-20)

Finally, Camden argues that it acted properly in rescinding the unapproved corrective action plan submitted by Principal Davis and replacing it with a Board-approved plan that appropriately (and severely) penalized M.M. for his unacceptable actions without taking action against blameless personnel and team members. Notwithstanding the "confusing" language of NJSIAA bylaws with regard to the role of the principal in district athletic programs, the Board avers, *N.J.S.A.* 18A:10-1 and 18A:11-1 make it clear that the district board of education is the ultimate authority in matters of operating district schools and enforcing and maintaining State regulations, policies and resolutions, including those of the NJSIAA where the board has voted to participate in that organization. Thus, Camden concludes, Principal Davis erred in submitting a plan without Board approval, and the Board exercised its lawful authority in overriding his determination based on its own finding that M.M. was the sole responsible party and that NJSIAA regulations required no corrective action other than appropriate sanction of M.M. (Camden's Brief at 16-18; see also 19-20)

DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the member schools, these rules and regulations are deemed school policy and are enforced by internal procedures of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that the Association applied such rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute his or her own judgment for that of the NJSIAA, even if he or she were to decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a).

This standard has been codified to provide clear notice to the public and regulated parties:[6]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a).

The New Jersey courts have also spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as that herein:

---

[6] *See* 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Thus, the Board in this matter bears a heavy burden, and, upon careful consideration of the record in light of the prescribed standard of review, the Acting Assistant Commissioner cannot find that the NJSIAA action here at issue should be overturned as unreasonable or unsupported by credible evidence. To the contrary, the Acting Assistant Commissioner is satisfied that the decision of the NJSIAA to place the Camden High School basketball team on two years' probation as a result of the incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006 was a reasonable exercise of the Association's authority and its responsibility for oversight of interscholastic athletic activity statewide, undertaken after affording full due process to the Board and grounded in the undisputed facts at hand.

While the Board persists in characterizing the NJSIAA's action as an unwarranted punishment of innocent students and staff and an impermissible finding of present guilt based on past transgressions, it is clear that the Association's purpose in imposing a two-year period of required reporting was not to punish individuals, but rather to compel the Camden Board – which consistently took the stance that it did not have a problem beyond the bad behavior of one student – to work constructively with the Association in addressing demonstrated flaws and gaps in the supervision and operation of its basketball program. All of these – the lack of communication and cooperation

between the Board and Principal, the circumscribed role of the Athletic Director, and the absence of a formal system of supervision and evaluation with clear expectations as to the duties of coaching staff – had been identified in the present proceeding, and all were likely to have enabled in whole or part the incident of March 7 and the Board's limited reaction to it.

For instance, it is uncontroverted that a student was admitted to the team whose disability can have behavioral manifestations. Yet there was no policy that the team's coach – a teaching staff member – be required to read the student's IEP to determine whether there was relevant information regarding possible behavior, or strategies to address such behavior. This is quite apart from the very different question of whether onsite officials would be able to maintain crowd control – as they fortunately were here – and prevent further injuries once an incident had occurred. Nor did the Board give any indication that it intended in any way to reconsider its practices and procedures in light of the March 7 incident and the NJSIAA's obvious concerns regarding it, nor to better integrate the Athletic Director and High School Principal – key local officials in matters involving interscholastic athletic activity – into future decisions about the operations of the basketball team.

Given its responsibility to do everything possible to ensure the safety and good sportsmanship of student athletes, as well as staff and spectators, it was not at all unreasonable – given the facts educed at hearing and faced with Camden's insistence that nothing needed to change – for the NJSIAA to take the position that systemic adjustments were needed in the supervision of the Camden basketball program and to direct that the district report regularly to the Association on its progress in this regard. While awareness

that the district had a history of past problems clearly factored into the decisions of both the Controversies Committee and the Executive Committee, it is equally clear that such awareness was not the determinative basis for them.

Accordingly, the Camden Board of Education having failed to sustain its burden of establishing that the NJSIAA's decision in this matter was arbitrary, capricious, unreasonable, or contrary to law, the Acting Assistant Commissioner upholds that decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.[7]

Barbara Gantwerk

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Mailing: 12/28/06

Date of Decision: 12/28/06

[7] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.5

300-05

OAL DKT. NO. EDU 969-05
AGENCY DKT. NO. 38-2/05

H.T., on behalf of minor children, A.T. AND I.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05

Date of Mailing: 8/18/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 969-05

AGENCY DKT. NO. 38-2/05

H.T., ON BEHALF OF MINOR CHILDREN, A.T. AND L.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

H.T., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent

Record Closed: July 28, 2005 Decided: August 1, 2005

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 10, 2005 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 1, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

8-3-05
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

H.T. O/B/O A.T. + I.T.	OAL Docket No.: EDU 05 00969-2005
v.	Agency Ref. No.: 38-E/05
Emery BOE	Settlement Agreement

This matter having come before the Honorable Stephanie M. Wantas on a Pro Se Residency Appeal, and the parties having reached a settlement on the date of hearing, It Is hereby agreed as follows on July 28, 2005:

1) The petitioners' father, Dean Tye, agrees to move back into his mother's house with his two children, A.T. + I.T. by October 1, 2005.

2) Petitioner, H.T., agrees to allow Dean Tye, his fiancee, and A.T. and I.T. to move back into her Emery residence.

3) Petitioner shall provide sufficient proof to demonstrate that D.T. and A.T. and I.T. have moved back into her residence, including written proof from D.T.'s current landlord.

4) Emery BOE agrees to withdraw its counterclaim for removal of the students and for eviction ~~[illegible]~~ without prejudice. Petitioner withdraws her petition.

Jeffrey Belz

Heidi Tye

Dean Tye

301-05

OAL DKT. NO. EDU 1915-04
AGENCY DKT. NO. 475-12/03

GEORGE WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARION P. THOMAS CHARTER SCHOOL, KAREN THOMAS, DELORES A THOMPSON, MS. BOLES AND THE BOARD OF TRUSTEES OF THE MARION P. THOMAS CHARTER SCHOOL, RESPONDENTS.	:	DECISION

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05

Date of Mailing: 8/18/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1915-04
AGENCY DKT. NO. 475-12/03

GEORGE WATSON, JR.,

Petitioner,

v.

MARION P. THOMAS CHARTER SCHOOL, KAREN THOMAS, DELORES A. THOMPSON, MS. BOLES AND THE BOARD OF TRUSTEES OF THE MARION P. THOMAS CHARTER SCHOOL,

Respondents.

George Watson, Jr., petitioner, *pro se*

Charles I. Auffant, Esq., for respondent

Record Closed: July 26, 2005 Decided: August 1, 2005

BEFORE **ELINOR R. REINER**, ALJ:

On or about December 31, 2003, petitioner, George Watson, Jr., filed a petition of appeal with the Commissioner of Education, alleging that he was improperly terminated from employment in violation of state and federal laws against discrimination. He further alleged harassment and the violation of various education laws. On or about January 23, 2004, respondents filed an answer denying the

allegations and asserting that the Commissioner of Education lacked jurisdiction to hear this matter. Petitioner filed an amended petition of appeal on February 9, 2004, and respondents filed an answer on March 3, 2004. On March 1, 2004, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned on April 5, 2004, and a telephone prehearing conference scheduled for June 7, 2004. The prehearing conference was held on June 8, 2004, at which time the issues were discussed. During a telephone conference on July 13, 2004, a settlement conference was scheduled for July 30, 2004. The scheduled settlement conference was adjourned to August 3, 2004 because petitioner was hospitalized. On that day, the parties agreed to settle this matter and petitioner signed the Stipulation of Settlement and Release. Despite repeated requests to respondents for the signed agreement, it was not filed and, thus, the case was scheduled for a hearing on July 26, 2005 at the OAL. On that date, counsel for respondents appeared and signed the Stipulation on behalf of all respondents as their representative. He also advised that petitioner had recently died and that he had been in contact with petitioner's son, who is the executor of the estate. He agreed that the estate would receive the $3,000 payment provided in the Stipulation, if the payment had not previously been made to petitioner. However, it is clear that the Stipulation of Settlement and Releases have been signed by all the necessary parties and resolve this matter.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I **APPROVE** the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 1, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

August 4, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Rutgers Community Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

GEORGE WATSON, JR. Plaintiff, vs. MARION P. THOMAS CHARTER SCHOOL, KAREN THOMAS, DELORES A. THOMPSON, MS. BOLES, THE BOARD OF TRUSTEES Defendants.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY DOCKET NO. 475-12/03 OAL DOCKET NO. EDU 1915-04 **STIPULATION OF SETTLEMENT AND RELEASE**

It is agreed by and among George Watson (referred to as " Mr. Watson"), the Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School that this matter shall be settled upon the following terms:

1. The parties agree to the following in settlement of all claims, including claims for attorneys' fees, which Mr. Watson may have against the defendants, their present and former members, officers, employees, agents and/or representatives, successors and the estates and/or heirs thereof, their insurers and re-insurers:

A. Marion P. Thomas Charter School will pay Mr. Watson Three Thousand Dollars ($ 3,000.00) within five business days from the receipt of the decision of the Commissioner of Education. Mr. Watson agrees that if it is determined that taxes, penalties or interest are due from him or the Board on this amount or any portion thereof, he will be solely responsible for payment of same.

B. Mr. Watson will withdraw his case against defendants and file a voluntary dismissal with prejudice in OAL Docket # EDU 1915-04

C. Mr. Watson will withdraw his case against defendants and file a voluntary dismissal with prejudice in the matter he filed with the Public Employees Relations Committee (PERC) Docket # CI-2004-038

D. Defendants will supply Mr. Watson with a letter stating that his employment record has been adjusted to reflect that he was in good standing at the time of his termination.

E. Mr. Watson will execute a General Release and Waiver in favor of all defendants ("General Release"), in the form annexed as Attachment A, and an Acknowledgment in the form annexed as Attachment B. Mr. Watson expressly acknowledges that this Agreement and the General Release are intended to extinguish all known claims which he may have against any person or entity identified as a Releasee in the General Release, resulting from anything which has happened up to the date of execution of the General Release and which were or could have been asserted in George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, Docket No. EDU 1915-04

F. Notwithstanding any provision in this Agreement, Mr. Watson does not release or waive any claim, cause of action, or right to sue arising after this Agreement and General Release are executed by her, and which may arise under the terms of this Agreement, or arising from any right to vested pension benefits that Mr. Watson may have. The Marion P. Thomas Charter School shall pay to the N.J. State Teachers' Pension and Annuity Fund (N.J.S.A. 18A:66-32, employer duties), the required amount for Mr. George Watson, Jr., a member of the plan, of employer contribution based on his reduced salary prior to termination.

2. The parties and their attorneys agree that, except as expressly provided below, each of them will keep confidential the terms of this settlement. It is further agreed that the parties and their attorneys may state only that the matter "was concluded" or "was settled".

3. It is understood that neither the execution of this Agreement nor any other action taken by the Defendants in connection with this settlement constitutes an admission by the Defendants or any person or entity identified herein or in the General Release as a Releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to Mr. Watson's employment was unwarranted. The parties have entered into this Agreement solely to compromise disputed claims. No findings of fact have been made or issued by the Court on the merits of the claims in this action, and no party purports to be the prevailing party in this action.

4. The Defendants, their agents, officers and/or employees agree to provide any prospective employer of Mr. Watson with a neutral reference verifying only his employment dates and his rate of pay.

5. This Agreement and the General Release and Acknowledgment referred to herein set forth the entire agreement between Mr. Watson and the Defendants. This Agreement supersedes any and all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

6. All parties and their counsel participated in the negotiations and drafting of the Agreement as equals. No particular party shall be deemed to be the drafter of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the remaining portions shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein.

7. This Agreement shall be governed by the law of the State of New Jersey.

Marion P. Thomas Charter School

By: Charles A Huffman Dated: 7/26/05

GEORGE WATSON Dated: 8/3/2004

for Karen Thomas Dated: 7/26/05

for Delores A. Thompson Dated: 7/26/05

for Ms. Boles Dated: 7/26/05

ATTACHMENT A

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings set forth in the attached Settlement Agreement, I release and discharge the Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles and The Board of Trustees of the Marion P. Thomas Charter School and their present and former officers employees, agents and/or representatives, successors, and the estates and/or heirs thereof, their insurers and re-insurers (hereafter the "Releasees"), from any and all claims which I, my estate and/or heirs has or may have against any of them. This releases all known claims, including claims for attorneys' fees, which were or could have been asserted in the action entitled George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, OAL Docket No. EDU 1915-04 and George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, PERC Docket No. CI-2004-038. I hereby promise not to commence or pursue, or authorize anyone to commence or pursue on my behalf, any action, legal or administrative, or otherwise seek to recover any damages, remedy or relief of any kind from any Releasee based upon any claim covered by this General Release and Waiver.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted in either of the above entitled actions filed in the New Jersey Office of Administrative Law Docket No. and the Public Employees Relations Commission Docket # . I also release all claims relating to or arising out of any aspect of my employment with the Board or the termination thereof including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866; 42 U.S.C. 1981, 1982, 1983 and 1985; The Civil Rights Act of 1991; The

Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and specifically §626; The Americans With Disabilities Act; The Employee Retirement Income Security Act of 1974; The Rehabilitation Act; The Worker Adjustment and Retraining Notification Act; The Family and Medical Leave Act; The Equal Pay Act; The New Jersey Conscientious Employee Protection Act; The New Jersey Law Against Discrimination; New Jersey Workers' Compensation Act; The New Jersey Family Leave Act; any contract of employment, express or implied; any provision of the Constitutions of the United States or the State of New Jersey; and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, unlawful discharge of employment, workplace harassment or discrimination on the basis of gender, race, color, religion, national origin, age, disability or handicap, marital status, sexual orientation or veteran's status; and any other law, common or statutory, of the United States, the State of New Jersey or any other State; and all claims growing out of any legal restrictions on the Boards right to terminate its employees.

X George Watson Jr Dated: 8/3/2004

George Watson

STATE OF NEW JERSEY :

: SS

COUNTY OF _____ :

I certify that on _____, 2004, George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

_____

Notary Public

ATTACHMENT B

ACKNOWLEDGMENT

I have carefully read, fully understand and agree with the terms and conditions of this settlement agreement, release and waiver. I acknowledge that I had the opportunity and was advised by the Charter School and its attorney to review this settlement agreement, release and waiver with my attorney and to discuss with such person the terms and conditions thereof, as well as my rights upon execution. I agree and acknowledge that neither the Charter School nor its representatives made any representations concerning the terms or effect of this settlement agreement, release and waiver other than as set forth in the document and that I have voluntarily signed this settlement agreement, release and waiver as my own free act with full knowledge of its terms and conditions, which are final and binding upon me.

Dated: 8/3/2004

George Watson Jr

George Watson

STATE OF NEW JERSEY :

: SS

COUNTY OF _____ :

I certify that on _____, 2004 George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

_____

Notary Public

ATTACHMENT C

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings set forth in the attached Settlement Agreement, I release and discharge George Watson, agents and/or representatives, successors, and the estates and/or heirs thereof, (hereafter the "Releasees"), from any and all known claims, including claims for attorneys' fees, which were or could have been asserted in the action entitled George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, OAL Docket No. EDU 1915-04 and George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, PERC Docket No. CI-2004-038. I hereby promise not to commence or pursue, or authorize anyone to commence or pursue on my behalf, any action, legal or administrative, or otherwise seek to recover any damages, remedy or relief of any kind from any Releasee based upon any claim covered by this General Release and Waiver.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted in either of the above entitled actions filed in the New Jersey Office of Administrative Law Docket No. and the Public Employees Relations Commission Docket # . I also release all claims relating to or arising out of any aspect of my employment with the Board or the termination thereof including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866; 42 U.S.C. 1981, 1982, 1983 and 1985; The Civil Rights Act of 1991; The Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and specifically §626; The Americans With Disabilities Act; The Employee Retirement Income Security Act of 1974; The Rehabilitation Act; The Worker Adjustment and Retraining Notification Act; The Family and Medical Leave Act; The Equal

Pay Act; The New Jersey Conscientious Employee Protection Act; The New Jersey Law Against Discrimination; New Jersey Workers' Compensation Act; The New Jersey Family Leave Act; any contract of employment, express or implied; any provision of the Constitutions of the United States or the State of New Jersey; and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, unlawful discharge of employment, workplace harassment or discrimination on the basis of gender, race, color, religion, national origin, age, disability or handicap, marital status, sexual orientation or veteran's status; and any other law, common or statutory, of the United States, the State of New Jersey or any other State; and all claims growing out of any legal restrictions on the Boards right to terminate its employees.

Dated: 7/26/05

STATE OF NEW JERSEY :
: SS
COUNTY OF _____ :

I certify that on _____, 2004, George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

_____
Notary Public

Rutgers Community Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

GEORGE WATSON, JR. :	STATE OF NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
Petitioner,	
:	DOCKET NO. CI-2004-038
vs.	
MARION P. THOMAS : CHARTER SCHOOL :	**STIPULATION OF DISMISSAL WITH PREDJUDICE**
Respondent :	

IT IS hereby stipulated by and between the parties hereto that the above captioned matter be and is hereby DISMISSED with Prejudice and without costs. .

George Watson

Charles I. Auffant

Dated: 8/4/2004

Rutgers Community Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

GEORGE WATSON, JR. Plaintiff, vs. MARION P. THOMAS CHARTER SCHOOL, KAREN THOMAS, DELORES A. THOMPSON, MS. BOLES, THE BOARD OF TRUSTEES Defendants.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY DOCKET NO. 475-12/03 OAL DOCKET NO. EDU 1915-04 **DISMISSAL WITH PREDJUDICE**

IT IS hereby stipulated that the above captioned matter, having been amicably adjusted is hereby dismissed with prejudice and without costs.

George Watson

Charles I. Auffant

Dated: 8/3/2004

HOWARD SOLOMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Former Superintendent of Passaic County Educational Services Commission (ESC) contended, among other allegations, that he was improperly terminated from employment in contravention of statute and the parties' contractual agreement. Petitioner claimed, *inter alia,* entitlement to automatic renewal because the ESC did not provide two years' notice of its intent not to renew his employment as required by contract. The ESC argued that the contractual two-year notice provision was invalid and that it had complied with the one-year statutory requirement.

In May 2004, the ALJ issued an order granting partial summary decision in favor of petitioner on the question of the two year notice provision in the contract, concluding that it was valid and enforceable pursuant to N.J.S.A. 18A:17-20. Although petitioner has been reinstated to his position as of January 3, 2005, the ALJ found that he was improperly and prematurely terminated from his employment from July 1, 2003 through this date. The ALJ ordered that: the petitioner be immediately reappointed, retroactively, to a new five year term commencing July 1, 2003; and the ESC pay petitioner any back pay due under the terms of the new retroactive contract, including all benefits and emoluments to which he is entitled.

Upon careful review and consideration of the record, the Commissioner concurs with the ALJ that petitioner is entitled to retroactive employment as Superintendent – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008, and adopts the Initial Decision with the following modification: payment to the petitioner shall be subject to offset by any income received from substituted employment and/or unemployment compensation during the term at issue. Commissioner found no support for the granting of pre- or post-judgment interest.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 22, 2005

OAL DKT. NO. EDU 9721-02
AGENCY DKT. NO. 294-9/02

HOWARD SOLOMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, Passaic County Educational Services Commission (ESC), were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in making his determination herein. Due to a substitution of attorney,[1] petitioner requested and was granted an extension of time, until Monday, August 8, 2005, within which to file reply exceptions. Although petitioner's reply exceptions were dated August 8, they were not *filed* with the agency until August 9, 2005, thereby rendering them untimely. (*N.J.A.C.* 1:1-18.4) Consequently, this submission was not considered herein.

Exceptions of the ESC essentially recast and reiterate its arguments advanced since the inception of this matter, *i.e.*, that since the ESC provided the minimally required notice pursuant to *N.J.S.A.* 18A:17-20, thereby satisfying the statutory requirement, and because automatic employment was not specified in the contract as a remedy for violation of the contractual 2-year notice provision, the ESC is not obligated to abide by the statutory

[1] By letter and advisement of Substitution of Attorney, dated August 1, 2005, Fiona M. Kolvek, Esq. reported that she had taken over representation of petitioner in this matter from withdrawing attorney, Joseph R. Morano, Esq.

requirement for reappointment. Again, it charges that to find to the contrary ignores "well established law prohibiting courts from rewriting better contracts for parties." (ESC's Exceptions at 4) Finding this argument to have been fully considered and resolved by the Administrative Law Judge (ALJ) in her prior Partial Initial Decision in this matter, which was clarified and adopted by the Commissioner and the State Board, and *again* clearly explained and resolved in the instant Initial Decision, the Commissioner finds any additional discussion on this issue unwarranted.

The ESC further objects to the ALJ's failure to address the question of mitigation. In this regard it proffers:

> [r]espondent's papers and oral argument noted that even though petitioner claimed that he is a highly qualified and experienced superintendent, petitioner did not present the Court with any evidence of mitigation. Despite the lack of mitigation evidence, the July 15, 2005 decision not only fails to address this point, but the decision also fails to adjust petitioner's damages.
> (ESC's Exceptions at 4)

Upon careful review and consideration of the record in this matter, the Commissioner concurs with the determination of the ALJ that petitioner is entitled to retroactive employment as Superintendent of Schools – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008. The Initial Decision is, therefore, adopted, as modified below.

Initially, although the ALJ's decision indicates that oral argument was conducted in this matter (Initial Decision at 2), presumably – at a minimum – to elicit testimony with respect to the issue of petitioner's mitigation of damages, the Initial Decision contains no discussion, nor does the record provide any details, on this topic. In this regard, the

Commissioner observes that petitioner claims entitlement to back pay as a consequence of his improper termination pursuant to *N.J.S.A.* 18A:6-30, which specifies:

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension***.

The court in *Mullen v. Board of Education of Jefferson* Township, 81 *N.J. Super.* 151 (App. Div. 1963), in reviewing *N.J.S.A.* 18:5-49.1, the precursor to this statutory provision, found that "the Legislature must be taken as having meant that all claims made by illegally dismissed persons under [this statute] be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word 'compensation'," such being the case because damages under this statute have been determined to be "compensatory" in nature and, thus, an individual should not be awarded more damages than actually sustained. (at 159) Therefore, under common law principles, the within petitioner was under a duty to mitigate his damages during the period of his improper termination by making reasonable efforts to secure alternative employment, notwithstanding that he was improperly terminated from his position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Miele v. McGuire*, 31 *N.J.* 339 (1960). Petitioner's obligation in this respect is not conditioned on any action on the part of the Board or any other individual or entity involved in adjudication of the case in chief. Consequently, the Commissioner finds and determines that the Board is entitled to offset from petitioner's award any money he received from alternative employment and/or unemployment compensation during the period of his illegal termination,[2] thereby according petitioner the full

[2] Although the Board is entitled to offset petitioner's monetary award by any unemployment compensation he may have received, it has an obligation, pursuant to *N.J.S.A.* 43:21-5(b), to reimburse the Department of Labor any monies so offset.

measure of his *actual* damages. To find otherwise would violate public policy as petitioner would be provided compensation in excess of his economic loss at public expense. However, while it is without doubt that the amount of petitioner's award must be reduced by his actual earnings during the time of his improper removal, (*Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981)), it is, likewise, well settled that a charge of *failure to mitigate*, which apparently is the crux of the Board's charge here, is an affirmative defense and the burden to demonstrate such failure rests with the employer. See *Goodman; Zielenski, supra.* It is not sufficient for an employer to merely raise lack of mitigation as an issue. As stated in *Cartin v. Continental Homes of New Hampshire*, "Such burden [of failure to mitigate] is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative." 360 *A. 2d.* 96, 134 *Vt.* 362 (1976) (*Zielenski* at 764) Rather, as stated by the Supreme Court in *Goodman, supra,*

> Mitigation *** is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer *** [who] may establish a prima facie case by first showing that comparable employment opportunities were available and, *** that there were other suitable [available] jobs ***. (at 40-41)

Here, the Commissioner notes that the Board raised the question of failure to mitigate in its papers below but failed to sustain its burden under the *Goodman* case by bringing forth facts serving to demonstrate that comparable job opportunities were available to petitioner in similar types of employment, with reasonable and diligent efforts. Thus, the Board cannot now complain that it was denied a favorable ruling on this issue.

Finally, the Commissioner declines to grant petitioner's request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before him does not support a finding that respondent's actions were taken in bad faith or in

deliberate violation of the law (*N.J.A.C.* 6A:3-1.17(c)1). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders his decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2).

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9721-02
AGENCY DKT. NO. 294-9/02

HOWARD SOLOMON,

Petitioner,

v.

PASSAIC COUNTY EDUCATION SERVICES COMMISSION,

Respondent.

Joseph Morano, Esq., appearing for Petitioner
(Viola, Benedetti & Azzolini, LLC, attorneys)

Anthony Sciarrillo, Esq., appearing for Respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: April 16, 2005 Decided: July 15, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Howard Solomon contends Respondent, Passaic County Educational Services Commission, improperly and prematurely terminated his employment as superintendent in contravention of law and the parties' agreement.

On November 27, 2002, the Department of Education transmitted the matter to the of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

Respondent applied for summary decision; Petitioner filed a cross application. On May 10, 2004, I entered an order granting partial summary decision in favor of Petitioner and denying the application of Respondent. That order concluded the two year notice provision contained in the contract between these parties was valid and enforceable. The Commissioner affirmed that determination on June 24, 2004; the State Board affirmed the determination of the Commissioner.

The parties then sought resolution of the remaining issues in the matter. To that end, on January 16, 2005, Petitioner filed an application for summary decision. Respondent replied and made a cross application for summary disposition. In addition, Respondent requested oral argument and, over the objections of Petitioner, the request was granted.

At the time of oral argument, I requested the parties to file further submissions and the record closed on April 16, 2005 upon my receipt and review of those submissions. The forty-five day period to issue an initial decision expired on May 31, 2005. During the months of April and May, I was assigned a number of cases which carry statutory deadlines for hearing and disposition, including two special education cases requiring multi-day hearings and a teacher tenure case. Accordingly, I requested and received an extension of time to file this decision until July 15, 2005.

FINDINGS OF FACT

In granting Petitioner's application for partial summary decision, I made specific findings of fact which are set forth in full in the order. Those findings of fact are incorporated into this initial decision and made a part hereof as if they were set forth in full.

In addition, based on the record before me I make the following additional findings of fact in this matter.

1. Petitioner has been reinstated to his position as Superintendent of Passaic County Educational Services Commission as of January 3, 2005.

2. Petitioner, Dr. Solomon, was improperly and prematurely terminated from his employment in contravention of both the statute and the agreement of the parties.[1]

ANALYSIS AND CONCLUSIONS

Summary decision is appropriate when the papers and discovery, together with any affidavits in support or against the application, show there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. When an application is made and supported, an adverse party must set forth specific facts showing there is a genuine issue, which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5. In this case, the parties have made cross applications. There are two issues to be resolved. The first is whether the provision in the contract providing for an automatic one year extension of the contract to include the 2003-04 school year is valid. The second is whether the Petitioner is entitled to a new contract for the same duration as the previous one.

Turning first to the issue of the extension of the previous contract to include the 2003-04, as Petitioner correctly notes, the Commissioner of Education has determined that automatic extensions, such as the one here, for one year, are illegal and have no force or effect on the remainder of the contract. *John Howard, Jr., v. Bd. of Educ. of East Orange,* C.#176-01 (June 5,2001) (slip op. at 16), *aff'd* State Bd. of Educ. (November 7, 2001), *aff'd* Superior Court, App. Div. Dkt. No. A-1699-01T1 (unpublished) (October 11, 2002).

[1] Although I did find Respondent was in compliance with the statutory notice requirement, for the reasons set forth in full in this decision, that compliance does not affect the ultimate determination of the issues herein.

I take note of Respondent's assertion that unpublished decisions are not binding; they are, however, persuasive. In this case, the provision permits the addition of one year to a five year contract unless the Board notified the Superintendent before June 30, 1999. The operative statute provides a board may only appoint a superintendent by contract for a minimum of three years and a maximum of five years. *N.J.S.A.* 18A:17-15. Since Petitioner already enjoys a five year contract, extending it for one year is impermissible under the specific language of the statute. For the same reason, the assertion that the extension operated as a separate, new contract must also fail. Accordingly, I **CONCLUDE** the one year extension provision is invalid.

The savings clause contained in the contract provides protection for the remainder of the contract.

Turning now to the other issue to be resolved, *i.e.,* whether the Petitioner is entitled to an automatic reappointment of the same duration as the previous contract. Petitioner, the applicant herein, asserts the determination that the two year notice provision is valid and enforceable entitles him to a new contract for the same duration as the previous one, pursuant to the statute. Furthermore, he seeks a determination that he is entitled to back pay, benefits and emoluments of employment, including interest.

Respondent, on the other hand, continues to assert that Petitioner is not entitled to employment beyond June 30, 2003, the expiration date of his employment contract and, consequently, since he is not entitled to employment beyond that date, he is not entitled to receive back pay, benefits, or other emoluments for the same period. In support of its position, Respondent contends the court should not invoke the statutory remedy because Respondent did not breach the statute and the court cannot write a better contract for the parties.

The crux of Respondent's position is, apparently, the finding of fact in the order of May 2004 that the Commission had complied with the statutory one year notice

requirement. Since, according to the position of the Respondent, the contract in question is silent on the remedy for failure to provide the notice provided for in the contract and Respondent has not breached the statute, the statutory remedy of automatic renewal subject to the same terms, conditions and duration as the preceding contract should not be invoked.

This position completely ignores not only the determination of this court, but the determination of the Commissioner and the State Board affirming this court's conclusion. In determining to adopt the Partial Initial Decision in this matter, the Commissioner states:

> . . . , the operative statute provides a *nonnegotiable framework* requiring *both* notice to the superintendent *and* reappointment to the superintendency upon the board's failure to provide it; all that is left to contractual agreement is *how much* more than one year's notice the parties may additionally choose to require. Given the plain language of the statute, it is disingenuous to argue that, since the ESC *did* give petitioner the minimally required *statutory* notice and automatic reemployment was not specified in the contractual agreement, the ESC is under no obligation to honor the statutory requirement for reappointment; . . . .[2] (Emphasis in the original).

The language of the Commissioner's decision is clear and unambiguous; the statute requires notice *and* reappointment to the superintendency upon the board's failure to provide to that notice. Moreover, clearly, the Commissioner dismissed as disingenuous the argument that since ESC did provide the minimally required notice and automatic reemployment was not specified in the contract, Respondent is under no obligation to honor the statutory requirement for reappointment.

Accordingly, I **CONCLUDE** Petitioner is entitled to employment under a contract of the same duration as the contract at issue here. The duration of that contract was five years and the termination date was June 30, 2003. Accordingly, I **FIND** Petitioner is entitled to retroactive employment under a contract which commenced on July 1, 2003

[2] Commissioner's Decision, pp. 9-10.

and continues for five years thereafter. I further **CONCLUDE**, therefore, Petitioner is entitled to back pay and *all* benefits and emoluments accruing to him pursuant to the contract of employment under which he was serving at the time Respondent improperly terminated his employment.

ORDER

I hereby **ORDER** Petitioner be and hereby is immediately reappointed, retroactively, to a new term commencing on July 1, 2003 and continuing for five years, to June 30, 2008, pursuant to the same terms and conditions as contained in the previous contract. I further **ORDER** Respondent to pay Petitioner any and all back pay due under the terms of the new, retroactive contract, and, further to ascribe to him all benefits and emoluments accruing to him pursuant to the contract of employment under which he is serving.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 15, 2005
DATE

Mailed to Parties:

JUL 18 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

N.G., on behalf of minor children, G.G., G.G., AND V.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her children, G.G., G.G. and V.G., were not eligible for a free education in the Township of West Orange School District. Respondent Board filed an answer to the petition, and asserted a counterclaim for payment of tuition by petitioner to the District for the unlawful attendance of the minor children during the 2004-2005 school year. Petitioner subsequently failed to appear at the scheduled OAL hearing, offering no explanation.

The ALJ concluded that the petitioner, by virtue of her failure to appear at hearing, failed to carry her burden of proof, and therefore that the Board is entitled to tuition in the amount of $14,633, representing the pro-rated tuition fee for the period of ineligible attendance of her three children, September 8, 2004 to January 13, 2005. The ALJ ordered the petition dismissed with prejudice.

The Commissioner adopts the Initial Decision of the OAL 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.

August 22, 2005

OAL DKT. NO. EDU 1131-05
AGENCY DKT. NO. 403-11/04

N.G., on behalf of minor children, G.G., G.G., AND V.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry her burden of proof that G.G., G.G. and V.G. are entitled to a free public education in the West Orange Township School District. The Commissioner further agrees with the grant of the Board of Education's counterclaim for tuition in the amount of $14,633.00 for the 80 days of G.G., G.G. and V.G.'s ineligible attendance in the schools of the West Orange Township School District from September 8, 2004 to January 13, 2005.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05
Date of Mailing: 8/22/05

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1131-05

AGENCY DKT. NO. 403-11/04

N.G. ON BEHALF OF MINOR CHILDREN, G.G., G.G., AND V.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Stephen J. Christiano, Esq., for respondent.

Record Closed: July 28, 2005 Decided: August 1, 2005

BEFORE **EDITH KLINGER**, ALJ:

On November 15, 2004, petitioner, N.G., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of West Orange (Board), to provide her children, G.G., G.G., and V.G. with a free public education in the West Orange schools pursuant to *N.J.S.A.* 18A:38-1b.

On December 13, 2004, the Board filed its answer to the petition and counterclaim for reimbursement of tuition. On January 11, 2005, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled on July 27, 2005 at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey. At the scheduled time, petitioner failed to appear and never contacted OAL to explain her non-appearance.

The record shows that N.G. was served with a Notice of Plenary Hearing, dated March 10, 2005, at the address she provided to the Board, to the Department of Education, and to the Office of Administrative Law. The Notice set forth the date, time and place of the hearing.

Respondent's attorney appeared and presented evidence in support of the Board's uncontested counterclaim for tuition. The record closed on July 28, 2005 when petitioner failed to explain the reason for her non-appearance within twenty-four hours. *N.J.A.C.* 1:1-14.4(a).

The burden of proof is on the parent to show that the children were entitled to a free public education in the school district. *N.J.S.A.* 18A:38-1b(2). Since the parent, N.G., failed to appear, I **CONCLUDE** that she has failed to carry her burden and is entitled to no relief as a result of her appeal.

I, therefore, **CONCLUDE** that the Board is entitled to tuition "on the basis of 1/180 of the total annual per pupil cost to the local Board multiplied by the number of days of ineligible attendance." *N.J.S.A.* 18A:38-1b(2). This amount is to be collected in the manner in which orders of the commissioner are enforced. *Ibid.*

Josefa Lopez, Registrar for the school district, testified to the following: business records and provided the following evidence. Based upon her testimony, I **FIND** that:

1. G.G., the oldest child in this matter, was enrolled in the West Orange High School from September 8, 2004 to January 13, 2005 while ineligible. After this date, his mother, N.G., gave custody of the child to her brother and sister-in-law who reside in West Orange. The Board only seeks tuition for the eighty-day period of G.G.'s ineligible attendance. The daily cost per pupil in the high school was $70.30 during the relevant time period, so that the Board is owed $5624 in tuition for G.G. (80 x $70.30). G.G. has graduated from the high school.

2. The middle child, G.G., was enrolled in the West Orange Roosevelt Middle School from September 8, 2004 to January 13, 2005 while ineligible. After January 13, 2005, the child left the West Orange school district and, to the best knowledge of the Board, is now attending school in Jersey City. The daily per pupil cost for attendance at the Roosevelt Middle School was $59.10 during the relevant time period. The Board is owed tuition in the amount of $4728 for the eighty days of G.G.'s ineligible attendance (80 x $59.10).

3. The youngest child, V.G., was enrolled in the West Orange Hazel Elementary School from September 8, 2004 to January 13, 2005 while ineligible. After January 13, 2005, this child also left the West Orange school district and, to the best knowledge of the Board, is attending school in Jersey City. The daily per pupil cost for attendance at the Hazel Elementary School was $53.51 during the relevant time period. The Board is owed tuition in the amount of $4281 for the eighty days of V.G.'s ineligible attendance (80 x $53.51).

4. The total tuition due to the Board is $14,633 ($5624 + 4728 + 4281).

Based upon the above, I **CONCLUDE** that N.G. has failed to prove that her children, G.G., G.G., and V.G., were entitled to a free public education in the Township of West Orange between September 8, 2004 and January 13, 2005 and, therefore,

N.G. is liable to the Board for tuition in the amount of $14,633 for this period of their ineligible attendance.

ORDER

It is, therefore, **ORDERED** that N.G. pay respondent tuition in the amount of $14,633, pursuant to *N.J.S.A.* 18A:38-1(b), for her children's ineligible attendance in the district's schools. It is further **ORDERED** that her petition is hereby **DISMISSED WITH PREJUDICE** because there is no relief to which she is entitled.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2005
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 2, 2005
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 3 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Respondent:

Josefa Lopez

Exhibits

For Respondent:

R-1 Basic Information on G.G. (Middle School)

R-2 Basic Information on G.G. (High School)

R-3 Basic Information on V.G.

R-4 Tuition Costs, 2004-2005

304-05

304-05

OAL DKT. NO. EDU 7115-05
AGENCY DKT. NO. 145-6/05

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, AND PRITCHARD INDUSTRIES, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the June 28, 2005 Order of the Office of Administrative Law (OAL), which was re-mailed to the parties on July 20, 2005 have been reviewed. No exceptions were filed by the parties.

In reviewing this matter, it is noted that the Administrative Law Judge (ALJ) first issued the Order on June 28, 2005, recommending denial of petitioner's application for emergent relief and concluding:

> Should petitioner Control wish to press claims made against the School District and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed. (Order of June 28, 2004 at 5)

The ALJ's recommended Order was subsequently adopted by the Commissioner on June 20, 2005 with instructions that the matter "shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary."

The OAL file does not contain any documents or correspondence filed after issuance of the ALJ's recommended June 28 Order. Thus, it appears that petitioner did not notify the ALJ of its intent to pursue its claim within the 14 days specified by the ALJ. However, in that the Order mailed to the parties on July 20, 2005 is *exactly* the same Order which disposed of the emergent relief request noted above and does not indicate the ALJ's conclusion with respect to whether this matter should be dismissed as moot, the Commissioner cannot conclude that the ALJ's Order constitutes an Initial Decision within the meaning of *N.J.A.C.* 1:1-18.1(b), which requires the issuance of an Initial Decision that is final in form and fully dispositive of all issues in the case.

Accordingly, this matter is remanded to the OAL for issuance of an Initial Decision in this matter, pursuant to *N.J.A.C.* 1:1-18.1 *et seq.*

IT IS SO ORDERED.*

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 7115-05

AGENCY DKT. NO. 145-6/05

CONTROL BUILDING SERVICES, INCORPORATED,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND PRITCHARD INDUSTRICES, INCORPORATED,

Respondents.

Joseph B. Fiorenzo, Esq., appearing for petitioner Control Building Services, Incorporated (Sokol, Behot & Fiorenzo, attorneys)

Sydney A. Sayovitz, Esq., appearing for respondent State-Operated School District of the City of Paterson (Schenck, Price, Smith & King, attorneys)

Patrick T. Collins, Esq., appearing for respondent Pritchard Industries, Incorporated, (Franzblau Dratch, attorneys)

Record Closed: June 21, 2005 Decided: June 28, 2005

BEFORE **DANIEL B. MCKEOWN,** ALJ (t/a):

STATEMENT OF THE CASE

Control Building Services, Inc., (petitioner), seeks emergency relief from the Commissioner of Education in the form of an Order by which Pritchard Industries, Incorporated (Pritchard), which submitted the low bid to supply custodial services to the

State-Operated School District of the City of Paterson (District) for the 2005-2007 school years, with the option for a third year, would be prohibited from commencing work under the contract on July 1, 2005 pending a plenary hearing on the asserted issue of its moral standing to be awarded a public contract. After the Commissioner of Education transferred the matter to the Office of Administrative Law on June 16, 2005, as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, an oral argument on the motion was heard June 21, 2005 at the Office of Administrative Law, Newark.

For the reasons that follow, the application of petitioner, Control Building Services, Incorporated, for a temporary stay of the commencement of work by Pritchard, successfully bid upon pending a hearing on the merits of petitioner's claim, Pritchard is not morally responsible is denied.

FACTS

The facts as can be discerned from the pleadings, exhibits, argument of counsel, certifications, and over which there is no dispute, are these. In 2003, the State-Operated School District sought bid submissions for its custodial work for the 2003-05 school years. Petitioner, Control, and respondent, Pritchard, were among those who submitted bids. Pritchard was declared the low bidder for custodial services in 2003. It appears issues arose regarding employee health benefits to be provided to existing custodial workers once Pritchard became the independent contractor providing the custodial services, and paid lunch breaks. It further appears that in order to resolve these issues, representatives of the District and of Pritchard conferred seeking a method and manner by which the issues could be resolved even to the extent of changing the terms of the contract just bid upon by Pritchard, but before its formal award. This communication between Pritchard and the School District and the subsequent change of the bids specifications from which bids were received and as reflected in the contract signed by Pritchard for 2003-05, formed the basis for a legal challenge to the awarding of the custodial contract to Pritchard.

Petitioner was successful at that time to secure a temporary restraining order on July 9, 2003 from New Jersey Superior Court, Law Division, The Honorable Joseph F. Scancarella, Presiding, against the contract being awarded Pritchard for 2003-05 pending a hearing into the merits of Control's claim regarding the post bid announcement of low bidder between Pritchard and the School District. On July 18, 2003, The Honorable Ralph L. DeLuccia, Jr., J.S.C., ordered the continuation of the restraints already issued in the matter, but transferred the case to the Office of Administrative Law for hearing on the merits. On August 22, 2003, Richard McGill, Administrative Law Judge, issued an initial decision on a motion by which he continued the restraint against the awarding of an actual contract to Pritchard for 2003-05 be continued pending a full hearing on whether the entire contract should not be rebid. The initial decision was affirmed by the Commissioner of Education on September 8, 2003. An appeal was taken to the State Board of Education which affirmed the Commissioner of Education in his determination to agree with Administrative Law Judge McGill in continuing the restraints pending a hearing. It is interesting to note several observations made by the State Board in its decision. It said

> Initially, we recognize that the allegations made by Control are serious. However, as found by the ALJ and the Deputy Commissioner, they related to the original March 2003 invitation to bid and to actions that preceded the re-bidding process, and Control has made no allegations of wrong doing with respect to the re-bidding process as it has proceeded thus far.

And,

> Moreover, given the circumstances, including the fact that the original specifications were erroneous, re-bidding is the appropriate course to follow.

Petitioner Control Services contends that on these facts it is entitled to a temporary restraining order against the commencement of the 2005-07 contract by Pritchard because Pritchard, although the nominal low bidder, is not the 'lowest responsible bidder' within the meaning of the Public Schools Contract Law, *N.J.S.A.* 18A:18A -1, *et seq.,* because it lacks the moral integrity to be so designated based on its conduct during the 2003 bidding process. Control says that these facts require Pritchard to be disqualified as the lowest responsible bidder and allow it, Control

Services, to continue providing the custodial services it has been providing the School District since 1996 and until it has a hearing to prove the truth of its allegations.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief request is govern by the provisions of *N.J.A.C.* 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

i. Petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal rights 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 are an interest of the parties or balance the petitioner will suffer greater harm than the respondent will suffer if their requested relief is not granted. [*N.J.A.C.* 6A:14-12.7(m)1].

It is well settled that petitioner must meet these four criteria to prevail on this application. See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Regarding the first prong of irreparable harm, I **CONCLUDE** that petitioner has not shown irreparable harm. Control has not shown its right to continue in providing custodial services to the School District for 2005-07 in light of the fact it was not the low bidder on the contract for that period of time. I realize Control seeks to reach back to 2003 and use the efforts, misguided they may have been, of the School District and Pritchard to conclude such conduct is 'fraudulent' and 'collusive.' However, and despite the fact two superior court judges reviewed the facts on a preliminary basis, and an administrative law judge reviewed the 2003 bid facts on a preliminary basis, as did the Commissioner and State Board of Education, no such finding was entered in this record at any time. Control presented no evidence that it will suffer irreparable harm if

Pritchard is restrained from performing under the contract because it presented no evidence regarding its rights that will be harmed.

Petitioner Control must show that the legal right underlying the claim is settled. I **CONCLUDE** the record in this case, although voluminous at this point, does not settle Control's underlying claim.

Additionally, I **CONCLUDE** that petitioner has not demonstrated the likelihood of success on the merits. Despite the fact Control has been providing the School District custodial services since 1996, its reliance on events in 2003 that both the Commissioner of Education and State Board of Education held, could be cured by rebidding, provides no basis for the conclusion that Pritchard and the School District engaged in fraud or collusive conduct.

In sum, I **CONCLUDE** for the above reasons that petitioner has not prevailed on his application for emergent relief and this application must be **DENIED**. Should petitioner Control wish to press claims made against the School District and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed.

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 (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 28, 2005

DATE

DANIEL B. McKEOWN, ALJ

jb

OAL DKT. NO. EDU 2996-05
AGENCY DKT. NO. 94-4/05

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN GRISO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
LAKEWOOD, OCEAN COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO.EDU 2996-05

AGENCY DKT. NO. 94-4/05

IN THE MATTER OF THE
TENURE HEARING OF JOHN GRISO,
SCHOOL DISTRICT OF THE TOWNSHIP
OF LAKEWOOD, OCEAN COUNTY.

Michael I. Inzelbuch, Esq., appearing for petitioner

Richard A. Friedman, Esq., appearing for respondent (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed – August 1, 2005 Decided – August 2, 2005

BEFORE **DONALD J. STEIN**, 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 and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/2/05
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

8-3-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/DJS

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

2005 AUG -1 A 11: 14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609)392-8172
Attorneys for Respondent
John Griso

IN THE MATTER OF THE TENURE CHARGES AGAINST JOHN GRISO, LAKEWOOKD BOARD OF EDUCATION, OCEAN COUNTY	: BEFORE THE OFFICE OF ADMINISTRATIVE LAW : : Agency Docket N. 94-4/05 : OAL Docket No.: EDUTH 02996-2005S : : **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to this matter, the Lakewood Board of Education and John Griso, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charge shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the tenure charge, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new,

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

revised or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the tenure charge.

3. Rationale for Settlement

A. On or about April 21, 2005, petitioner filed the tenure charge with the Commissioner of Education against the respondent.

B. The charge alleges that respondent's actions permitted or encouraged students to fight, and that respondent was out of his classroom at times when he should have been present, thereby not providing the required supervision and instruction to his students, and that on such occasions, respondent's aide provided supervision and instruction that should have been provided by respondent.

C. In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates to the petitioner's satisfaction that it is unlikely that petitioner could sustain the burden of proof with respect to the allegations that respondent permitted or encouraged students to fight.

D. In the course of their investigation and discovery in the case, information was exchanged between the parties which has demonstrated to respondent's satisfaction that it is likely that petitioner can prove the allegation that respondent was not present in his class at times when he should have been, and that during such time periods, respondent delegated the supervision of students in the class to his aide, and that such actions were improper. Thus, the parties believe that it is likely that petitioner can sustain its burden of proof with respect to these allegations.

E. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which would be proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the matter proceeds to a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in paragraph 3 (C) or (D) of this agreement, or in any other paragraph in this agreement.

F. Both parties agree that the most substantial allegation, that respondent permitted or encouraged students to engage in fighting, is unlikely to be proven, as per paragraph 3 (C) above, but that in view of the contents of paragraph 3 (D), the filing of the tenure charge was appropriate.

G. Petitioner is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, which includes evaluation of the time and expense of pursuing tenure charges, the uncertainty of the result which might be obtained, both in terms of sustaining the charges and the penalty which might be imposed, respondent's tenured service in the district, and in all other respects favorable record, petitioner believes and respondent concurs that it is in the best interests of all parties and the public to resolve this matter by this settlement agreement.

4. The parties agree that the acts or omissions engaged in by respondent as referred to in paragraph 3 D may be deemed to constitute conduct unbecoming and were sufficient to warrant the filing of the tenure charge, but that the appropriate penalty in the circumstances is the

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

C.G.
E.L.

withholding of respondent's employment and adjustment increments, and suspension with pay and benefits until December 31, 2005.

5. The parties agree that respondent's employment and adjustment increments for the 2005-06 school year shall be withheld as a result of this agreement. The parties also agree that if this settlement agreement is rejected, petitioner may file an appeal of any increment withholdings for the 2005-06 school year and that any such appeal shall be deemed timely filed, if filed within ninety (90) days of the rejection of this agreement by the Commissioner of Education.

6. By settling this matter, respondent acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the tenure charge, and on the penalty, if any, if the charge is sustained. Respondent further acknowledges that he understands and agrees to the terms of this agreement and is satisfied with the legal representation that he received in this matter.

7. The parties understand that as a result of personal circumstances unrelated to the tenure charge, upon expiration of his suspension with pay, respondent will not return to employment with the petitioner, and has so advised petitioner. The parties further agree that the appropriate penalty for respondent's acts or omissions is as set forth in paragraphs 4 and 6 above, and that respondent's determination not to return to employment after his suspension does not constitute part of the consideration for this agreement.

8. As per paragraph 7 above, the parties expressly agree that neither the tenure charge nor the settlement thereof shall be deemed to have resulted in respondent's loss of his tenured position.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

9. The parties agree that the facts do not warrant suspension or revocation of respondent's certificate, but are aware that the Commissioner may refer the matter to the State Board of Examiners to initiate proceedings to revoke or suspend respondent's certificate.

10. The parties agree that in the event that the Commissioner of Education does not accept any paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for hearings without prejudice to either parties' position.

11. The petitioner board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

X _____
Chet Galdo, President of the Board of
Education of Lakewood Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF Ocean :

I certify that on 7/29, 2005, Chet Galdo, President of the Board of Education of Lakewood Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

_____
Michael I. Inzelbuch, ESQ.
Attorney At Law
State of New Jersey

X _____
Edward W. Luick, Acting Superintendent
Lakewood Public Schools

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

STATE OF NEW JERSEY :
: SS
COUNTY OF Ocean :

I certify that on 7/29, 2005, Edward W. Luick, Acting Superintendent of Lakewood Public Schools, personally came before me and acknowledged under oath, to my satisfaction,

Michael I. Inzelbuch, ESQ.
Attorney At Law
State of New Jersey

that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

John Griso, Respondent

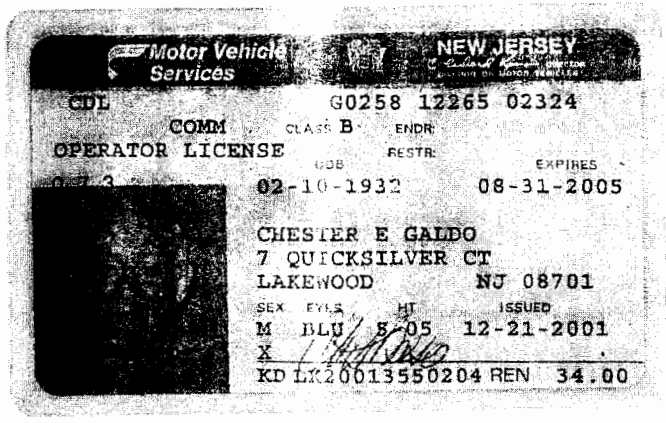
STATE OF NEW JERSEY :
: SS
COUNTY OF Atlantic :

I certify that on 7/28/05, 2005, John Griso, Respondent in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

ELEANOR CRANE
Notary Public of New Jersey
My Commission Expires 6/19/06

C. G.
E. L.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW


Motor Vehicle Services
NEW JERSEY
CDL G0258 12265 02324
COMM CLASS B ENDR
OPERATOR LICENSE RESTR
DOB EXPIRES
02-10-1932 08-31-2005
CHESTER E GALDO
7 QUICKSILVER CT
LAKEWOOD NJ 08701
SEX EYES HT ISSUED
M BLU 5-05 12-21-2001
X
KD LK20013550204 REN 34.00

MICHAEL I. INZELBUCH

Attorney-at-Law
Independence Community Bank Building
555 Madison Avenue
Lakewood, New Jersey 08701
Member NJ and NY Bars
732-905-0325
***Fax:* 732-886-0806**
E-Mail: michaelinz@aol.com

VIA OVERNIGHT MAIL

July 29, 2005

The Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building 9
P.O. Box 049
Mercerville, New Jersey 08625-0049

2005 AUG -1 A 11:14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: **In the Matter of the Tenure Hearing of John Griso,**
School District of the Township of Lakewood, Ocean County
OAL Docket No.: EDU-2996-05 / Agency Docket No.: 94-4/05

Dear Judge Stein:

As Your Honor is aware the undersigned represents the interests of the Lakewood Board of Education in connection with the above-referenced matter.

Enclosed for Your Honor's review and docketing, please find one (1) original fully executed STIPULATION OF SETTLEMENT AND AGREEMENT entered into between the parties herein.

Respectfully submitted,

MICHAEL I. INZELBUCH, ESQ.

MII/sn
Enclosure
cc: Richard A. Friedman, Esq. – 1-609-392-8933
Edward W. Luick, Superintendent
Kathryn D. Fuoto, Business Administrator
Board President Chet Galdo
Board Members (through Edward Luick)

LAKEWOOD BOARD OF EDUCATION
LAKEWOOD, NEW JERSEY

RESOLUTION

WHEREAS, the Lakewood Board of Education reviewed a proposed settlement agreement with employee John Griso and placed same on the agenda of Board of Education meeting of July 6, 2005 for formal action,

NOW, THEREFORE, BE IT RESOLVED, by a unanimous affirmative vote of the members present, the Lakewood Board of Education accepted and approved the settlement agreement pending approval from the Office of Administrative Law and the Commissioner of Education.

CERTIFICATION

I, Edward W. Luick, Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of Resolution adopted by the Board of Education of the Township of Lakewood at a public meeting held on the 6th Day of July 2005.

Edward W. Luick

EDWARD W. LUICK
BOARD SECRETARY

MOTION MR. GALDO SECONDED MR. SHAIN

AYES 6 NAYS 0 ABSENT 3 ABSTAINED 0

S0605

OAL DKT. NO. EDU 11298-03
AGENCY DKT. NO. 155-5/97

BETH EBLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11298-03
AGENCY DKT. NO. 155-5/97

BETH EBLER,

Petitioner,
v.

STATE OPERATED SCHOOL DISTRICK OF THE CITY OF NEWARK (ESSEX COUNTY),
Respondent.

John E. Croot, Jr., Esq. for petitioner
(Algeier, Tosti & Woodruff, P.C., attorneys)

Steven M. Fleisher, Esq., for respondent
(Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: July 28, 2005 Decided: August 5, 2005

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 21, 2003, for determination as a contested case.

The parties informed the court that settlement negotiations were being discussed, and several status conferences were completed. Prior to the scheduled August 26, 2005 telephone status conference, the attached Stipulation of Settlement was submitted. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Sandra Ann Robinson

8/5/05
DATE

SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

M. Kathleen Dunn/ch

8-10-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Attorneys for Respondent,
State-Operated School District
of the City of Newark

RECEIVED
STATE OPERATED SCHOOL DISTRICT
2005 JUL 28 A 11:18

BETH EBLER, Petitioner, v. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK (ESSEX COUNTY), Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOR-11298-2003N **STIPULATION OF SETTLEMENT**

WHEREAS, Petitioner filed a Verified Petition against the State-Operated School District of the City of Newark ("Newark" or "Respondent") on or about May 14, 1997 asserting claims under N.J.S.A. 18A:30-2.1; and

WHEREAS, Petitioner alleged that she was improperly charged 87 sick days for a period of time when she was out of work due to a valid, work-related injury; and

WHEREAS, Petitioner claims that she is entitled to have this sick leave restored; and

WHEREAS, Newark expressly denies any wrongdoing or liability and expressly denies violating petitioner's rights under N.J.S.A. 18A:30-2.1; and

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue litigation; and

WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. In complete and full satisfaction of her claims, Petitioner will receive credit and reimbursement for 35 sick days previously charged against her accrued leave, for a total payment of $11,749.85 by Newark to Petitioner. In consideration of her receipt of this payment, Petitioner expressly waives any and all claims she has or may have arising under N.J.S.A. 18A:30-2.1 through the date of this Agreement. An IRS form 1099 will be issued by Newark to Petitioner in connection with this payment. Petitioner agrees to pay any and all taxes found to be owed from payments made pursuant to this Agreement and to indemnify and hold Newark harmless from any and all claims, assessments, demands, penalties and interest owed, or found to be owed, as a result of any payment made pursuant to this Agreement.

2. Petitioner acknowledges that she has entered into this Agreement voluntarily and entirely of her own free will and that she was not subject to any duress and/or coercion. Petitioner further acknowledges that she has been advised and represented by counsel in this matter.

3. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

For the State-Operated School District
Of the City of Newark

By: _____
MARION BOLDEN

Dated: April ___, 2005

By: _____
BETH EBLER

Dated: April 23, 2005

#897177 v1

311-05

PETER A. KEANEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, employed as Supervisor of Maintenance by the Board from 1994 until a reorganization in 2003, claimed tenure entitlement to employment in a supervisory capacity and in a trade position with Bloomfield Township Schools.

The ALJ found, *inter alia*, that: petitioner had attained tenure as a janitorial employee with the Board and never knowingly waived tenure rights when he assumed the position of Supervisor of Maintenance; the Board selected other candidates for position vacancies after the reorganization for legitimate and non-retaliatory reasons; petitioner attained tenure in the general category of janitorial employee, not in any specific assignment within that broad grouping of job titles, and therefore petitioner did not earn tenure rights to a supervisory position. The ALJ ordered the Board to immediately reinstate petitioner to a trade position or other appropriate assignment within the scope of a janitorial employee, along with appropriate back pay and benefits, subject to mitigation.

Upon a thorough and independent review of the record in this matter, the Commissioner adopts the Initial Decision of the OAL as the final decision in this matter, with a clarification as to the nature of the petitioner's reinstatement.

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 31, 2005

OAL DKT. NO. EDU 5881-03
AGENCY DKT. NO. 128-4/03

PETER A. KEANEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioner's reply thereto[1] were filed in accordance with the requirements of *N.J.A.C.* 1.1-18.4 and these submissions were considered by the Commissioner in making his determination herein.

The Board's exceptions essentially recast and reiterate its arguments advanced below, which the Commissioner determines -- in all material part -- were fully addressed and considered in the Initial Decision and warrant no further discussion here.

Upon his full and independent review of the record in this matter, which included transcripts of only one of the three days of hearing in this case,[2] the Commissioner adopts the Initial Decision of the Administrative Law Judge (ALJ) for the reasons clearly articulated

[1] It is, however, noted that petitioner's timely reply to the Board's exceptions, filed on August 15, 2005, also included a section identified as petitioner's exceptions to the Initial Decision. This portion of petitioner's submission, purporting to be primary exceptions filed in response to an Initial Decision mailed to the parties on July 29, 2005, is untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, was not considered. By letter dated August 16, 2005, the Board objected to petitioner's submission of untimely exceptions but, notwithstanding its urging that these be rejected, filed replies thereto. In light of the discounting of petitioner's primary exceptions, the Board's reply was similarly not considered herein.

[2] The record indicates that hearing in this matter was conducted on May 14, October 6 and 14, 2004. Transcripts of the May 14, 2004 hearing date are contained in the record.

therein. In so determining, the Commissioner concludes that the ALJ provided an accurate and comprehensive presentation of existing law in reaching each of his conclusions, with which the Commissioner fully concurs.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to reinstate petitioner immediately to an appropriate vacancy or to the position of a non-tenured individual within the scope of a janitorial employee. The Board is further directed to reimburse petitioner back pay and emoluments as may be appropriate (see footnote 1, Initial Decision at 2), offsetting from this award any money petitioner received from alternative employment and/or unemployment compensation during the period of his illegal termination.[3]

IT IS SO ORDERED.[4]

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

[3] Although the Board is entitled to offset petitioner's monetary award by any unemployment compensation he may have received, it is obligated, pursuant to *N.J.S.A.* 43:21-5(b), to reimburse the Department of Labor any monies so offset.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
OAL Dkt. No. EDU 5881-03
AGENCY Dkt. No. 128-4/03

PETER A. KEANEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: December 2, 2004 Decided: July 28, 2005

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a "supervisor of maintenance" from the elimination of his position as the result of a restructuring of custodial and maintenance services in a public school district. Petitioner Peter A. Keaney ("Keaney") alleges that the Bloomfield Board of Education ("Board") violated his tenure rights by failing to offer him the newly

created supervisory position as manager of facilities. In the alternative, Keaney contends that he is entitled to reinstatement to his former custodial position.

Basically, the pleadings raise four separate issues: First, whether Keaney acquired statutory tenure as a janitorial employee under *N.J.S.A.* 18A:17-3 because he was hired by the Board for an indefinite as opposed to a fixed term. Second, whether he waived any tenure rights as a custodian by his acceptance of a promotion to a supervisory position. Third, whether he acquired tenure in a supervisory position by virtue of his service under a supervisory title. Fourth, whether the Board's failure to offer him a trade position constitutes retaliation in violation of the New Jersey Conscientious Employee Protection Act, *N.J.S.A* 34:19-1 to -8.

For the reasons that follow, Keaney has a tenure right to a janitorial position, but did not acquire any tenure to a supervisory position.

Procedural History

On April 17, 2003, Keaney filed a verified petition with the Commissioner of Education ("Commissioner") seeking reinstatement and back pay for violation of his tenure rights.[1] Respondent Board filed its answer on June 11, 2003 and its amended answer on June 17, 2003. Subsequently, on July 3, 2003, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Thereafter, on August 22, 2003, Keaney filed an amended petition, and the Board filed its second amended answer on September 2, 2003.[2] The OAL held three days of hearing ending on October 15, 2004. Both parties filed post-hearing submissions on December 2, 2004.

---

[1] Keaney's claim for back pay is largely mooted by the stipulation that he obtained employment with another school district earning more money than he was making while employed by Bloomfield.

[2] On May 7, 2004, petitioner served written notice of the pendency of this matter on various current Board employees over whom he claims greater tenure rights. *N.J.A.C.* 1:1-16. None of them exercised their opportunity to move to intervene as parties or otherwise participate in this case.

Findings of Fact

General Background Information

All of the general background information is undisputed. Bloomfield Board of Education organizes its building support staff into two subdivisions: custodians (who clean buildings and do routine janitorial tasks) and maintenance/trade workers (who perform more skilled types of labor). Trade workers are further divided into various specialized categories, namely carpenters, electricians, plumbers and painters. No particular license is required to hold a trade worker position (e.g., electricians do not have to be licensed electricians; plumbers do not have to be licensed plumbers.)

Keaney began working for the district in April 1987 in a temporary "trade position." After serving a three-month probationary period, he was hired full-time at the start of the school fiscal year in July 1987. He was assigned primarily to do minor carpentry work such as repairing or installing shelves, radiator covers, bulletin boards and wooden flooring. There is evidence that a trade worker also helped in other areas if his services were needed. In February 1999, Keaney was promoted to supervisor of maintenance, a managerial position involving supervision of other trade workers.

Due to reorganization in July 2003, the Board abolished the position of supervisor of maintenance and, in its place, created the new position of manager of facilities. Although petitioner interviewed for the new title, he was not offered that job. Petitioner also interviewed for a vacant "trade position," but he was not hired because the district needed a plumber more than a carpenter. The Board did not offer any job to petitioner. Consequently, he brought suit claiming tenure both in a supervisory capacity and in a trade position.

Employment of Keaney in a Trade Work Position

When Keaney obtained his initial appointment for the 1987-88 fiscal year, the parties entered into a written employment contract specifying that his employment would run "from the first day of July, 1987 to the 30th day of June, 1988." Similarly, for the following year (1988-89), the written contract signed by the parties stated that Keaney's employment would continue "from the first day of July, 1988 to the 30th day of June 1989.

Starting in 1989-90, the Board stopped issuing formal written contracts limiting the length of Keaney's employment. Instead, the Board began using a different document, which petitioner calls a "short-form contract," but which the Board more accurately describes as a "salary notification." Each year from 1989-90 through 1992-93, the Board presented Keaney with such notice fixing his annual salary for the current school year. Unlike the earlier employment contracts, the salary notification did not contain language limiting the term of Keaney's employment. While the employment contracts include a standard clause allowing either party to terminate their relationship upon thirty days written notice to the other, the salary notifications lack a similar provision (giving rise to the reasonable inference that the Board cannot unilaterally terminate the relationship, except for just cause or as the result of a reduction in force.)

Moreover, the Board's own resolutions provide additional evidence of its intention to grant Keaney tenure as a janitorial employee from at least 1990-91 onward.[3] Board resolutions approving the master payroll for the 1987-1988 and 1988-89 years have an asterisk beside Keaney's name and, in an explanatory note at the bottom, the asterisk is defined as meaning "non-tenure." Former assistant board secretary George Sutton, who served the Bloomfield public school district for over forty

[3] The Board resolution approving the master payroll for 1989-90 is missing from the record.

years before retiring in June 1991, testified that the existence of an asterisk next to Keaney's name meant that he was not considered a tenured employee "at that point." Sutton explained that the Board subsequently utilized the device "(NT)" in place of an asterisk to designate which of its employees were "non-tenured." In his capacity as assistant board secretary, Sutton's duties included attending all board meetings and preparing board minutes

Significantly, there is no asterisk or "(NT)" alongside Keaney's name in the approved master payroll for 1990-91. Several custodial employees listed on the same payroll have the notation "(NT)" typed immediately after their names. George Sutton, who was still assistant board secretary at that time, interpreted the resolution as signifying that Keaney had acquired tenure, whereas the gentlemen with "(NT)" written next to their names had not. None of the Board's witnesses could persuasively rebut Sutton's first-hand knowledge of Board practice during the relevant time period. Heather Carr, Bloomfield's current director of personnel, only came to the district in May 2000 and has no personal knowledge of Board operations during the early years of Keaney's employment.

Notwithstanding the unambiguous language of its own contracts and resolutions, the Board sought to overcome petitioner's proofs by reliance on its tenure policy, adopted on July 19, 1982 and in effect on the date of Keaney's initial employment. Although the Board emphasizes that the policy provides that full-time custodial and maintenance employees "shall be employed on an annual fixed term basis," the full text of the policy actually provides a mechanism for granting tenure to janitorial employees. Entitled "Tenure of Certain Noncertificated Employees," the policy in context reads as follows:

> It is the policy of the Board that full-time custodial/maintenance employees shall be employed on an annual fixed term basis. Renewal of annual contracts is a prerogative of the Board. After obtaining a fireman's license during the first full year of contractual employment and after completion of three consecutive full successful years contract service in this district, these employees will be placed in tenured status by Board

> resolution and the employee advised of the change of status. Time served as a probationary employee shall not be applied to the three year requirement.

Keaney's circumstances admittedly do not satisfy the literal terms of this policy. He did, of course, meet the basic requirement of completion of three consecutive years of successful employment in the district. However, he did not possess a fireman's or boiler operator license during his first year of employment, although he ultimately obtained one in May 1991, long before his involuntary termination more than a decade later.

Nonetheless, the Board has not hesitated to disregard its official tenure policy when it suits its convenience to do so. On March 9, 1992, the Board adopted a blanket policy that, "Persons employed as janitors, custodian, and maintenance personnel, including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions." Thereafter, on September 9, 1997, the Board adopted a resolution authorizing the grant of tenure to twenty-three named custodial staff members "who had been employed by the district for more than three years prior to September 7, 1996."[4] Thus, the Board had no difficulty making personnel decisions in violation of its supposed policy. Keaney's name was not included on the list, however, because, by that time, he had already been promoted to a supervisory title and the Board did not consider him to be eligible for tenure.

I **FIND** that that, as of the 1990-91 fiscal year, Keaney was employed as a carpenter for an indefinite term. Regardless of any generalized policy statement promulgated by the predecessor to the current Board, individuals who meet the statutory criteria automatically gain tenure by operation of law. Here the Board conferred tenure on Keaney when it stopped issuing employment contracts of limited

[4] Heather Carr pointed out that an employee identified as T. Leo, who had been employed as a carpenter longer than Keaney, had no asterisk or (NT) next to his name on the 91-92 and 92-93 master payrolls, yet was included in the list of custodial and maintenance employees granted tenure by Board resolution on March 9, 2002. Whether or not T. Leo already had attained tenure and whether the 2002 resolution should be regarded as superfluous with respect to him depends on examination of his personnel records and is beyond the scope of this proceeding.

duration and began using annual salary notifications without a fixed term of employment. It was unnecessary for the Board to adopt a resolution awarding tenure to Keaney, since the existence of such status is a question of statutory application.

Promotion to Supervisor of Maintenance

At a meeting on February 8, 1994, the Board formally approved Keaney's appointment as supervisor of maintenance at a prorated salary for the remainder of 1994-95. Insofar as the record reflects, the Board never put Keaney on notice that it considered his acceptance of this promotion to be a waiver of whatever tenure rights he may have previously acquired. Indeed, a cheerful letter from the then Superintendent of Schools, Dr. Edward Glickman, advising Keaney of the Board's action simply says "Congratulations and good luck in your new position." [5] Keaney continued in that position until his termination in July 2003.

Neither side produced a job description for supervisor of maintenance, so the record does not contain a precise specification of the duties of that position. During his testimony, Keaney described his duties as similar to those he had previously performed during his six years in a trade position. However, Charles Collins, the district's newly-appointed director of facilities in February 2003, maintained that Keaney's supervisory function involved delegating tasks to others and reviewing the work on completion, but that Keaney no longer did the actual work himself. According to Collins, the two positions are distinct and there is no overlap in their duties.

I **FIND** that Keaney never knowingly and intelligently waived his tenure as a janitorial employee when he assumed the title of supervisor of maintenance. His duties remained in the field of maintenance and skilled trades, although now he had greater

[5] Once Keaney had become a supervisor, the Board reverted to its earlier custom of issuing employment contracts for one-year terms from 1995-1996 through 2000-2001. This change arguably might have served as a warning that Keaney would not be earning tenure as a supervisor, but would not necessarily have alerted him that he was giving up previously vested tenure rights.

responsibility to supervise the work done by others performing carpentry, electrical, plumbing and painting assignments.

Reorganization of the Custodial and Maintenance Department

Prior to the reorganization in July 2003, the organizational hierarchy of the district's custodial and maintenance department included a director of facilities at the top and various skilled maintenance/trade workers and custodians at the bottom. At the middle management level, a supervisor of maintenance and two foremen were in charge of the maintenance/trade workers. As a result of the reorganization, the Board inserted a new middle management position, known as manager of custodians, between the director of facilities and the custodians. In addition, the Board eliminated Keaney's former position, supervisor of maintenance, and the two foremen and replaced them with a single intermediary position known as manager of maintenance.

Ironically, the Board had originally offered Keaney the top position of director of facilities (the spot presently occupied by Charles Collins), but Keaney declined that offer because he felt that the salary was not high enough. Instead, Keaney applied for the new position of manager of maintenance, which he regarded as a lateral transfer from his prior job as supervisor of maintenance.[6] By letter dated March 17, 2003, the Board informed Keaney that "another candidate's name will be taken to the Board for approval." Ultimately, the Board appointed Ralph Kries to the manager of maintenance position. Mr. Kries, a plumber, had been a maintenance worker in the district for more than thirty years. Director Collins, who served as a member of the interviewing committee, explained that Kries was the preferred candidate because he had displayed leadership in organizing the task of snow removal. Moreover, Collins noted that Keaney was opposed to the reorganization plan and did not seem to be the best choice to implement the Board's new direction.

[6] A posting for this opening, dated July 1, 2003, lists the new job title as "manager of facilities-maintenance/trades."

Despite his disappointment that he did not get the managerial position he sought, Keaney was relatively certain that he could continue his employment in the district. In early April 2003, he applied for an immediate vacancy in a trade position. Keaney was interviewed for this position by a committee, which included Charles Collins and Heather Carr, and purportedly received assurances that he would be approved at the next Board meeting. Both Collins and Carr denied that any representations were made to him about his likelihood of obtaining the position. In any event, the Board never offered a trade position to Keaney. Collins explained that the district needed a plumber and that Keaney's area of expertise was as a carpenter. Joseph Follett, the candidate appointed to the position, is an experienced plumber who had worked for a plumbing company in the community.

Before learning that he would not be offered a trade position, Keaney filed his appeal from the Board's refusal to recognize his tenure as a manager of maintenance. When the Board also declined to offer him a trade position, Keaney amended his petition to allege retaliation against him for bringing his appeal.

I **FIND** that the Board selected someone else to serve as manager of maintenance because it regarded that candidate as better qualified for the job. Likewise, the Board preferred another candidate for the trade position because it wanted an employee with experience in plumbing. Members of the interviewing committee could make recommendations, but the decision on whom to appoint belonged to the Board. Regardless of what representations were made during the interview, the Board had a valid non-retaliatory reason for preferring a plumber over a carpenter.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Keaney has tenure in the position of janitorial employee, but not as a supervisor.

Custodial employees acquire tenure in one of two ways, either by statute or through collective negotiations. *Wright v. Board of Education*, 99 *N.J.* 112 (1985). *N.J.S.A.* 18A:17-3 provides, in pertinent 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[.]

This statute confers immediate tenure on any janitorial employee hired for an indefinite term. Keaney attained instant tenure as a janitorial employee when the Board stopped issuing annual contracts and began sending him salary notices. It is well established that salary notices, standing alone, do not establish yearly reappointments for definite terms. To the contrary, salary notices are commonly recognized as indicia of the tenure status of an employee. *McCullough v. Board of Educ. of Trenton,* 2002 WL 32590883 (N.J. Adm.) (Comm'r Jan. 15, 2002), *appeal dismissed*, 2002 WL 32590884 (N.J. Adm.) (St. Bd. April 3, 2002). *Gilliam v. Board of Educ. of Toms River*, 1974 *S.L.D.* 54 (Comm'r May 14, 1974), *modified on other grounds*, 1975 *S.L.D.* 302 (Comm'4 May 1, 1975). As elaborated in *Smith v. Bd. of Ed. of the Twp. of East Brunswick*, OAL Dkt. No. EDU 5654-81 (June 13, 1983), *adopted* Comm'r of Ed. (August 15, 1983), *aff'd* State Board of Education (April 4, 1984):

> Such salary notices or salary agreements are generally reserved for those employees who have acquired a tenure status in the employ of a board of education. Once an employee has acquired tenure, as for example, a teaching staff member, pursuant to *N.J.S.A.* 18A:28-5, the board's offer of a contract to the teacher becomes superfluous in regard to the term of employment. The term is indefinite and continuous; therefore, the only subject matter to be contracted for is the employee's annual salary and emoluments. . . [T]he need for a contract between a board of

> education and a tenured employee, setting forth all the terms and conditions of employment is no longer necessary and the board resorts to the issuance of a salary notice or salary agreement, pursuant to the negotiated agreement to the tenured employee. (at 13)

Courts broadly construe the term "janitor" in this context to extend to all school employees generally engaged in cleaning, upkeep or repair functions. In light of the principle of liberal construction of tenure laws, the Appellate Division has declared that "the Legislature used the terms janitor, custodian, etc. in a generic sense with intent to include all janitorial and custodial employees." Rejecting the argument that tenure protection is limited to the positions expressly enumerated by the predecessor statute, the Court extended its reach to various positions of a similar nature, including janitorial supervisors, utility men and groundskeepers. *Barnes v. Board of Education*, 85 *N.J. Super.* 42, 45 (App. Div. 1964), *certif. den.* 43 *N.J.* 450 (1964). Similarly, the Commissioner has uniformly treated the current janitorial tenure statute as affording tenure rights to a wide range of janitorial-type job titles, such as maintenance man. *Lauffer v. Board of Educ. of Leonia*, 1984 *S.L.D.* 1290. *Accord*, *Atlantic City Educ. Ass'n v. Board of Educ. of Atlantic City,* EDU 10335-98 (Aug. 19, 1999), *adopted (Comm'r Oct. 7, 1999), aff'd (*St. Bd. March 1, 2000) (head custodian); *Reinersten v. Board of Educ. of East Brunswick*, EDU 10328-97 (Comm'r July 8, 1998) ("head custodian"); .*Brunner v. Board of Educ. of Camden*, 1960 *S.L.D.* 155 ("chief janitor"). Accordingly, Keaney was eligible for tenure in a janitorial or custodial position.

Nor can Keaney be deemed to have relinquished his tenure rights by accepting the Board's invitation to assume greater responsibility in his area of tenure. Waiver of tenure protection requires that the tenure employee voluntarily relinquish a known right. *O'Toole v. Forestal*, 211 *N.J. Super.* 394 (App. Div. 1986). The Board has not presented any proofs tending to show that Keaney was aware that he was giving up vested rights by becoming a supervisor in the field in which he had been working all along. Rather, his situation is analogous to that of the tenured clerk who was entitled to resume her clerical duties after her interim appointment as a clerk-attendance officer had ended. *Quinlan v. Board of Education*, 73 *N.J. Super.* 40 (App. Div. 1962).

Indeed, the Commissioner has expressly rejected the argument that a janitorial employee relinquishes his existing tenure by accepting a higher job title as chief janitor. Referring to parallel reasoning with respect to teacher's tenure, the Commissioner stated:

> Although tenure provisions for teachers and for janitors may vary greatly in several basic respects, in this regard they are similar. Thus, a teacher who is called a supervisor, co-ordinator, director, head teacher, vice-principal, or other title, while not acquiring tenure in these named positions, continues to hold tenure as a teacher. *Lascari v. Lodi Board of Education.*, 36 *N.J. Super.* 426 [App Div. 1955]. Also a principal may be given the title of supervising principal, administrative principal, etc. without losing his tenure protection as a principal. *Viemeister v. Prospect Park Board of Education*, 5 *N.J. Super.* 215. {App. Div. 1949]. Similarly a janitor may be named chief janitor without surrendering his tenure as a janitor.
>
> *Brunner,* at 157

N.J.S.A. 18A:17-3 conveys tenure status to the janitorial category or class of employment and not to any specific position. Accordingly, in *Reinersten*, *supra*, the Commissioner held that a custodial employee acquired tenure in the general category of janitorial employee, but not in the particular job title of "head custodian." "The title 'head custodian' merely denotes a special assignment within the general classification of janitorial services." *Reinersten*, slip op. at 4. So too, in *Brunner, supra,* the Commissioner determined that "the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute." 1960 *S.L.D.* at 157. *See also, Lauffer*, *supra*, wherein a person employed as a maintenance man for an indefinite period of time achieved tenure as a janitorial employee, although tenure status did not attach to his specific assignment as a maintenance worker. Under this controlling authority, Keaney attained tenure in the general category of janitorial employee, not in any specific assignment within that broad grouping of job titles. Therefore, he did not earn tenure status to a supervisory position.

Last, Keaney claims that the Board's failure to offer him a vacant trade position was in retaliation for filing his appeal to the Commissioner and constitutes a violation of the Conscientious Employee's Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to -8. The Legislature enacted CEPA "to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." *Dzwonar v. McDevitt*, 177 *N.J.* 451, 461 (2003). Toward that end, *N.J.S.A.* 34:19-3(c) prohibits any employer from retaliating against an employee who objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation, is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare.

Routine employment decisions do not automatically become CEPA causes of action simply because the parties happen to disagree over their respective legal rights. Here the triggering event leading to the filing of petitioner's original appeal to the Commissioner was the Board's belief that Keaney had not acquired tenure status as a supervisor. As it turned out, the Board was correct on that issue (although that would not be dispositive so long as Keaney had an objectively reasonable belief that improper conduct occurred.) One important limiting factor underlying CEPA, however, is that the offensive activity complained of must pose some threat of public harm, "not merely private harm or harm only to the aggrieved employee." *Mehlman v. Mobil Oil Corporation*, 153 *N.J.* 163, 199 (1998). Thus, in *Cosgrove v. Cranford Bd. of Educ.*, 356 *N.J. Super.* 518 (App. Div. 2003), *abrogated for other reasons, Dzwonar v. McDevitt*, 117 *N.J.* 451 (2003), the Appellate Division held that the filing of a grievance over distribution of overtime concerned a "personal objection" that is not cognizable under CEPA. Similarly, in *Alexander v. Kay Finlay Jewelers, Inc.*, 208 *N.J. Super.* 503 (App. Div. 1986), *certif. den.* 104 N.J. 466 (1986), the Appellate Division held that institution of legal proceedings concerning salary had "no significance beyond the private interests of plaintiff and defendant" and could not support a valid CEPA claim. Keaney is unable to point to any wrong to which he objected that rises above the level of a private dispute.

More importantly, Keaney has not shown that the Board's refusal to offer him the trade position of plumber was in retaliation for his bringing an appeal regarding the supervisory position. While the current law does not distinguish between various job assignments in trade positions, it is understandable that the Board would prefer to hire an experienced plumber to do plumbing work. Even though the Board's action was in violation of Keaney's tenure status, there is no good reason to believe that the Board sought to punish Keaney for asserting his legal rights.

Order

It is **ORDERED** that the Board immediately reinstate Keaney to a trade position or other appropriate assignment within the scope of a janitorial employee.

And it is further **ORDERED** that the Board restore full back pay and other benefits to Keaney, subject to mitigation.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 2005
DATE

KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 28, 2005
DATE

Mailed to P[illegible]
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 29 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Peter A. Keaney, appellant

2. George Sutton, former assistant board secretary and director of business operations, Bloomfield public school district

3. Charles Michael Collins, director of facilities, Bloomfield public school district

4. Heather Carr, director of personnel, Bloomfield public school district

5. Michael Dederian, school business administrator and board secretary, Bloomfield public school district

6. Thomas Dowd, Superintendent of Schools, Bloomfield public school district

List of Exhibits

No.	Description
P-1	Copy of employment contract for 1987-88 school year.
P-2	Copy of revised employment contract for the 1987-1988 school year.
P-3	Copy of employment contract for the 1988-1989 school year
P-4	Copy of salary notification for the 1989-1990 school year

P-5 Copy of salary notification for the 1990-1991 school year

P-6 Copy of salary notification for the 1991-1992 school year

P-7 Copy of salary notification for the 1992-1993 school year

P-8 Copy of letter to Peter Keaney from Edward J. Glickmin, Ed.D., dated 8, 1994

P-9 Copy of employment contract for the 1995-1996 school year

P-10 Copy of employment contract for the 1996-1997 school year

P-11 Copy of employment contract for the 1997-1998 school year

P-12 Copy of employment contract for the 1998-1999 school year

P-13 Copy of employment contract for the 1999-2000 school year

P-14 Copy of employment contract for the 2000-2001 school year

P-15 Copy of salary notification for the 2001-2002 school year

P-16 Copy of salary notification for the 2002-2003 school year

P-17 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1987 to June 30, 1989

P-18 Copy of Article 19 extracted from the agreement between the Bloomfield Board of Education and Bloomfield Public School Service Association for the period July 1, 1989 to June 30, 1991

P-19 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1991 to June 30, 1993

P-20 Copy of excerpt from the agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period from July 1, 1993 to June 30, 1995

P-21 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1995 to June 30, 1998

P-22 Copy of agreement between Bloomfield Board of Education and Bloomfield Public School Service Association for the period July 1, 1998 to June 30, 2001

P-23 Copy of resume of Peter A. Keaney, undated

P-24 Copy of job posting for the position of manager of facilities-maintenance/trade, with the response date of February 12, 2003

P-25 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated February 12 and 13, 2003

P-26 Copy of letter to Peter Keaney from Heather Carr, dated March 17, 2003

P-27 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated March 27 and March 31, 2003

P-28 Copy of job posting for the position of trade position, with a response date of April 16, 2003

P-29 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated April 9, 2003

P-30 Copy of letter to Peter Keaney from Heather Carr, dated April 3, 2003

P-31 Id. Copy of spreadsheet of important dates prepared by Peter Keaney on May 13, 2004

P-32 Id. Copy of resolution of the Bloomfield Board of Education, with an effective date of April 20, 1987

P-33 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1987-1988

P-34 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1988-1989

P-35 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1990-1991

P-36 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1992-1993

P-37 Diagram of positions before and after reorganization, prepared at the hearing on October 15, 2004

P-38 Id. Copy of interview form for director of facilities, dated November 2002

P-39 Copy of letter to Daminen Roszkowski from Heather Carr, dated April 3, 2003

P-40 Copy of letter to Peter Keaney from

R-1 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1985 to June 30, 1987

R-2 Copy of black seal boiler operator license from the New Jersey Department of Labor, issued on May 24, 1991

R-3 Copy of letter to Peter Keaney from Robert E. Schiller, Ed.D., dated April 30, 1987

R-4 Copy of letter to Peter A. Keaney from George L. Sutton, dated April 13, 1987

R-5 Copy of notification of salary for the 1997-1998 school year, dated May 14, 1997

R-6 Copy of letter to Gerard Nazzaretto, dated January 20, 1998

R-7 Copy of letter to Peter Keaney from Gerry Nazzaretto, dated January 22, 1998

R-8 Copy of minutes of a regular meeting of the Bloomfield Board of Education held on September 9, 1997

R-9 Copy of letter to Peter Keaney from Thomas J. Dowd, dated September 24, 1999

R-10 Copy of letter to Peter Keaney from heather Carr, dated June 28, 2000

R-11 Reserved

R-12 Reserved

R-13 Copy of minutes of the Bloomfield Board of Education, dated July 19, 1982

(a) Copy of excerpt from Bloomfield Board of Education policy manual, revised September 7, 1996

R-14 Copy of interview form for manager of custodians, dated February 2003

R-15 Copy of interview form for manager of maintenance, dated March 2003

R-16 Copy of interview form for trade position, dated April 2003

307-05

OAL DKT. NO. EDU 8382-04
AGENCY DKT. NO. 318-9/04

IN THE MATTER OF THE TENURE	:	
HEARING OF JULIETTE KERSAINT,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF CAMDEN, CAMDEN COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

In light of the *allegations* of conduct unbecoming, however, wherein the Board asserts, *inter alia*, that petitioner improperly disposed of medical waste, violated standard, required nursing procedures in a public school district, improperly secured medications, improperly diagnosed and provided inadequate medical treatment of students and employees, all of which petitioner denies, this matter is being referred to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.6(a)1, which authorizes the Commissioner to refer a tenure matter to the State Board of Examiners for possible action against a teacher's certificate in instances where

tenure proceedings are concluded prior to adjudication because the charged party has resigned or retired.

Accordingly, a copy of this decision shall be transmitted to the State Board of Examiners for its consideration.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/30/05

Date of Mailing: 8/30/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8382-04
AGENCY DKT. NO. 318-9/04

IN THE MATTER OF THE TENURE HEARING OF JULIETTE KERSAINT, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

Jennifer Mazaway, Esq., for Board of Education of the City of Camden (Genova, Burns & Vernola, attorneys)

Arnold M. Mellk, Esq., for Juliette Kersaint (Wills, O'Neill & Mellk, attorneys)

Record Closed: August 11, 2005 Decided: August 12, 2005

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 5, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/12/05
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

8/16/05
DATE

DEPARTMENT OF EDUCATION

AUG 16 2005

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

AGREEMENT

THIS AGREEMENT is made this _____day of July, 2005 by and between the Camden City Board of Education ("Board"), with principal offices at 201 N. Front Street, Camden, New Jersey 08102, and Juliette Kersaint ("Employee"), residing at 48 Petunia Lane, Willingboro, New Jersey 08046.

WITNESSETH

WHEREAS, Employee has been employed in the Camden City School District for more than 10 years; and

WHEREAS, from the commencement of her employment until the winter of 2003, Employee had a competent record of service with the Board; and

WHEREAS, Employee was served with thirteen tenure charges of unbecoming conduct, and denied the allegations therein; and

WHEREAS, the charges which are currently pending against Employee do not arise out of any conduct which is alleged to be criminal, but rather, from allegations of negligent performance, and from certain personal differences with co-workers; and

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

WHEREAS, The Board is aware of the risks involved in litigating this matter to conclusion, in that the Employee may not ultimately be dismissed from her position; and

WHEREAS, it is believed to be in the best interest of the community to resolve the outstanding issues without the necessary expense and time constraints placed on district employees to testify at hearing; and

WHEREAS, it is the position of the Board—accepted by Employee—that this Agreement appropriately effectuates the Board's interest in discontinuing her employment, while not unreasonably compensating her for the loss of her tenure in the absence of an administrative proceeding; and

WHEREAS, both parties, represented by counsel, enter into this Agreement with a full understanding of their rights, and Employee 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, pursuant to N.J.A.C. § 6A:3-5.6, and both parties enter into this Agreement free of coercion, and without reservation;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly set forth below, it is hereby **AGREED** that the tenure charges against Employee shall

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

be **WITHDRAWN** on the following conditions:

1. Upon its approval by the Commissioner of Education, pursuant to N.J.A.C. 6A:3-5.6, this Agreement shall constitute Employee's irrevocable resignation of her employment with the Board. Employee will sign or otherwise authorize any statement of said resignation as the Board may require, provided that any such statement be limited solely to resignation, without other explanation or admission, within ten (10) days of said approval.

2. The Board will pay Employee a lump sum of twenty thousand ($20,000.00) dollars within thirty (30) days of this Agreement's approval by the Commissioner of Education.

3. Employee agrees to waive any and all claims she has or may have against the Board with regard to the subject matter of this Agreement, including any claims for counsel fees or other monetary relief.

4. The Board agrees to waive any and all claims it may have against Employee with regard to the subject matter of this Agreement, including any claims for counsel fees or other monetary relief.

5. The Board will not oppose, obstruct, or hinder Employee's application for a disability retirement.

This Agreement constitutes the sole, entire, and integrated agreement between the Employee and Board, and may be modified only in writing. All terms of this Agreement are deemed material. This Agreement

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

is contingent upon approval by the Commissioner of Education, and shall be entirely void if such is not granted.

Camden City Board of Education

Witness:

By: _____

_____

Date: 8/8/05

_____
Juliette Kersaint

State of New Jersey:

SS:

County of Mercer:

BE IT REMEMBERED that on this 25th day of July, 2005, before me, the subscriber, a Notary Public of the State of New Jersey, personally appeared **JULIETTE KERSAINT,** who I am satisfied is the individual mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon she knowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

_____

JANET HOLMLUND
A Notary Public of New Jersey
My Commission Expires October 29, 2006

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

508-05

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

MARY SAVINO, RAHWAY BOARD : DECISION

OF EDUCATION, UNION COUNTY. :

SYNOPSIS

The Board sought to suspend the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of resignation from her position as a teacher in the Rahway Middle School. The Board submitted that there were no material facts in dispute, and that the Board was entitled to summary judgment pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Respondent contends that she had mitigating circumstances and was compelled to resign due to her unfitness to teach middle school.

The ALJ found, *inter alia,* that: respondent is guilty of unprofessional conduct for failure to provide 60 days written notice of resignation; respondent was stressed and fearful regarding her reassignment to teach at the middle school rather than an elementary school; respondent had no motive of self-interest in her action; and respondent's honesty regarding her professed unfitness to teach middle school should be considered a mitigating factor in determining the appropriate penalty in this case. The ALJ concluded that a suspension of respondent's teaching certificate for one year is unnecessarily harsh punishment, and recommended a penalty of 60 days suspension of respondent's teaching certificate.

Upon a thorough and independent review, the Commissioner agrees that the respondent is guilty of unprofessional conduct, but disagrees with the ALJ's assessment of respondent's behavior, finding that there is nothing in the record to suggest any mitigating factors in this matter; he concludes that respondent's desire for early release from her professional obligations was based on personal motives and convenience. Respondent is therefore deemed guilty of unprofessional conduct and – consistent with the penalty assessed in similar matters – her teaching certificate is hereby suspended for a period of one year commencing upon the date of this decision. A copy of this decision will be forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 30, 2005

OAL DKT. NO. EDU 11688-04
AGENCY DKT. NO. 360-10/04

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
MARY SAVINO, RAHWAY BOARD	:	DECISION
OF EDUCATION, UNION COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

As noted by the Administrative Law Judge (ALJ), it is undisputed that respondent entered into an employment contract with the Rahway Board of Education (Board) on or about May 11, 2004 to serve as a teacher in the Rahway School District from September 1, 2004 to June 30, 2005. The contract signed by the parties provided that either party could terminate the contract with 60 days written notice. Notwithstanding this notice requirement, respondent did not report to work on September 1, 2004, but, instead, submitted her resignation to the Board via e-mail on September 2, 2004, one day after the start of the 2004-2005 school year, with an effective date of September 7, 2004.

N.J.S.A. 18A:28-8 establishes the procedure by which a teaching staff member must provide notice of resignation to a board of education and authorizes the Commissioner to suspend a teacher's certificate if that teacher fails to comply, as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve or release on shorter notice, and if he fails to give such notice, he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

Additionally, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for ceasing to perform her duties before the expiration of her employment obligations. *N.J.S.A.* 18A:26-10 provides that:

> Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

In the instant matter it is undisputed that respondent resigned without proper notice to the Board. Additionally, respondent acknowledges that Superintendent Petrino, in a telephone conversation on September 3, 2004, reminded her of the 60-day notice requirement and explained that failure to honor the 60-day notice requirement could place her certification to teach in the State of New Jersey in jeopardy. Accordingly, the Commissioner concurs with the ALJ's determination that respondent is guilty of unprofessional conduct for her failure to provide the 60-day notice required by her contract, *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

The Commissioner, however, is unable to conclude that there are factors which would mitigate the imposition of a one-year suspension of respondent's teaching certificate and, thus, rejects the ALJ's conclusion that a lesser penalty is appropriate in this instance. In so concluding, the Commissioner disagrees that petitioner's failure to give the required notice is mitigated by factors similar to those applied in *Mooney, supra, and Rogers, supra.* The situation herein is substantially different. Unlike *Mooney* and *Rogers,* respondent does not provide compelling reasons for needing early release, and respondent does not make any claim that she attempted to communicate with the Board to negotiate a mutually beneficial and agreeable earlier release date than the required 60 days' notice. Instead, the record reflects that respondent clearly made a unilateral decision to resign with full knowledge that her notice did not satisfy the notice requirement.

Moreover, although respondent claims that she is "unfit" to teach middle school students, petitioner has presented nothing to suggest that she is not fully certified to teach the middle school classes to which she was assigned. It is apparent, though, that respondent both prefers to teach elementary students and that she is uncomfortable in a middle school environment. Respondent's preferences, however, do not excuse her failure to act in a professional manner. Respondent was aware in the Spring of 2004 that she was going to be re-assigned from her elementary Special Education teaching position to the position of Special Education Teacher at the middle school for the 2004-2005 school year. Instead of declining to sign the teaching contract for the 2004-2005 school year or giving notice of her resignation by July 1, 2004, as required by her contract, respondent spent the summer trying to find another position. When she was unsuccessful, respondent gave her notice of resignation on September 2, 2004, one day after school began. It is evident from these actions that respondent was trying to keep her options open without any consideration of her responsibilities to the school district and her students. The Commissioner, therefore, concludes that respondent's desire for an early release from her professional obligations was based solely on personal motives and convenience.

Additionally, the ALJ found that respondent's actions of blocking any incoming email messages from the school district, not accepting telephone calls, and lying to the superintendent about having another job were mitigating factors because they demonstrated that respondent was under stress. The Commissioner disagrees. Unlike the ALJ, the Commissioner finds these actions only serve to support the conclusion that respondent acted unprofessionally. Moreover, respondent's offer to surrender her teaching certificate for the 2004-2005 school year and the *de facto* suspension she imposed on herself by not seeking employment as a teacher since her September 2004 resignation demonstrate respondent's attempt to control the situation for her personal convenience.

The Commissioner emphasizes that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting

students***" (*Bd. of Ed. of Penns Grove-Carneys Point Reg. Sch. Dist. v. Leinen,* 94 *N.J.A.R.*2d (EDU) 405, 407, citations omitted). By resigning from her teaching position with only five days notice on the second day of school, petitioner showed a blatant disregard for the middle school students assigned to her care and the District's ability to find a suitable replacement on such short notice. Even if the Board were able to find a replacement quickly, however, such replacement would not negate respondent's unprofessional conduct. (*See Aiken, supra,* at 2821)

For the reasons set forth above, therefore, the Commissioner agrees with the Board that, in resigning abruptly, respondent's actions of putting her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board dictate the maximum penalty. Accordingly, pursuant to *N.J.S.A.* 18A:26-10 and consistent with the penalty assessed in similar matters, respondent Mary Savino is deemed guilty of unprofessional conduct and her teaching certificate is hereby suspended for a period of one year, which period shall commence upon the date of this decision. (See, *e.g.*, *Montalbano, supra; Farran, supra*; and *Aiken, supra.*) A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/30/05

Date of Mailing: 8/30/05

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

OAL DKT. NO. EDU 11688-04

AGENCY DKT. NO. 360-10/04

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MARY SAVINO, RAHWAY BOARD OF EDUCATION, UNION COUNTY

John A. Boppert, Esq., for Appellant
(Oxfeld Cohen, PC),

Alan J. Schnirman, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso and Kessler)

Record Closed: July 27, 2005 Decided: July 28, 2005

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Rahway Board of Education, seeks the prospective suspension of the teaching certificate of Respondent, Mary Savino, for failing to provide a 60-day notice of resignation to the District. Respondent contends she had mitigating circumstances and was compelled to resign due to her unfitness to teach middle school.

PROCEDURAL HISTORY

On September 24, 2004, the Rahway Board of Education filed documents with the Commissioner of Education seeking an Order to suspend Respondent's teaching certification for a period not to exceed one year. The Department of Education Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) on November 23, 2004 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to B-15 and *N.J.S.A.* 52:14F-1 to F-13. On January 3, 2005, the undersigned was appointed to the case; and on January 13, 2005 the OAL Clerk scheduled a plenary hearing for June 3 and 6, 2005. The June hearing dates were adjourned because of an attorney scheduling conflict. The OAL rescheduled the matter for a *de novo* hearing on December 21, 2005. In the interim, counsel for Respondent requested that the matter move forward on a Summary Decision. Motions, cross-motions and briefs were received at OAL by May 31, 2005. Oral arguments and/or joint stipulation of facts were accepted on July 27, 2005 at 11AM; thereafter on the same date the record closed.

UNDISPUTED FACTS

1. Respondent Mary Savino is the holder of a New Jersey teaching certificate.

2. On or about May 11, 2004, Respondent entered into an employment contract with Petitioner, Board of Education of Rahway.

3. The employment contract terms required Respondent to serve as a teacher in the public schools, under the control of the Rahway Board of Education from the 1st day of September 2004, to the 30th day of June 2005.

4. The employment contract signed by Respondent specified that:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 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 that contract shall run for the full term named above."

5. On September 2, 2004, one day after the start of the 2004-2005 school contract year, Respondent tendered her resignation via e-mail to the Rahway Board of Education, effective September 7, 2004.

6. Respondent indicated in her e-mail that she resigned because she wanted an elementary school position, and not the middle school position she was assigned to.

7. Respondent did not report to work as a teacher at the beginning or at any time during the 2004-2005 school year.

8. The Rahway Board of Education did not consent to Respondent's resignation on less than 60 days' notice.

9. On November 3, 2004, Respondent wrote a letter to the Commissioner of Education, Bureau of Controversies and Disputes, explaining the reasons for the sudden nature of her resignation.

10. On November 15, 2004, Respondent wrote a letter to M. Kathleen Duncan, Director of Controversies and Disputes for the Department of Education, offering through counsel to refrain from contesting a suspension of her certificate through June 30, 2005.

LEGAL DISCUSSION AND FINDINGS

N.J.A.C. 6A:3-1.12(a), the Commissioner of Education shall apply the standard set forth in the Uniform Administrative Procedure Rules in deciding motions for

summary decision. Under *R.*1: 1-12.5(b) of the Uniform Administrative Procedure Rules, a motion for summary decision shall be rendered:

> if the papers and discovery which have been filed, together with the affidavits,
>
> if any, show that there is no genuine issue as to any material fact challenged
>
> and that the moving party is entitled to prevail as a matter of law.

In *Brill v. Guardian Life Insurance Company of America,* 142 *NJ.* 520 at 541 (1995), the New Jersey Supreme Court determined that "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment..." Also, in *Celotex Com. v. Catrett,* 477 *U.S.* 317, 323 (1986) the U.S. Supreme Court explained that: "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"...

The instant case is ripe for Summary Judgment / Decision, except it is the undersigned's opinion that a limited oral presentation setting forth the resolutions of the parties during a spring 2004 meeting was required. Respondent requested the meeting to discuss a middle school teaching assignment versus an elementary school assignment.

The Rahway Board of Education contends it should prevail as a matter of law because respondent failed to give the requisite notice of resignation. As per *N.J.S.A.* 18A:28-8, teaching staff members employed by a local board of education must adhere to the following statute when resigning from their teaching positions:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

Further, *N.J.S.A.* 18A:26-10 provides that:

> Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

Under *N.J.S.A.* 18A:28-8 and *N.J.S.A.* 18A:26-10, a resignation on less than 60 days' notice, absent consent from the local board of education for a lesser notice period, constitutes unprofessional conduct. In the present matter, it is undisputed that Respondent did not report to work nor at any time did the Board approve of Respondent's early release from her teaching duties. Therefore it is clear that Respondent violated the provisions of *N.J.S.A.* 18A:28-8 and *N.J.S.A.* 18A:26-10 and is guilty, *per se,* of unprofessional conduct.

The Commissioner has discretionary authority to suspend a teaching certificate for up to one year for failure to provide such notice. *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. See also, *N.J.A.C.* 6A:9-17.9. The duration of any penalty is discretionary and the maximum penalty of up to one year is not mandatory or automatic, even in cases where the employee did not obtain the employer's consent to resign. *In The Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 *S.L.D.* 183, *adopted*, Comm'r, 1983 *S.L.D.* 195. *N.J.A.C.* 6A:9-17.9 states, in pertinent part:

> (a) A teacher employed by a district board of education who, without the consent of the board, ceases to perform his or her duties prior to the expiration of the employment, shall be deemed guilty of unprofessional conduct.
>
> (b) The Commissioner *may*, upon receiving notice of the fact, suspend the certificate for a period not to exceed one year. (Emphasis supplied).

Since it is undisputed that Respondent is guilty of unprofessional conduct under *N.J.S.A.* 18A:26-10, *N.J.S.A.* 18A:28-8, and *N.J.A.C.* 6A:9-17.9, the issue in this case is what constitutes an appropriate term for the suspension of Respondent's teaching certificate, under the circumstances. The applicable statutes and regulations afford the Commissioner the discretion to impose a suspension of a lesser term. Petitioner is requesting that the maximum term be imposed: a one-year suspension, starting from the date of this decision. Respondent is specifically asking for a suspension from September 1, 2004 to June 30, 2005.

A violation of the 60-day resignation notice requirement does not automatically trigger a flat 365-day suspension. The Commissioner has found mitigating circumstances in some cases which justified a lesser suspension term. Less than one-year suspensions were imposed in the following three cases, due to mitigating factors: *The Board of Education of Black Horse Pike Regional School District v. Mooney,* 1984 *S.L.D.* 810, *adopted, Comm'r,* 1984 *S.L.D.* 821; *In the Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 *S.L.D.* 183, *adopted, Comm'r,* 1983 *S.L.D.* 195; and *In the Matter of the Suspension of the Teaching Certificate of Rogers*, 1989 *S.L.D.* 1962, *adopted, Comm'r,* 1989 *S.L.D.* 1968.

In *Burgess*, *supra*, the Commissioner held that suspension of a teaching certificate was not warranted for a teacher who had left employment without providing the requisite notice. The teacher had provided notice on January 29, 1982 that he would resign as of February 15, 1982. The board accepted his resignation and advised him that it would do all it could to find a replacement for him by February 15, but that he would not be released earlier than 60 days from the date of his notice unless the board found a suitable replacement. The Commissioner concluded that a suspension was not warranted because the board had not carried out its promise to the employee to do all that it could to secure a replacement by February 15.

The language in the statues and regulations "may upon receiving notice" clearly indicates that the Legislature did not intend the suspension of a teacher's certificate to be automatic, "even absent the board's consent". As set forth in *Mooney, supra*, in exercising its discretionary authority, the Commissioner must consider all the attendant

circumstances, including any mitigating factors specific to the case which may compel the conclusion that a suspension for less than one year is appropriate. In *Mooney,* the Commissioner held that suspension was not warranted in light of the teaching staff member's considerable efforts to assist the board of education in ensuring a smooth transition for her replacement. In *Mooney,* the teacher assisted in the development of a program through the end of the school year, met with her successor in order to establish the program, and left final grades for her classes.

A less-than-one-year suspension has been deemed appropriate where the teacher's conduct in seeking an early release was driven not simply by a desire to "feather his own nest" by obtaining employment elsewhere, but rather from "honest" and more "noble" motivations. In *Rogers*, *supra,* a non-tenured teacher of the handicapped resigned on short notice to take a position working with severely handicapped children.

> At the last minute he had questions about what work he was best suited to. He had worked in another school district for a year as well as worked with the severely and multiply handicapped at New Libson. The children served by the Board are much less and differently handicapped than the New Libson population. Different teaching qualities, techniques and temperaments are required in serving these very different groups. Notwithstanding the burdens of New Libson's work, school districts almost invariably pay better than does the State and the State has considerable difficulty obtaining sufficient dependable staff for that work. Civil service decisions out of the State developmental centers demonstrate a continuing theme of inability to obtain and hold staff due to the pay and working conditions there.

Although Rogers in fact left to take another position, the desire to work with severely handicapped children was considered a mitigating factor that precluded a one-year suspension; a three-month suspension was found to be appropriate. The ALJ wrote:

> I am persuaded that it was not to feather his own nest that Rogers failed to fulfill his contract with the Board, but rather from honest and most noble motivations...

Conversely, the Commissioner will impose the maximum one-year suspension,

starting from the date of decision, in cases where a teacher violates the 60-day notice requirement for strictly personal reasons. In *East Amwell Township Board of Education v. Acken*, 86 *S.L.D.* 2803, a teacher failed to provide the Board with the required notice, and resigned one week before the start of school. The failure to provide unequivocal oral notice of her intention to relinquish her position was found to be based upon personal motives. She and her spouse were living in Florida, he was unemployed, and their house in New Jersey had not sold. The teacher's uncertainty as to their future continually delayed her decision. The ALJ determined that the teacher wished to resign her post, but considered herself financially unable to do so. The ALJ wrote:

> In effect, she keeps her irons in the fire right up to the week before school is to begin, thus guaranteeing herself employment in East Amwell, if nothing else became available in Florida or her husband remained unemployed. Ms. Acken also suggests that her resignation was tendered so late and without the 60-day notice because of her concern for the students. She suggests that she wished the students to have one teacher for the year instead of switching teachers in mid-stream. While the concern she expresses may be genuine, the purpose of the notice requirement is to provide the School and the administrator with sufficient time to locate and hire an acceptable replacement so that the students are not switched from substitute to substitute until a replacement is hired.

In the case captioned, *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano*, OAL Dkt. No. EDU3588-00, Initial Decision (April 24, 2001), *adopted, Comm'r.* (June 11, 2001), the Commissioner of Education ordered a one year suspension of the teaching certificate of Montalbano following his departure from the Ridgefield School District on twelve days' notice. In *Montalbano*, the ALJ determined that the employee's need for an early release from his teaching contract was motivated by purely personal reasons, specifically his desire to secure alternative employment as a police officer in the State of New Jersey. The Commissioner found that the facts surrounding Montalbano's mid-term departure could not obviate his obligation to continue serving in his teaching position for the required 60 days.

In the recent case, *In The Matter of the Suspension of the Teaching Certificate of*

Mary Farran, School District of the Chathams, Morris County (Agency Docket No. 415-11/04) the Commissioner concluded that Farran was guilty of unprofessional conduct, and ordered that her teaching certificate be suspended for one year. She resigned her position without proper notice, after deciding that it was a hardship for her to continue to teach while caring for an infant child and commuting from her new home in Pennsylvania. The Commissioner said, even though she was aware of her obligation to provide 60 days' notice, that Farran had "put her own self-interest above the interests of her students and her professional obligations to provide adequate notice to the Board." Additionally, the Commissioner found no merit in Farran's argument that her unprofessional conduct could be excused due to the lack of notification by the school district of its intent to seek suspension of her license.

In the present case, Petitioner contends that Respondent intended to abandon her class for another job, as indicated in Respondent's letter of November 3, 2004 to the Commissioner:

> "This summer, after an unsuccessful search for an elementary school position in another district, I felt that I had no choice but to return to Rahway" (document attached).

Unlike the facts in *Montalbano,* the undisputed facts in Respondent's case set forth that she did not take other employment. Respondent has neither worked as nor sought employment as a teacher since her resignation in September of 2004. Respondent's letter allows a reader to reasonably believe that the job search was a result of her fear of failure and of her own inadequacy for the middle school special education assignment. As Respondent continued in her letter:

> "I have reached a point, at 55 years of age, where I can no longer force myself to do what I feel so uncomfortable with and for which I feel so ill suited. Even if I could start the year, I was sure that I could not muster the strength to finish the school year" (document attached).

Dr. Petrino, Superintendent of Schools, telephoned Respondent on September 3,

2004, to speak about the letter of resignation. He said she signed a contract to work in the Rahway Public Schools for the 2004-05 school year and that she was obligated to honor the contract. He specifically explained to that her failure to honor the 60-day required advance notice could jeopardize her teaching certificate. Dr. Petrino submitted an Affidavit regarding his communications with Respondent (document attached).

In regard to Respondent's reference to starting another job, she explains the situation in the November 3, 2004 letter to Commissioner Librera:

> "In an effort to end a very unpleasant conversation, I told him (Dr. Petrino) that I could not return because I would be starting with another school system. *This was untrue.* In hindsight, if I had told the truth and told him why I felt that I couldn't return, things would not have gotten so ugly. He threatened to sue the district that hired me and said that he would begin the process to have my certificates suspended. Knowing this, I discontinued my job search and I am still unemployed" (emphasis added).

Petitioner contends that on September 3, 2004, Respondent could have reconsidered and returned to work for the requisite 60 days so as to comply with the governing notice statutes; but since she did not, the full suspension period of one year under *N.J.S.A.* 18A:26-10 should be imposed.

The most weighty factor in reviewing an appropriate length of suspension for a Respondent is motivation. The statute defines sudden cessation of duty as unprofessional conduct and upon the occurrence of unprofessional conduct the Commissioner may suspend a teaching certificate for up to one year. I **FIND** the following circumstances in the present case:

Respondent, a fifty-five (55) year old teacher, returned to teaching after an eleven (11) year break in service;

Petitioner interviewed Respondent for a teaching position and offered her a position at the middle school: Respondent declined the position, saying that she was unfit;

One year later, Petitioner offered Respondent a teaching position in the elementary school; she accepted the position and at the end of the first year was asked to return for a second year of teaching in the elementary school: she accepted;

At the end of the second year, Petitioner asked Respondent to continue teaching in the district and advised her that the position would be in the middle school;

Respondent requested a meeting in an effort to obtain an assignment in the elementary school; no promises were made at the meeting but Petitioner's representative said she would "sleep on" the matter;

Respondent looked for another elementary school teaching position for most of the summer without success and beyond the 60-day notice deadline on July 1, 2004;

Respondent's reluctance to teach in a middle school environment continued;

Respondent became so stressed and fearful by September 1, 2004, the commencement date for the 2004 school year, that she took matters into her own hands and emailed the school to resign; Respondent lied to the superintendent when he confronted her during a subsequent telephone conversation;

Respondent's actions of blocking any incoming email messages from Petitioner, not accepting telephone calls, lying to her superior about another job, and volunteering to surrender her teaching certificate for one year is an indication of the extreme stress and fear she was experiencing;

Respondent believed, for whatever reasons, that she was unfit to teach at the middle school level; her talents in elementary school were proven two years in a row when Petitioner asked her to return to elementary school;

Respondent was not trying to "run away" from the district; no motive of self-interest was ever suggested by Petitioner;

Respondent did not violate the 60-day notice requirement in order to "feather her own nest";

Respondent's contention that she could not perform or carry out her teaching responsibilities because of her unfitness to teach in the middle school environment is undisputed and is credible;

Respondent imposed a de facto suspension on herself, by not seeking employment as a teacher since her resignation in September of 2004.

CONCLUSION

Based on all of the above, I **CONCLUDE** that a suspension for one year is unnecessarily harsh in this case. Respondent did not teach for the entire 2004-2005 school year because of her resignation due to her belief that she would jeopardize the training needs of her students because of her fear of unfitness for the job. In this case Respondent's honesty should be considered a mitigating factor. Imposing the suspension sought by Petitioner would, realistically, preclude Respondent from working as a teacher until September of 2006. Therefore, I **CONCLUDE** that Respondent's teaching certificate should be suspended for sixty (60) days from the date of this decision, which will enable her to seek a teaching job for at least a portion of the upcoming school year.

ORDER

I hereby **ORDER** that the teaching certificate of Mary Savino be and hereby is suspended for a period of sixty (60) days, commencing July 28, 2005 and ending September 26, 2005.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 2005
DATE

Sandra A Robinson
SANDRA A. ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/28/05
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 29 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

DOCUMENT SUBMISSIONS

Order To Show Cause with Supporting Affidavit for Initiation of Suspension Proceedings
Signed by Commissioner Dr. William Librera October 4, 2004;
Proof of Mailing
Certification of Attorney Alan J. Schnirman re: Facsimile Signature

Letter Brief together with Respondent's Certified Statement In Support of Respondent's Motion For Summary Decision dated May 3, 2005:
Respondents Letter to Commissioner Librera dated November 3, 2004;
Respondent's Counsel's Letter to the Director of the Division of Controversies and Disputes dated November 15, 2004;
Certification of Respondent in Support of Motion For Summary Decision

Letter Brief In Support of Petitioner's Cross Motion For Summary Decision and In reply To Respondent's Motion For Summary Judgment dated May 25, 2005:
Employment Contract between Respondent and Petitioner dated May 11, 2004;

Affidavit of William D. Petrino, Ed. D., Superintendent of Rahway Public Schools dated September 23, 2004;

Letter of resignation from Respondent to Eleanor Peris date September 2, 2004;

Letter from Rahway Public School Superintendent Petrino to respondent dated September 3, 2004;

Email attempt from Petrino to Respondent via AOL dated September 3, 2004;

Notice to Petrino of Email failure via AOL dated September 3, 2004;

Notice to DiGiovanni of Email failure via AOL dated September 3, 2004;

Notice of successful Email "sent" to Respondent via MSN Hotmail dated September 3, 2004;

Letter from Superintendent Petrino to Commissioner Librera dated September 7, 2004.

#309-05

309-05

OAL DKT. NO. EDU 9527-04
AGENCY DKT. NO. 259-7/04

JOSEPH MUNIZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The Commissioner has reviewed the file in this matter. While there is correspondence referencing a settlement, there is neither an executed settlement agreement nor a clear statement of withdrawal from the petitioner. Accordingly, the Commissioner hereby remands the matter to the OAL for final resolution.

IT IS SO ORDERED*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

310-05

OAL DKT. NO. EDU 6143-05
AGENCY DKT. NO. 186-8/05

EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law on August 23, 2005, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the Order denying emergent relief as he concurs with the ALJ's determination that petitioner has not satisfied any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits, scheduled for September 9 and September 23, 2005, as directed by the ALJ.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05
Date of Mailing: 8/31/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER – EMERGENT RELIEF

OAL DKT. NO. EDU 6143-05

AGENCY DKT. NO. 186-8/05

EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND,

Respondent.

Lazlo Beh, Esq. for petitioner (South Jersey Legal Services, Inc., attorneys)

Paul Kalac, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

BEFORE **BRUCE M. GORMAN**, ALJ:

The New Jersey Department of Education (DOE) Bureau of Controversies received a request for relief on July 29, 2005. Petitioner contends the Board of Education's Mennies Pilot Program does not meet the requirements of a full-time program of bilingual education and seeks reinstatement of a compliant program. The matter was transmitted to the Office of Administrative Law (OAL) on August 3, 2005. *N.J.S.A.* 18A:38-1. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The New Jersey Department of Education, Bureau of Controversies and Disputes, received a petition for emergent relief on or about July 29, 2005. The matter was transmitted to the Office of Administrative Law (OAL) on August 3, 2005, to be heard as an emergent contested case. .

The matter was scheduled for oral argument for August 11, 2005, but was adjourned as respondent's counsel was on vacation. The matter was rescheduled for August 23, 2005, at the OAL office in Atlantic City, New Jersey.

Petitioner brings this matter on an emergent basis seeking an Order enjoining respondent from enrolling third and fourth grade students in its Pilot Program at its Mennies School and transferring them into an existing bilingual program at the district's Johnstone School. Additionally, petitioner seeks an Order compelling respondent to provide a full-time bilingual program to all eligible third and fourth grade students.

The petition is grounded in *N.J.S.A.* 18A:35-18, which states:

> a. When, at the beginning of any school year, there are within the schools of the district 20 or more pupils of limited English-speaking ability in any one language classification, the board of education shall establish, for each such classification, a program in bilingual education for all the pupils therein; provided, however, that a board of education may establish a program in bilingual education for any language classification with less than 20 children therein.
>
> b. The Commissioner of Education may waive the requirement that a board of education establish a full time bilingual education program when the board is able to demonstrate that due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide a full time bilingual education program. The waiver shall permit the district to implement a special alternative instructional program for as long as the conditions exist that justified the waiver.

Petitioner argues that respondent has failed to provide the mandated program. In support of that contention, petitioner relies primarily upon the Certification of Minerva Negron. Ms. Negron is the mother of S.R., a third grade student in the Pilot Program during the 2004-2005 school year. Ms. Negron's certification states that her daughter never brought home books or assignments in Spanish. An open house for parents in the Spring of 2005 was conducted entirely in English. At the conclusion of the school year, S.R. was unable to either read or write in Spanish.

Petitioner also relies upon a newspaper article from the Vineland Daily Journal wherein Millie Ramos, District Supervisor of Instruction for Bilingual Programs appeared to be critical of respondent's handling of bilingual education.

Petitioner argued that respondent obtained a waiver from the Department of Education for its 2004-2005 program, but has failed to do so for 2005-2006. Petitioner asserted that DOE has approved no program for bilingual instruction to the present time.

Respondent submitted no affidavits or certifications, but relied solely on the argument of counsel and brief testimony by Annette Rudd, Principal. Ms. Rudd testified respondent had prepared a program (R-1), but admitted that State approval was pending.

Respondent's counsel argued that no irreparable harm existed because respondent already had in place a program that complies with State requirements. Although respondent offered no proof that such is the case, petitioner offered no proof that such is not the case. Respondent contended that since a program exists, petitioner's children will be properly educated, and therefore the equities and interests should be balanced in favor of respondent.

Petitioner argued that the law on this issue is settled, citing *N.J.S.A.* 18A:35-18. Respondent retorted that while that statute required a program, no case law exists on the subject.

Respondent argued that there is insufficient likelihood that petitioner will prevail on the merits, because petitioner is relying solely on the opinions of certain parents.

The requirements for granting emergent relief are well settled. Petitioner carries the burden in seeking emergent relief. The standard is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), necessary for the awarding of this relief. See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 N.J. 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

> 1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;
>
> 2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;
>
> 3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and
>
> 4. The relative hardship to the parties in granting or denying relief must be considered. *Id.* at 132-34.

Petitioner's application for emergent relief falls short in all of the *Crowe* criteria, essentially for one reason. Petitioner has submitted only the certification of Ms. Negron to form a factual basis for its allegations. The newspaper article quoting Ms. Ramos is hearsay, and I have no way of determining whether her statements were taken out of context.

The allegations and legal arguments raised by petitioner are significant, but at this juncture, the record contains an insufficient factual basis for me to determine that petitioner has a reasonable probability of ultimate success on the merits. A far greater quantum of proof will be necessary for petitioner to prevail at trial.

Similarly, Ms. Negron's allegations that S.R. received no instruction in Spanish cannot alone establish that the students in the Pilot Program will suffer irreparable harm if the emergent relief is not granted. Respondent argues it has a program in place. While the lack of DOE approval is troubling, to date DOE has not rejected the proposed program. And I note that, should the program subsequently be found inadequate, either by me at trial or by DOE following

its review, the affected students could be provided with remedial education to make up for what the program lacked.

Finally, while the law is settled that respondent must provide an appropriate program, whether the current program meets the legal standard is a fact-driven issue. Questions of fact can only be resolved at trial.

Accordingly, I **FIND and CONCLUDE** that petitioner has failed to show a reasonable probability of success on the merits. I **FIND and CONCLUDE** that petitioner has failed to establish the children in question will suffer irreparable harm. And I **FIND and CONCLUDE** that the balancing of relative hardship weighs in favor of respondent.

Therefore, I **FIND** and **CONCLUDE** that emergent relief should be denied.

During oral argument, an issue was raised regarding the standing of petitioner to bring this action. The parties disputed petitioner's origins and could not agree on what authority it had. That issue will be easily resolved by petitioner filing an amended petition joining at least one child, together with the child's guardian, who is affected by the 2005-2006 program.

ORDER

I **ORDER** that petitioner's application for emergent relief by **DENIED.**

I **ORDER** that petitioner be granted leave to file an amended petition adding one or more children affected by the 2005-2006 program as parties hereto, within ten (10) days from the date of this **ORDER.**

A plenary hearing is scheduled for September 9 and September 23, 2005, at 9:30 a.m. at the OAL office located at 1601 Atlantic Avenue, Atlantic City, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

8/24/05
DATE

BRUCE M. GORMAN, ALJ

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

None

For Respondent:

Annette Rudd, Principal

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 3 Year Program

312-05

OAL DKT. NO. EDU 1805-04
AGENCY DKT. NO. 461-12/03

ENRICO CIAMILLO, JR., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION
DECISION

BOARD OF EDUCATION OF :
THE BOROUGH OF RIDGEFIELD,
BERGEN COUNTY, :

RESPONDENT. :

:

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been thoroughly and independently reviewed. After considering the facts and applicable law, the Commissioner is constrained to adopt the Initial Decision.

The underlying facts in this case are not disputed. Petitioner holds certifications as a teacher (art), school social worker, guidance counselor, guidance director, and principal and supervisor. He began employment for respondent in 1994 as a guidance counselor, and has continued working in the Ridgefield schools to the present. Under the terms of a contract between respondent and the Ridgefield Education Association, guidance counselors must work for two weeks each summer.

In 1996-1997 petitioner accepted a position with the "unrecognized title" of "Guidance Consociate Teacher." The job description for Consociate teacher required an administrative certificate with a supervisor endorsement, and tenure in that position would be earned under the legal title of "Supervisor." The salary was to be the appropriate step on the

teachers' salary guide plus a stipend. The position of "Consociate Teacher" was listed in "Extra Service Guides" (annexed, *inter alia,* to the 1995-1996, 1996-1997 and 2001-2004 contracts between respondent and its employees), which set forth negotiated amounts payable to employees performing various "extra" positions. Thus, petitioner's annual salary notices from the 1996-1997 school year through the 2003-2004 school year showed petitioner's base salary as per petitioner's placement and step on the salary guide, and separately set forth the amount of remuneration petitioner was to receive for summer work and for extra work as a Consociate Teacher.

For the school years beginning in 1996, 1997, 1998, 1999, 2000, 2001 and 2002, petitioner did the extra work of Consociate Teacher, in addition to his guidance position. The extra consociate work in 1996-1997 brought petitioner $4,084 over his "contractual" salary of over $76,500. In 1997-1998 the stipend for consociate work was $4,235; in 1998-1999, $4,396; in 2002-2003, $6,061, bringing his total remuneration for that year to $96,334.

Petitioner was not reappointed to the Guidance Consociate Teacher position for the 2003-2004 school year. An "Annual Salary Notice to Tenure Personnel" dated April 29, 2003 and received by petitioner in May 2003 shows that for the 2003-2004 school year petitioner's contractual salary would be $90, 694, representing his step on the salary guide plus $4,319 for two weeks of summer work. The reduction in pay from 2002-2003 to 2003-2004 represented primarily the absence of any stipend for consociate work.

On May 7, 2003 the high school principal, Dr. Robert Jack, met with petitioner and explained that economic restraints caused him to conclude that the consociate position would not be viable for the coming school year. They met again on May 13, 2003. Dr. Jack advised petitioner that cost efficiencies mandated by the diminution of the district's magnet school

program (and the associated special education funding) had been the basis of his recommendation not to renew petitioner's consociate work.

Petitioner acknowledges that sometime in May 2003 he received the annual salary notice that revealed the elimination of the consociate work. The Administrative Law Judge (ALJ) found that petitioner admitted "that he knew no later than June 15, 2003 that he was not going to be the Guidance Consociate Teacher." (Initial Decision at 9)

As a result of an administrative reorganization, the duties of Guidance Consociate Teacher were incorporated into the Vice-Principal's job. Respondent has not subsequently appointed any other individual to the position of Guidance Consociate Teacher, and has stipulated that petitioner has tenure/seniority rights to the position. Petitioner has not disputed that the reorganization was driven by economic reasons, or argued that the reorganization was a sham or perpetrated in bad faith.

Petitioner filed his appeal on December 11, 2003.

Allegations by petitioner to which respondent does not subscribe are as follows. Petitioner contends that at their May meetings Dr. Jack told petitioner that the departure of the district superintendent would allow petitioner to be reinstated to the consociate work during the summer of 2003. Petitioner also maintains that at the school prom in June 2003, members of the respondent board of education told him they would correct the situation. Petitioner says he relied upon these statements and consequently did not realize that he was not reappointed until September 15, 2003, the date of his first paycheck. Petitioner also noted that he did not know of any other consociate whose salary was reduced.

Petitioner also suggested that the consociate position was not an "extra service" position. He testified that it was not posted in the same manner that other extra service positions

were posted, he never received a separate extra-service contract, and his last consociate appointment had not been acted upon at the June 11, 2002 meeting of the respondent board of education. (Initial Decision at 11) He also opined that extra service payments were made quarterly and were not pensionable, while he received payment on a biweekly basis and all his income was reported for pension purposes. (*Ibid.*)

On cross examination petitioner conceded that he did not know whether there had been job postings that he had not seen, that he did not know whether the respondent Board might have acted upon his last consociate position at a meeting other than the one on June 11, 2002, and that he was not actually familiar with the regulations regarding pensionable income. (*Ibid.*)

The ALJ found that petitioner's appeal of respondent's action was time barred, and determined that it was consequently unnecessary to reach the merits of petitioner's claim of tenure violation. In his exceptions, petitioner argues that since respondent conceded that petitioner had tenure in the position of Guidance Consociate Teacher, the ALJ should have first determined whether respondent violated petitioner's tenure rights and then decided "whether tenure rights are subservient to the 90-day rule." (Petitioner's Exceptions at 2)

Citing no authority, petitioner contends that the 90-day rule does not apply to alleged tenure violations. In the alternative, petitioner maintains that even if the 90-day rule applies to appeals of alleged tenure violations, that rule should be relaxed in petitioner's case because of the alleged "assurances" of reinstatement from the principal, Mr. Jack, and certain Board members, and because he did not know until his first paycheck that his salary had been lowered.

The Commissioner finds no merit in petitioner's exceptions. The question of whether petitioner has tenure in the position of Guidance Consociate Teacher is not

determinative of the applicability of the 90-day rule. Assuming, *arguendo*, that petitioner has such tenure, he was none-the-less obliged, under *N.J.A.C.* 6A:3-1.3(d), to "file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." (Initial Decision at 13) S*ee, e.g.*, *Gordon v. Passaic Twp. Bd. Of Educ.*, 1985 *S.L.D.* 1929, *aff'd.* No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986) (the statute of limitations specified in *N.J.A.C.* 6:24-1.2 [predecessor of *N.J.A.C.* 6A:3-1.3] applies to claims . . . which allege the violation of tenure or seniority rights).

The event which triggers the limitations period is the petitioner's receipt of adequate notice of the Board's action, *i.e.,* notice that is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow v. Bd. of Educ. of Berkeley Twp.* , 131 *N.J.* 572, 587 (1993). Petitioner received an official written communication in May 2003 that he was not reappointed to the consociate position and that his salary would be lowered. No subsequent written notice was produced that contradicted same. Thus, the period of limitations began in May 2003 and ended in August 2003.

Further, petitioner's statement that he did not know that the Board's action had not been "corrected" until he received his first paycheck seems disingenuous. Clearly, as of the first day of school in September, petitioner knew that he was not performing consociate work, and would thus not be paid for it. In all likelihood, December 11, 2003, the day petitioner filed, was more than 90 days after the first day of school in September 2003. In any event, as the ALJ stated, "[t]he 90-day clock begins to tick once notice of the final order, ruling or other action is

given, and not when the injury is felt by the petitioner." (Initial Decision at 14, citing *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 272 *N.J.Super.* 373, 379-81 (App.Div.), *certif. den.* 137 *N.J.* 315 (1994). Not even settlement negotiations negate the receipt of adequate notice or toll the running of the limitations period. *Kaprow, supra,* 131 *N.J.* at 588.

The Commissioner also notes that this controversy arose in the context of a reduction in force (RIF). It is undisputed that the Guidance Consociate Teacher position was eliminated for economic reasons, and no one else was subsequently given the position. *N.J.S.A.* 18A: 28-9 allows such a RIF. While *N.J.S.A.* 18A:28-12 entitles petitioner to be on a preferred eligibility list for reemployment if the position is restored, petitioner has no statutory right to retain the salary he had before the RIF. In any event, if petitioner wished to challenge the effects of the RIF upon him, he was required to do so within the 90-day period. *Kaprow, supra,* 131 *N.J.* at 585-586 (Rights resulting from RIFs in the local school districts do not constitute a statutory entitlement; the limitations period of *N.J.A.C.* 6:24-1.2(c) [*N.J.A.C.* 6A:3-1.3], therefore, applies).

Finally, for the reasons set forth in pages 23-25 of the Initial Decision, the Commissioner declines to exercise his discretion, under *N.J.A.C.* 6A:3-1.16, to relax the 90-day rule. In May 2003 the petitioner had the information he needed to challenge respondent's action. In this matter there is no constitutional issue or compelling public interest beyond the concern of the petitioner. *Bogart v. Bd. of Educ. of the City of East Orange*, OAL DKT. EDU 6245-82 at 4 (January 26, 1983), *adopted,* Commissioner March 14, 1983. Nor has there been any showing that respondent acted in bad faith, as was found in *New Jersey School Boards Ass'n. v. Bd. of Educ. of the Twp. of Wyckoff*, Agency Dkt. No. 281-9/99 (Commissioner, February 3, 2000),

where, for six years, the respondent had not forwarded to petitioner the dues that were deducted from employee paychecks for the express purpose of transmittal to petitioner.

Accordingly, the Initial Decision of the OAL is adopted and petitioner's appeal is hereby dismissed.

IT IS SO ORDERED*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1805-04
AGENCY DKT. NO. 461-12/03

ENRICO CIAMILLO, JR.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Harold N. Springstead, Esq., for petitioner (Springstead and Maurice, attorneys)

Stanley Turitz, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: February 28, 2005 Decided: July 15, 2005

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE

In this matter, petitioner alleges that he acquired tenure in the position of Guidance Consociate Teacher and the Board of Education of the Borough of Ridgefield (the Board) unlawfully reduced his salary stemming from the abolishment of that position effective September 1, 2003. The Board maintains that petitioner's claim is time barred pursuant

to the 90-day limitation embodied in *N.J.A.C.* 6A:3-1.3. Alternatively, the Board contends that the abolished position previously held by petitioner was a stipend position, which is not tenurable, and upon the abolishment of the position petitioner is no longer entitled to the stipend salary attributable to that position.

PROCEDURAL HISTORY

On December 11, 2003, petitioner filed a Petition of Appeal with the Commissioner of Education (the Commissioner). Petitioner avers that he is a tenure teacher employed by the Board, petitioner was paid $96,334 pursuant to a contract during the 2002-2003 school year, and petitioner "received his first paycheck in September and realized that his salary had been reduced." Petitioner alleges that the Board's action in reducing his salary violates *N.J.S.A.* 18A:6-10 and is arbitrary, unreasonable and illegal. Petitioner seeks a determination requiring the Board to pay his former salary plus increments. On or about January 9, 2004, the Board filed its Answer. The Board asserts, as one of its affirmative defenses, that petitioner's claim is time barred by *N.J.A.C.* 6A:3-1.3(d) in that it was filed beyond the required 90-day time period.

The Department of Education transmitted the matter to the Office of Administrative Law where, on February 26, 2004, it was filed for determination as a contested case. The matter was assigned to the undersigned on March 29, 2004 and scheduled for hearing on September 10 and September 24, 2004. The hearing scheduled for September 10, 2004 was adjourned at the joint request of counsel. The undersigned heard the matter on September 24, 2004. At the hearing, counsel agreed that the hearing should proceed on all issues notwithstanding the timeliness issue, which the parties would address in post-hearing submissions. Following the conclusion of testimony, the record remained open for the receipt of post-hearing briefs. The parties submitted briefs in support of their respective positions and petitioner submitted a reply brief. Thereafter, petitioner provided a copy of an unreported decision cited in his reply brief. The record was closed upon receipt of the last submission.[1]

[1] Orders were entered extending the time within which to complete this Initial Decision.

ISSUES PRESENTED

The threshold issue concerns the timeliness of the petitioner's Petition of Appeal pursuant to *N.J.A.C.* 6A:3-1.3. Should petitioner's claim be determined to have been timely filed, the issue then presented is whether the Board violated petitioner's tenure rights when, as a result of the Board's abolishment of the Guidance Consociate position previously held by petitioner, petitioner's salary was reduced as of the 2003-2004 school year.

FACTUAL DISCUSSION

The majority of the facts surrounding this matter are not disputed. Based upon a review of the testimony and the documentary evidence, I **FIND** the following **FACTS**:

1. Petitioner Enrico Ciamillo, Jr. is a tenured teacher employed by respondent, the Board of Education of the Borough of Ridgefield (the Board).

2. Petitioner holds certifications as a Principal-Supervisor, Director of Guidance, Guidance Counselor, School Social Worker and Art Teacher.

3. Petitioner commenced employment with the Board in January 1994 as a Guidance Counselor.

4. Petitioner has served in the position of Guidance Counselor from January 1994 to the present.

5. The Board and petitioner entered into an Employment Contract providing for petitioner's employment as a Guidance Counselor for the period of January 1994 to June 30, 1994. (P-1). Subsequently, the Board and petitioner entered into respective Employment Contracts providing for petitioner's employment as a Guidance Counselor during the 1994-1995 and 1995-1996 school years. (*Ibid.*). The Employment Contracts set forth

petitioner's salary, along with a breakdown of that salary attributable to petitioner's placement and step on the negotiated Salary Guide and for summer work.

6. Pursuant to an agreement between the Board and the Ridgefield Education Association (REA), Guidance Counselors are required to work two weeks during the summer. Schedule B of the negotiated Agreement between the Board and the REA for the period of July 1, 2001 through June 30, 2004 (the 2001-2004 Agreement) (J-1) states in pertinent part:

> Guidance Counselors shall be placed on a ten (10) month Teacher Contract and shall be required to work one (1) week before and one (1) week after the regular teachers work year.
>
> Compensation shall be at the Counselor's per diem rate....

7. The former Superintendent of Schools, Dr. Richard Sabella, requested and received approval from the County Superintendent to use the unrecognized title of "Consociate Teacher (Special Education)" during the 1994-1995 and 1995-1996 school years (P-9). For the 1996-1997 and 2002-2003 school years, Dr. Sabella requested and received approval to use the unrecognized title of "Consociate Teacher." (*Ibid.*). The issued approvals reflect the "Authorizing Endorsement" and "Legal Title" as "Supervisor." They further instruct: "You are advised that while you may use the unrecognized title(s) below, the person(s) employed will accrue seniority upon the attainment of tenure under the legal title."

8. Schedule D of the 2001-2004 Agreement, entitled "Extra Service Guide," lists negotiated amounts payable to employees performing various extra positions. (J-1). The position of "Consociate Teacher" is included on that Extra Service Guide, along with the Extra Service Guides for 1995-1996 and 1996-1997. (R-1). "[A] stipend for consociate teachers has appeared on Schedule D since 1990." (J-2, PERC Decision at 5).

9. The additional pay listed on the Extra Service Guide is granted for extra duties which a staff member undertakes that are beyond the staff member's regular teaching or guidance duties.

10. A separate written Job Description exists for the position of Consociate Teacher, which was adopted in May 1996 (P-5; J-2, PERC Decision at 7). Pursuant to the Job Description, a New Jersey Supervisor Certificate is required, coupled with a minimum of three years successful teaching experience, proven leadership ability, demonstration of effective human relation skills and utilization of motivational techniques. The Consociate Teacher reports to the Building Principal where assigned. The Job Description lists the following "Performance Responsibilities":

    a. Assists the principal in the administrative functioning of the building, *e.g.,* scheduling, assembly programs, student conduct, classroom observations.

    b. Assists teachers in the improvement of instruction through modeling, workshops, and dissemination of professional information.

    c. Assists in the accomplishment of professional improvement plans prepared by the teaching staff.

    d. Assumes other such responsibilities as assigned by the Principal or the Superintendent of Schools.

    The Job Description further states, as "Terms of Employment," "10 or 11 month year. Salary to be on appropriate teacher salary guide plus stipend."

11. In 1996, petitioner sent a letter to Dr. Sabella, dated June 6, 1996, at the suggestion of then Building Principal, Marcella Gleie. (P-2). The letter reflects that, per Dr. Sabella's memo, petitioner was enclosing his resume for consideration regarding a Guidance Consociate position.

12. Petitioner was appointed to and held the position of Guidance Consociate Teacher during the 1996-1997 school year in addition to his Guidance Counselor position.

13. After petitioner acquired tenure, the Board provided annual salary notices to petitioner ("Annual Salary Notice To Tenure Personnel") for the 1996-1997 through 2003-2004 school years. (P-3). The respective Notices include petitioner's base salary in accordance with petitioner's placement and Step on the negotiated Salary Guide. The Notices also separately set forth remuneration associated with petitioner's Consociate position(s) and for summer work.

14. An Annual Salary Notice To Tenure Personnel, dated April 25, 1996, reflects that for the 1996-1997 school year petitioner's "contractual salary" would be $74,746, representing "MA+30-Step M $71,187 + $3,559 (2 weeks summer)." (P-3). In a subsequent Annual Salary Notice To Tenure Personnel, dated July 11, 1996, petitioner's "contractual salary" for that school year was increased to $80,610 representing, in part, $4,084 related to petitioner's "Guidance Consociate Teacher" position. (*Ibid.*)

15. For the 1997-1998 school year, petitioner was appointed to and held the positions of Guidance Consociate Teacher and Transition Consociate in addition to his Guidance Counselor position.

16. An Annual Salary Notice to Tenure Personnel, dated April 22, 1997, sets forth petitioner's "contractual salary," subject to negotiations, for the 1997-1998 school year, including a breakdown of that amount attributable to petitioner's placement on the Salary Guide, summer work and Consociates positions. A later Annual Salary Notice was issued, presumably after negotiations were finalized, dated October 28, 1997, which reflects that for the 1997-1998 school year petitioner's "contractual salary" was $85,317, representing "MA + 30-Step M $73,187 + $3,660 (2 weeks summer) +

$4235 Guidance Consociate Teacher + $4235 Transition Consociate." (P-3).

17. For the 1998-1999 school year, petitioner was not reappointed to the position of Transition Consociate. Petitioner was reappointed to and held the position of Guidance Consociate Teacher in addition to his Guidance Counselor position. Although petitioner (then a tenured employee) was not reappointed to the Transition Consociate position, petitioner acknowledges that he did not claim an entitlement to the pay attributable to that position.

18. An Annual Salary Notice To Tenure Personnel, dated August 4, 1998, reflects that for the 1998-1999 school year petitioner's "contractual salary" was $83,237, representing "MA+30-Step M $75,087 + $3,754 (2 weeks summer) + $4,396 Guidance Consociate Teacher." (P-3).

19. Petitioner was reappointed to the position of Guidance Consociate Teacher for the 1999-2000, 2000-2001, 2001-2002 and 2002-2003 school years. The Annual Salary Notices for those years similarly reflect petitioner's "contractual salary," along with a breakdown of that amount attributable to his placement on the Salary Guide, summer weeks and position as Consociate Teacher. (P-3).

20. As reflected in petitioner's Employment Contracts and Annual Salary Notices, commencing with the 1994-1995 school year and through the 1999-2000 school year, petitioner received extra pay for working two weeks in the summer. (P-1, P-3).

21. As reflected in petitioner's Annual Salary Notices, an additional week of summer work was added for the 2000-2001, 2001-2002 and 2002-2003 school years. (P-3).

22. The pay associated with the additional summer work weeks was listed separately from petitioner's base salary in his Employment Contracts and Annual Salary Notices. (P-1, P-3).

23. The pay associated with petitioner's positions as Transition Consociate and Guidance Consociate Teacher was listed separately from petitioner's base salary in his Annual Salary Notices.

24. An Annual Salary Notice To Tenure Personnel, dated May 9, 2002, reflects that for the 2002-2003 school year petitioner's "contractual salary" was $96,334, representing "MA-Step 18 $83,975," "$6,298 3 Weeks Summer," and "$6,061 Consociate Teacher." (P-3).

25. Petitioner was not reappointed to the Guidance Consociate Teacher position for the 2003-2004 school year.

26. An Annual Salary Notice to Tenure Personnel, dated April 29, 2003, reflects that for the 2003-2004 school year petitioner's "contractual salary" would be $90,694, representing "MA-30 Step 18 $86,375" and "$4,319" for two weeks of summer work. (P-3).

27. The difference in salary from the 2002-2003 to 2003-2004 school years relates to the pay associated with petitioner's former Guidance Consociate Teacher position and a reduction of petitioner's summer work from three to two weeks.

28. Petitioner explained that he did not sign the April 29, 2003 Annual Salary Notice because it did not reflect the Consociate position.

29. Dr. Robert Jack, High School Principal, met with petitioner on May 7 and May 13, 2003. The matters addressed at the meetings are memorialized in a memorandum from Dr. Jack to Dr. Sabella dated May 13, 2003 (P-4), the accuracy of which Dr. Jack confirmed at the hearing.

30. On May 7, 2003, Dr. Jack met with petitioner to discuss his observation for the 2003-2004 academic school year. During the meeting, Dr. Jack indicated to petitioner that, given the current economic restraints faced by

the District, Dr. Jack believed that the position of Consociate would not be tenable during the upcoming year. (P-4).

31. As further reflected in Dr. Jack's memorandum, upon receipt of petitioner's guidance contract, Dr. Jack again met with petitioner on May 13, 2003, during which petitioner asked why his position of consociate had not been "renewed" for next year. (P-4). The reason given by Dr. Jack is memorialized in aforesaid memorandum. More particularly, Dr. Jack stated that his "building recommendation had been offered to Dr. Sabella in the context of the necessary cost efficiencies mandated by the diminution of the Magnet School Program," Dr. Jack "made this recommendation in the belief that this recommendation would assist the district in coping with a pending fiscal crisis," and "the motivation for this building recommendation was cost efficiency, not performance." (P-4).

32. Petitioner admits that he received the Annual Salary Notice, dated April 29, 2003, "sometime in May," 2003. Based on the evidence, I further **FIND** that petitioner had received his Annual Salary Notice no later than the May 13, 2003 meeting with Dr. Jack, and discussions transpired during that meeting regarding why petitioner was not appointed to the Consociate position. Petitioner further admits that he knew no later than June 15, 2003 that he was not going to be the Guidance Consociate Teacher.

33. Petitioner filed his Petition of Appeal with the Commissioner on December 11, 2003.

34. As a result of an administrative reorganization, petitioner's former position of Guidance Consociate Teacher was incorporated into the Vice Principal's position and the job duties previously undertaken by petitioner as a Guidance Consociate Teacher were subsumed under the Vice Principal's job title.

35. The Board has not appointed another individual to the Guidance Consociate Teacher position. The Board stipulated that petitioner has seniority to the position of Guidance Consociate Teacher.

The Testimony

In addition to the evidence which forms the foundation of the aforesaid findings of fact, a summary of other testimony presented at the hearing follows.

Enrico Ciamillo

Petitioner described his duties as a Guidance Consociate Teacher. Petitioner testified that he "was there for the Principal for the overall running of the operations of the school." For example, if the principal left the building, petitioner would be in charge of the building. Petitioner "would work closely with the Dean of Students as well as the Assistant to the Principal . . . and the overall operations as well, investigations, student conduct, what have you." In addition, petitioner conducted observations of other teachers. Petitioner was not interviewed for the Guidance Consociate position and, as far as petitioner knew, the position was not posted. When petitioner became a Consociate, the building principal asked petitioner if he would take on an extra week in the summer because she needed more assistance.

Petitioner met with Dr. Jack on May 7 and May 13, 2003. According to petitioner, on May 7, 2003, Dr. Jack stated that the Board was looking to reduce positions and save money. Dr. Jack was not sure at that point which Consociates may be affected. Petitioner acknowledged that he later had a discussion with Dr. Jack about not being appointed to the Consociate position. Dr. Jack also showed petitioner a copy of his May 13, 2003 memorandum to Dr. Sabella. According to petitioner, Dr. Jack told petitioner that, since Dr. Sabella was resigning, Dr. Jack saw no reason why petitioner would not be reinstated during the summer. Petitioner further testified that, during the high school

prom in June 2003, three newly elected Board members approached him. In describing his encounter with one of the Board members (Mrs. Fugnitti) petitioner stated:

> "[S]he came over to me and she said that what. . . the new Board members felt what was done to me was wrong and that they were going to correct the situation. But they needed some time. That's what they said.

Petitioner indicated that the first time he knew they did not correct the situation was when he received his first paycheck on September 15, 2003. Petitioner was not aware of any other Consociate Teacher who was, in essence, demoted in salary.

Petitioner testified that his salary, including that associated with the Consociate position and the summer work, was paid in bi-weekly installments and the extra pay is reported for pension purposes. Petitioner noted that pay for stipend positions is made quarterly and opined that it is not pensionable. He further described the procedure with respect to filling extra service positions. Each year the building principal would put a list of extra service positions in the staff's mailboxes. Anyone who was interested in an extra service position would return the letter of interest to the building principal. Petitioner testified that the position of Consociate Teacher was never posted. He presented notifications distributed for extra service contracts during the 2000-2001 to 2004-2005 school years, which do not include Consociate Teacher. (P-6, P-10). Petitioner stated that extra service positions are filled through appointments approved by the Board and presented a sample "Extra Service Contract." (P-8). Petitioner never received an Extra Service Contract relating to the Consociate Teacher position and his name does not appear in the list of appointments made for Extra Service Contracts at a Board meeting on June 11, 2002. (P-7). On cross-examination, petitioner acknowledged that he did not know the number of times throughout the year that the Board may appoint individuals to various positions, there may have been other postings for open extra service positions and petitioner lacked knowledge regarding the regulations addressing what is included in pension payments.

Dr. Robert Jack

Dr. Jack has been employed as the High School Principal for two and one half years. He explained the basis for his recommendation, which culminated in the elimination of the Guidance Consociate position previously held by petitioner. The Ridgefield School District runs a Magnet School Program. In connection with that program, the District receives special education students and related tuition from approximately sixty-seven other districts. The funds received are instrumental to the running of the high school and defray costs, including salaries for special and regular education staff. Based on a percentage wide ratio which is established administratively, if a staff member functions in a capacity with special education, a percentage of their salary is paid through the special education funds. Petitioner's salary was not paid specifically by special education funds. Dr. Jack stated that, if the projections for the special education revenue are lowered, this would have a devastating effect on the high school program, staffing, personnel and programmatic issues. He explained that this is what the District was facing at the time petitioner's position was eliminated.

Dr. Sabella directed Dr. Jack to find cost efficiency measures which could be implemented, in lieu of a potential lack of funding in the District. One of the measures Dr. Jack recommended was the elimination of the Guidance Consociate position. The Guidance Consociate position, when it existed, came directly under Dr. Jack's line of authority. As a result of an administrative reorganization, the job previously undertaken by petitioner as a Guidance Consociate is currently done by the Vice Principal. Dr. Sabella indicated that, from the cost efficiency measures Dr. Jack provided, he would recommend that the District eliminate the Guidance Consociate position. Dr. Sabella directed Dr. Jack to implement the elimination of the consociate position in guidance, which ultimately affected petitioner. Dr. Jack testified that, at the time of his conversations with petitioner, Dr. Jack had no indication Dr. Sabella was leaving the District and, when they discussed the future of petitioner's Consociate position, Dr. Jack indicated that the circumstances as to the elimination of the position would be dictated as to cost efficiency.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The initial issue to be determined is whether petitioner's Petition of Appeal is time barred pursuant to *N.J.A.C.* 6A:3-1.3. The regulation dictates in salient part:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case.[2]

The New Jersey Supreme Court reaffirmed the validity of the 90-day limitation period (then codified as *N.J.A.C.* 6:24-1.2(c)) in the seminal case of *Kaprow v. Bd. of Educ. of Berkeley Twp.,* 131 *N.J.* 572 (1993). The Supreme Court concluded that the rule "falls within the scope of statutory authority granted to the Commissioner and the State Board" and "represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." *Id.* at 582. In explaining the underlying purpose of the rule, the Court said:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements....
>
> [*Id.* at 582.]

The 90-day period for filing an appeal with the Commissioner is triggered at the point in time that the affected individual has received "adequate notice" of the "final

---

[2] During the relevant period, this 90-day limitation was codified in *N.J.A.C.* 6A:3-1.3(d). As a result of an amendment to the regulation effective April 4, 2005, it is now set forth in *N.J.A.C.* 6A:3-1.3(i).

order, ruling or other action," which is the subject of the requested contested case. Although the regulation does not specify what constitutes adequate notice, the decisional law provides guidance. The Supreme Court has instructed that "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow, supra,* 131 *N.J.* at 587. It must also be sufficient to further the purpose of the 90-day limitation period. *Ibid.* The intendment of the rule is two-fold. It is "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." *Ibid.* The rule is further intended to "'penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs." *Ibid.* (citation omitted.) In recognition of these dual considerations, the Supreme Court held that "the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a . . . cause of action" and, "[a]t the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'" *Ibid.* In *Kaprow,* the Court concluded that a letter from the secretary of the local board, which informed the petitioner that the board had created and filled two positions in which the petitioner claimed a tenure right, while "unofficial and informal, was sufficient to trigger the ninety-day limitations period." *Id.* at 588.

The 90-day clock begins to tick once notice of the final order, ruling or other action is given, and not when the injury is felt by the petitioner. *See Nissman v. Bd. of Educ. of the Twp. of Long Beach Island,* 272 *N.J. Super.* 373, 379-81 (App. Div. 1994), *certif. den.* 137 *N.J.* 315 (1994). In *Nissman* the Appellate Division held that a principal, who was informed in April 1990 that the Board had adopted a resolution not to offer her a contract and not to grant her tenure, was required to file a challenge within 90 days of that notice, even though it was not until the last day of her contract on August 31, 1990 that petitioner claimed she acquired tenure rights. The Appellate Division reasoned that, "[u]pon receipt of the Local Board's resolution, petitioner knew or should have

known that she was not going to be offered a new contract for the following academic year; that she was going to be required to serve out the remaining time on her existing contract; that she would complete three full years of service in the district thereby granting her tenure rights under *N.J.S.A.* 18A:28-5; and, notwithstanding that fact, the Local Board had voted not to grant her tenure." *Id.* at 379. The court went on to find that "the Local Board had the right to know within 90 days whether its action was going to be challenged," "[u]ndoubtedly the Local Board had to secure and contract with another elementary school principal to take petitioner's place" and, "[t]o allow a teaching staff member, such as petitioner, to file a claim after the commencement of a new academic year in these circumstances defeats the principle of 'repose, an essential element in the proper and efficient administration of the school laws.'" *Id.* at 380 (citation omitted). As the court observed, pursuant to the provision of the rule, "the 90 days begin on the date on which the final action of the Local Board took place, April 23, 1990, not the date on which petitioner claims that a substantive right accrued," and "[a]n agency regulation that focuses on the date of the employer's wrongful act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious." *Id.* at 381.

Equally recognized is that attempts to resolve a claim through negotiations with the local board do not negate the receipt of adequate notice nor do they toll the running of the limitations period. *Kaprow, supra,* 131 *N.J.* at 588; *Giannetta v. Bd. of Educ. of the Twp. of Egg Harbor,* Agency Docket No. 357-10/04 (Comm'r. April 25, 2005) at 6.

In this matter, petitioner acknowledges that the within "action was filed December 11, 2003 or over seven months from the date petitioner was first noticed that his position as consociate teacher was being eliminated." Petitioner's post-hearing brief at 8. The crux of petitioner's argument is that "the 90-day rule cannot apply to defeat his claim because it is grounded in statute," citing *N.J.S.A.* 18A:6-10 and 18A:28-5, and "his salary was reduced in violation of that statute...." *Ibid.* Petitioner principally relies on *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982) in support of his stance.

In *Lavin*, a teacher filed an action seeking military service credit pursuant to *N.J.S.A.* 18A:29-11 nine years after her employment began. The Court found that because *N.J.S.A.* 18A:29-11, which allows employment credit to teachers for time served in the military, is an emolument that "bears no relationship to the services to be rendered as an employee," the six year contract statute of limitations should not apply. *Id.* at 150. In its words:

> Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of incorporation in the employment contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment.
>
> xxx
>
> Where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such . . .
>
> xxx
>
> The legislative purpose of *N.J.S.A.* 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable.
>
> [*Id.* at 150-51.]

The Supreme Court revisited the statutory entitlement concept in *North Plainfield Educ. Ass'n. v. Bd. of Educ. of North Plainfield,* 96 *N.J.* 587 (1984). At issue in that case was whether the regulatory 90-day limitation barred two tenured teachers' statutory claims to credit on the salary scale for time spent on a sabbatical under *N.J.S.A.* 18A:29-8. The Appellate Division determined that because the teachers had a statutory right to credit on the salary scale without regard to performance, the time bar (then codified as *N.J.A.C.* 6:24-1.2) could not affect that right. *Id.* at 590. The Supreme Court disagreed and distinguished the teacher's claims under *N.J.S.A.* 18A:29-8 from *Lavin's* claim under *N.J.S.A.* 18A:29-11:

> [S]alary increments accruing under *N.J.S.A.* 18A:29-11 are distinctly different from those awarded under *N.J.S.A.* 18A:29-8. The annual increment under *N.J.S.A.* 18A:29-11 accrues because of time spent in military service without regard to performance as a teacher. By contrast, the annual increment under *N.J.S.A.* 18A:29-8 is subject to annual evaluation of teacher performance. Consequently, [the Appellate Division's] . . . analogy of an annual increment to the statutory entitlement for veterans is invalid.
>
> [*Id.* at 594.]

Concluding that the Appellate Division had misperceived "the increment as a 'statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered,'" *Id.* at 593, the Supreme Court stated:

> Because the award of the annual increment is not a matter of statutory right, but is subject to 'denial for inefficiency or other good cause,' *N.J.S.A.* 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. . . .
>
> [*Id.* at 594.]

The Court further rejected the teachers' attempt to circumvent the time bar by requesting relief for future years. It explained that the teachers' asserted right to advance an additional step in the next year, 1980-81, depends on the propriety of the board's action in not advancing then on 1979-80 guide and, thus, "[t]he time bar of the

original action also precludes the dependent action for relief in future years." *Id.* at 595. And, the Court did not agree that the withholding of the increment constitutes "a continuing violation," holding that "[s]uch a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case" and "the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations." *Ibid.*

The Appellate Division in *Polaha v. Buena Regional School District,* 212 *N.J. Super.* 628 (App. Div. 1986), addressed the applicability of the 90-day limitation to a claim arising out of an alleged violation of statutory tenure rights under *N.J.S.A.* 18A:28-5. The Commissioner concluded that the 90-day requirement did not bar the petition "because a statutory right with respect to tenure is involved." *Id.* at 632. The State Board reversed this determination and the Appellate Division concurred with the State Board's conclusion that the 90-day rule (then codified as *N.J.A.C.* 6:24-1.2) "is applicable to appellant's claim notwithstanding the assertion of his statutory right to tenure under *N.J.S.A.* 18A:28-5." *Id.* at 632-33. The court found the case similar to *North Plainfield* and distinguishable from *Lavin. Id.* at 633. It held that because the "decision necessary to confer tenure is undoubtedly carried out based on [an] evaluation of teacher performance, behavior and efficiency," *N.J.A.C.* 6:24-1.2 is applicable to the appellant's claim. *Id.* at 634.

More recently, the Supreme Court in *Kaprow* provided further guidance as to the intended reach of the regulatory provision. In *Kaprow*, the Court considered the timeliness of a claim by a tenured assistant superintendent who was terminated during a reduction in force (RIF) pursuant to *N.J.S.A.* 18A:28-9. The employee contended that his RIF right is an "absolute statutory entitlement" and, therefore, exempt from the 90-day limitation period. *Kaprow, supra,* 131 *N.J.* at 583. The Court reviewed the prior decisions in *Lavin, North Plainfield* and *Polaha* and observed that *Lavin* "is the only reported case that found a statutory benefit to constitute an absolute statutory entitlement." *Id.* at 584. In explaining the appropriate inquiry, the Court stated:

> That there exists a statutory basis for rights on the reduction in the school's work force is not enough to establish a statutory entitlement. Rather, the critical inquiry focuses on whether a 'functional relationship' exists between the statutory benefit, the RIF right, and Kaprow's employment as a tenured assistant superintendent in the school district.
>
> [*Id.* at 585.]

The Court rejected Kaprow's position on the basis that -

> Kaprow's RIF rights stem from his termination for reasons related to fiscal efficiency in the administration of the school system and from his status as a tenured assistant superintendent. . . . If Kaprow had not acquired tenure pursuant to *N.J.S.A.* 18A:28-5, he would have no right to seniority nor to a place on the preferred eligibility list.
>
> Because the decision necessary to confer tenure under *N.J.S.A.* 18A:28-5 is based on an evaluation of teacher performance, behavior, and efficiency, *see Polaha, supra,* 212 *N.J. Super.* at 634..., the only way Kaprow could acquire tenure rights, and therefore RIF rights, was through employment in the school district. Kaprow's RIF rights are then distinguishable from the petitioner's right to military service credit in *Lavin*; Kaprow is not entitled to his RIF rights independent from the administration of a school system or from his standing as a tenured assistance superintendent. Instead, his RIF rights have 'a relationship to the services *** rendered as an employee.' *Lavin, supra,* 90 *N.J.* at 150....
>
> Because RIF rights are inextricably tied to employment in a school system and to tenure rights, a 'functional relationship' exists between Kaprow's RIF right to preference in reemployment and his service in the school district. Rights resulting from RIFs in the local school districts do not constitute a statutory entitlement. The limitations period of *N.J.A.C.* 6:24-1.2(c), therefore, applies to Kaprow's petition.
>
> [*Id.* at 585-86.]

Similarly, in *Gordon v. Passaic Twp. Bd. of Educ.,* 1985 *S.L.D.* 1929, *aff'd.* No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986),

the State Board ruled "that the statute of limitations specified in *N.J.A.C.* 6:24-1.2 applies to claims ... which allege the violation of tenure or seniority rights," and the petitioner's failure to comply with the requirement bars his claims to both retroactive and prospective relief. *Id.* at 1930-32. It reasoned that "the tenure and seniority rights of teachers, unlike the right to military service credit, are predicated on the rendering of services as a school teacher" and, "[i]n both cases, the rights acquired are functionally related to teaching experience." *Id.* at 1931. In contrast, "the kind of statutory right that renders the statute of limitations inapplicable is one that, like the right to military service credit, does not bear a functional relationship to service as a teacher." *Ibid.* The Appellate Division affirmed the determination substantially for the reasons stated in the State Board's decision. In holding that 90-day rule was applicable to the petitioner's claim, the Appellate Division stated:

> While there is a statutory basis for tenure, *see N.J.S.A.* 18A:28-5..., and rights upon reduction in the school's work force, *N.J.S.A.* 18A:28-9, *et seq.*, just as there is a statutory basis for the salary increment involved in *North Plainfield,* the issue herein relates to administration of the school system, *i.e.,* the termination of a teacher for reasons related to expenses and efficiency of the system, and the role of petitioner as a teacher. It does not concern credits or rights to which he is entitled under statute independent or irrespective of the administration of the school system or his performance or standing as a teacher.
>
> xxx
>
> We conclude that issues resulting from reduction in force in local school districts do not give rise to the type of rights by virtue of statutory entitlement as in *Lavin,* where there was no 'functional relationship' between the military service credit required by statute and Ms. Lavin's experience as a teacher.... Here, unlike *Lavin* (but as in *North Plainfield*), tenure and reduction in benefits have a 'relationship to the services to be rendered [by petitioner] as an employee.' *Lavin, supra,* 90 *N.J.* at 150.
>
> [*Gordon, slip op* at 7-8.] (footnote omitted.)

See also Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, 92 *N.J.A.R.*2d (EDU) 621, *aff'd.* on other grounds, 272 *N.J. Super.* 373 (App. Div. 1994) (State Board

held that the ALJ erred in concluding that tenure acquisition "is a creature of statute and cannot be cut short by a rule of repose" and the Commissioner erred in adopting that conclusion). *Contrast East Orange Educ. Ass'n. v. East Orange Bd. of Educ,* 94 *N.J.A.R.*2d (EDU) 364, 365 (holding that the 90-day rule did not bar the claims of permanent building-based teaching substitutes (PBBS) to sick leave and health benefits because sick leave and health benefits are not tied to a teacher's status or performance and there is no "functional relationship" between their employment as a PBBS and eligibility for statutory sick leave and health benefits).

Against this backdrop, petitioner argues that the 90-day rule should not be applied because his salary was reduced in violation of *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:28-5. Petitioner contends that, unlike *Kaprow* and *Polaha*, a "[r]eduction of tenured teachers' salaries in violation of statute is independent of petitioner's standing as a teacher." Petitioner's post-hearing brief at 11. Alternatively, petitioner postulates that, "[i]f the 90 day limitation is found to apply, it should only limit petitioner's claim for compensation effective December 11, 2003, the day he filed the Petition." *Ibid.* In short, the Board maintains that the rights claimed by petitioner are similar to those asserted in *Kaprow*, (*i.e.,* a claim of statutory benefits flowing from employment as a tenured employee), and there is no statutory entitlement which would preclude the application of the 90-day limitation period of *N.J.A.C.* 6A:3-1.3. Board's post-hearing brief at 3, 6.

Succinctly stated, the undersigned embraces the Board's position. The decisional law supports the conclusion that petitioner's claim does not involve a statutory entitlement insulated from application of the 90-day rule. Rather, the rights claimed by petitioner in this matter stem from a claim of tenure. Similar to the RIF rights in *Kaprow*, protected salary stems from tenure rights, which have a relationship to the services rendered as an employee in the district. Stated differently, protected salary is not independent from the administration of a school system or from petitioner's tenured status. *See Kaprow, supra,* 131 *N.J.* at 585-86; *Nissman, supra*, 92 *N.J.A.R.*2d (EDU) at 621. A "functional relationship" exists between the statutory benefit arising

from tenure rights and petitioner's employment in the school system. Accordingly, I **CONCLUDE** that petitioner's claim is subject to the 90-day limitation of *N.J.A.C.* 6A:3-1.3(i) (formerly *N.J.A.C.* 6A:3-1.3(d)).

The record is clear that petitioner received the Annual Salary Notice to Tenure Personnel, dated April 29, 2003, in May 2003 and Dr. Jack met with petitioner on May 13, 2003 to discuss why his Guidance Consociate position had not been "renewed." In other words, as of May 13, 2003, petitioner received adequate notice that he would not be appointed to the Guidance Consociate position and would not be receiving the monetary remuneration associated with that position to which, in this case, petitioner claims an entitlement. As of that date, petitioner possessed the state of facts sufficient to enable him to file a timely claim. Even considering the facts in a light most favorable to petitioner, petitioner had notice of the disputed action no later than June 15, 2003 when petitioner candidly acknowledges knowing that he would not be the Guidance Consociate Teacher. Irrespective of whether petitioner's claim is deemed to have accrued in May or June 2003, no debate exists that petitioner did not file his petition with the Commissioner within 90 days of either date but waited until approximately six to seven months later on December 11, 2003.

Petitioner contends that the rule should be relaxed in the interest of justice because "he was lulled into believing that his salary would not be reduced" emanating from Dr. Jack's advice and petitioner's conversation with the Board member at the prom. Petitioner's post-hearing brief at 17. Petitioner claims that "[h]is first actual knowledge" that his pay was not restored was when he received his pay check on September 15, 2003 and petitioner then filed the instant appeal within 90 days. *Ibid.* Additionally, petitioner urges that the Board "intentionally and flagrantly disregarded the proscriptions of *N.J.S.A.* 18A:28-5 by reducing petitioner's salary" and "there are public policy considerations involved which create a fundamental public interest beyond that which concern the parties in this matter," citing *New Jersey School Boards Ass'n. v. Bd. of Educ. of the Twp. of Wyckoff,* Agency Dkt. No. 281-9/99 (Comm'r. February 2, 2000). Petitioner's brief at 17-18.

N.J.A.C. 6A:3-1.16 confers on the Commissioner the authority to relax the procedural rules in his discretion "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." The decisional law makes clear, however, that the 90-day rule is to be strictly applied. *Gordon, supra,* 1985 *S.L.D.* at 1931; *American Federation of Teachers, Local 3417 v. Bd. of Educ. of the Twp. of Berkeley Heights,* EDU 5355-97, Initial Decision (October 13, 1998), *adopted,* Comm'r. (November 30, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>; *Bd. of Educ. of Elmwood Park v. Farrell,* 95 *N.J.A.R.*2d (EDU) 375, 377. Although the Commissioner has the authority to relax the 90-day rule, such authority is rarely invoked. *DeMaio v. New Providence Bd. of Educ.,* 96 *N.J.A.R.*2d (EDU) 449, 453. Relaxation or waiver of the rule is reserved for cases presenting compelling reasons or exceptional circumstances such that strict adherence would be inappropriate, unnecessary or where injustice would result. *Kaprow, supra,* 131 *N.J.* at 590-91; *Gordon, supra,* 1985 *S.L.D.* at 1931-32; *DeMaio, supra,* 96 *N.J.A.R.*2d (EDU) at 453; *American Federation of Teachers, supra.* As articulated in *Bogart v. Bd. of Educ. of the City of East Orange,* OAL Dkt. EDU 6245-82 at 4 (January 26, 1983), *adopted*, Comm'r. (March 14, 1983), the 90-day rule will be relaxed "only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves."

I **CONCLUDE** that no compelling reason or exceptional circumstances exist in this case to warrant relaxation or waiver of the 90-day rule. Petitioner admittedly received notice of his 2003-2004 annual salary in May 2003, discussed his non-appointment to the Guidance Consociate position with Dr. Jack that same month and knew by no later than June 15, 2003 that he would not be the Guidance Consociate Teacher. The triggering event for purposes of the limitation period is when the petitioner received notice of the Board's action, not when the petitioner felt the injury, *i.e.,* petitioner's receipt of his first paycheck. *See Nissman, supra,* 272 *N.J. Super.* at 379-81. The undersigned affords little weight to petitioner's testimony vis-à-vis Dr. Jack's alleged advice and the alleged comment by the new Board member at a school

function. Nor does the undersigned concur with petitioner's argument that any such comments justifying an elongation of the regulatory time period and operate to nullify petitioner's receipt of notice concerning his salary and the Guidance Consociate position in September 2003. As recognized in *Kaprow,* and recently restated by the Commissioner in *Giannetta,* attempts to resolve a claim through negotiation do not negate the receipt of adequate notice and do not toll the running of the limitations period. *Kaprow, supra,* 131 *N.J.* at 588; *Giannetta, supra,* at 6. Based upon a review of the totality of the evidence, I **CONCLUDE** that no compelling reasons or exceptional circumstance exist to warrant relaxation of the 90-day time requirement.

The facts presented in *New Jersey School Boards Ass'n., supra,* are inapposite and provide no solace to petitioner. That case involved a petition by the New Jersey School Boards Association (NJSBA) seeking an order directing the Board of Education of the Township of Wyckoff to pay the NJSBA $106,206 in dues assessed for its fiscal years 1993-1994 through 1999-2000 and to make future timely payment of assessed dues. The Commissioner concluded that the Board's intentional disregard of the statutory provision of *N.J.S.A.* 18A:6-50, by refusing to pay dues assessed by the NJSBA, warranted relaxation of the 90-day rule "because a compelling public interest is presented." *Id.* at 5. The Commissioner further commented that he "cannot and will not countenance a board of education's long-standing refusal to fulfill its statutory obligation." *Id.* at 6.

Suffice it to say, the instant case concerns petitioner's individual claim to a higher salary. No constitutional issues are involved and the matter does not implicate issues of significant public interest beyond the present parties. *See Giannetta, supra,* at 6. Given this, the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioner's appeal as untimely. *Ibid.* If the rule was relaxed every time that a harsh result occurred, the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified. *Pacio v. Bd. of Educ. of Lakeland Regional High School School. District,* 1989 *S.L.D.* 2060, 2064.

In sum, I **CONCLUDE** that petitioner's claim is subject to the 90-day time limitation embodied in *N.J.A.C.* 6A:3-1.3(i) (formerly *N.J.A.C.* 6A:3-1.3(d)). I further **CONCLUDE** that petitioner received adequate notice that he would not be appointed to the Guidance Consociate position and would not receive the remuneration previously associated with that position in May 2003 and by no later than June 15, 2003. I further **CONCLUDE** that, irrespective of whether petitioner's cause of action is deemed to have accrued in May or June 2003, petitioner failed to file his Petition of Appeal with the Commissioner within the mandated 90-day period and waited until six to seven months later on December 11, 2003. I further **CONCLUDE** that no compelling or exceptional circumstances exist to justify a waiver or relaxation of the regulation. Accordingly, I **CONCLUDE** that petitioner's claim is time barred pursuant to *N.J.A.C.* 6A:3-1.3(i) (formerly *N.J.A.C.* 6A:3-1.3(d)) warranting dismissal of the within appeal. I further **CONCLUDE** that petitioner's failure to timely file his petition bars both retroactive and prospective relief and reject petitioner's contention that the matter involves a continuing violation. *See North Plainfield Educ. Ass'n., supra,* 96 *N.J.* at 595; *Gordon, supra,* 1985 *S.L.D.* at 1930-32; *Sasse v. Bd. of Educ. of the Borough of Point Pleasant,* 92 *N.J.A.R.*2d (EDU) 339, 344. In view of the foregoing, the undersigned will not address the merits of petitioner's claims alleging that he has tenure as a Guidance Consociate, the Board's reduction of his salary relating to this former position and/or the extra work week during the summer violates petitioner's tenure rights, and petitioner should have preferred eligibility in the position of supervisor.

ORDER

It is hereby **ORDERED** that petitioner's Petition of Appeal be and hereby is **DISMISSED** for failure to comply with *N.J.A.C.* 6A:3-1.3(i) (formerly *N.J.A.C.* 6A:3-1.3(d)).

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 2005
DATE

MARGARET M. MONACO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 18, 2005
DATE

Mailed to Parties

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 18 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/pb/jb

APPENDIX

List of Witnesses

For Petitioner:

Enrico Ciamillo

For Respondent:

Robert Jack

List of Exhibits

Joint Exhibits:

J-1 Agreement between Board of Education of the Borough of Ridgefield and Ridgefield Education Association, July 1, 2001 thru June 30, 2004 (31 pp)

J-2 Letter from Dr. Edmund A. Eyernan, President, Ridgefield Board of Education, to Staff Members of the Ridgefield School System, dated January 29, 1998 (5 pp); Memorandum from Dr. Richard A. Sabella, Superintendent of Schools, to All Staff dated December 24, 1996 (2 pp); Memorandum from Evan M. Goldman to Colleen Loughlin dated November 21, 1996; Letter from Colleen Loughlin, REA President, to REA Teaching Staff; dated December 19, 1996 (2 pp); Letter from Edmund G. Gerber, Director of Representation, Public Employment Relations Commission, to Stanley Turitz, Esq. and Alfred Maurice, Esq., dated December 3, 1997 (13 pp); and Decision of Edmund G. Gerber, Director of Representation, Public Employment Relations Commission, In the Matter of Ridgefield Board of Education and Ridgefield Education Association issued December 26, 1997 (10 pp; double sided)

For Petitioner:

P-1 Employment Contracts dated November 21, 1995, April 18, 1995, September 14, 1994, April 26, 1994, February 10, 1994 and December 8, 1993 (6 pp)

P-2 Letter from Enrico D. Ciamillo, Jr. to Dr. Richard A. Sabella, Superintendent of Schools, dated June 6, 1996

P-3 Annual Salary Notice To Tenure Personnel dated April 29, 2003, May 9, 2002, September 26, 2001, June 29, 2000, April 28, 1999, August 4, 1998, April 14, 1998, August 4, 1998, October 28, 1997, April 22, 1997,

July 11, 1996 and April 25, 1996 and Memorandum from Marcella Gleie to Dr. Richard A. Sabella dated July 30, 1998 (13 pp)

P-4 Memorandum from Dr. Jack to Dr. Sabella dated May 13, 2003

P-5 Job description – Consociate Teacher

P-6 Memorandum from Gary Behan, Larry Dunn and Marcella Gleie to Staff dated May 20, 2002 (2 pp)

P-7 "Appointments – Contractual Schedule E-14D" at Special Meeting on June 11, 2002 (3 pp)

P-8 Extra Services Contracts dated July 9, 2003

P-9 Memoranda from Aaron R. Graham, Ed.D to Dr. Richard A. Sabella, Superintendent, dated September 4, 2002, and October 22, 1996 and memoranda from Anthony C. Scalzo to Richard A. Sabella, Superintendent, dated July 25, 1995 and August 22, 1994 (4 pp).

P-10 Memorandum from Gary Behan, Larry Dunn and Marcella Gleie to Staff dated June 2000; Memorandum from Gary Behan, Larry Dunn and Dr. Robert Jack to Staff dated May 13, 2003 and Memorandum from Dr. Robert Jack to Staff dated May 12, 2004 (6 pp)

For Respondent:

R-1 Schedule D, Extra Service Guides, 1995-1996 and 1996-1997

R-2 Description of Consociate Position, Duties of Position

313-05

OAL DKT. NO. EDU 4883-03
AGENCY DKT. NO. 208-6/03

JULIE A. MOONEY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,

RESPONDENT.

AND

OAL DKT. NO. EDU 2818-04
AGENCY DKT. NO. 73-2/04

MELANIE B. BIGSBY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 4883-03
AGENCY DKT. NO. 208-6/03

JULIE A. MOONEY,
Petitioner,
v.
BOARD OF EDUCATION OF
OF CLINTON TOWNSHIP,
HUNTERDON COUNTY
Respondent.

And

OAL DKT. NO. EDU 2818-04
AGENCY DKT. NO. 73-2/04

MELANIE B. BIGSBY
Petitioner,
v.
BOARD OF EDUCATION
THE TOWNSHIP OF CLINTON,
HUNTERDON COUNTY.

Kathleen Naprstek Cerisano, Esq., appearing for petitioner, (Zazzali, Flagella,Nowak, Kleinbaum & Friedman, attorneys)

Anthony P. Sciarrillo, Esq., appearing for respondent, (Lindabury, Mccormick & Estabrook, attorneys)

Record Closed –July 22, 2005 Decided – July 25, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ:

These consolidated matters were transmitted to the Office of Administrative Law (hereinafter OAL) on July 25, 2003 and May 5, 2004, respectively, 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 consolidated matter was scheduled for hearing at the OAL, Mercerville, N.J. but rather than litigate the issues, the parties met and negotiated the matter.

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 record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 26, 2005
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

7-28-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

JULIE A. MOONEY, Petitioner, v. BOARD OF EDUCATION OF CLINTON TOWNSHIP, HUNTERDON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Dkt. No. EDUOR 04883-2003S Agency Ref. No. 208-6/03
MELANIE B. BIGSBY, Petitioner, v. BOARD OF EDUCATION OF CLINTON TOWNSHIP, HUNTERDON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Dkt. No. EDUOR 02818-2004S Agency Ref. No. 73-2/04 **STIPULATION OF SETTLEMENT**

The above-captioned matters having been brought before the Commissioner of Education upon the Petitions of Appeal filed by Julie A. Mooney (hereinafter "Mooney") and Melanie B. Bigsby (hereinafter "Bigsby") against the Board of Education of Clinton Township, Hunterdon County (the Board), and the parties having agreed to resolve the dispute between them now pending before the court, subject to the terms and conditions set forth below:

1. The Board agrees to pay Mooney the gross amount of $1,066.65, subject to standard and ordinary deductions and taxes.

ZZALI,
A, NOWAK,
INBAUM
IEDMAN
NAL CORPORATION
EYS AT LAW

2. Payment shall be made to Mooney within thirty (30) days.

3. The Board agrees to pay Bigsby the gross amount of $1,308.35, subject to standard and ordinary deductions and taxes.

4. Payment shall be made to Bigsby within thirty (30) days.

5. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

6. The petitioners shall withdraw the Petitions of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, bearing the above-captioned docket numbers.

7. This Settlement Agreement resolves all claims between Mooney and the Board arising during the 2002-03 school year and all claims between Bigsby and the Board arising during the 2003-04 school year.

8. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

9. Neither this Agreement nor anything contained herein, nor any action taken by the parties in performance of their obligations hereunder, shall be construed as evidence of the validity of the claims set forth in the actions nor an admission of the same by any of the parties.

ZAZZALI, FELA, NOWAK, KLEINBAUM & FRIEDMAN PROFESSIONAL CORPORATION ATTORNEYS AT LAW

Julie A. Mooney

Julie A. Mooney

Dated: 4/12/05

Melanie B. Bigsby — 4/16/05
Melanie B. Bigsby — Dated:

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioners

4/21/05
By: Kathleen Naprstek Cerisano, Esq. — Dated:

LINDABURY, McCORMICK & ESTABROOK
Attorneys for Respondent,
Board of Education of Clinton Township

By: Anthony P. Sciarrillo, Esq. — Dated: 7/19/05

CLINTON TWP. BOARD OF EDUCATION

By: Elisabeth Nastus, Ed.D. — 6/27/05
Elisabeth Nastus, Ed.D. — Dated:
Superintendent

THIS AGREEMENT IS SUBJECT TO RATIFICATION BY THE CLINTON TOWNSHIP BOARD OF EDUCATION.

ZAZZALI,
LA, NOWAK,
EINBAUM
RIEDMAN
IONAL CORPORATION
NEYS AT LAW

CLINTON TOWNSHIP PUBLIC SCHOOLS

CERTIFICATION OF DARIA A. WASSERBACH

I, Daria A. Wasserbach, Secretary of the Board of Education of the Township of Clinton in the County of Hunterdon, State of New Jersey, hereby certify, that the annexed extract is from the draft of minutes of the meeting of the Board of Education duly called and held on June 27, 2005, is true, complete and correct copy of the original minutes so far as they relate to the subject matter referred to in the extract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board of Education this 28th day of June 2005.

Daria A. Wasserbach

Daria A. Wasserbach, Secretary

[Seal]

RECEIVED
2005 JUL 21 A 10:18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

A. **Facilities/Finance** — Thomas Marron, Chairperson Facilities
Sandra Kotter, Chairperson Finance
Christopher Yula

A-15 Motion to approve transfer of 2004-2005 excess surplus to operating account 11-000-230-331 (legal expenses).

A-16 Motion to authorize use of 2004-2005 Capital project interest to offset debt service in the 2006-2007 budget.

A-17 Motion to award contract for renovations project to lowest bidder pending attorney review.

A-18 Motion to approve the Stipulation of Settlement between Clinton Township and J. Mooney in the gross amount of $1,066.65.

A-19 Motion to approve the Stipulation of Settlement between Clinton Township and M. Bigsby in the gross amount of $1,308.35.

A-20 Motion to approve the 2005-2006 regular education tuition contract for 7th and 8th grade Lebanon Borough students to attend Round Valley Middle School, Clinton Township, in the amount of $238,890 (30 students @ $7,963 per student).

318-05

OAL DKT. NO. EDU 1351-05
AGENCY DKT. NO. 397-11/04

L.C., on behalf of minor children, J.C. AND J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the Superintendent of the Caldwell-West Caldwell School District signed the Settlement Agreement on behalf of the Board of Education (Board). Neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating the superintendent to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner, therefore, cannot approve the within Settlement Agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and the Initial Decision 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.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/1/05

Date of Mailing: 9/7/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1351-05

AGENCY DKT. NO. 397-11/04

L.C., ON BEHALF OF MINOR CHILDREN,

J.C. AND J.C.,

Petitioner,

v.

BOARD OF EDUCATION OF CALDWELL-

WEST CALDWELL, ESSEX COUNTY,

Respondent.

L.C., *pro se*

Mark A. Wenzcel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed and Decided: August 12, 2005

BEFORE **BARRY N. FRANK**, ALJ:

Petitioner appeals the district's determination of the children's attendance at a particular school in the district. This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 21, 2005, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for August 12, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 12, 2005
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

August 17, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 22 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

L.C. o/b/o J.C.

v.

Caldwell-West Caldwell Board of Education

BEFORE NEW JERSEY COMMISSIONER OF EDUCATION

EDUCATION 0135-2005N

OAL Docket No.: ~~397-11/04~~

Agency Reference No.: 397-11/04

SETTLEMENT AGREEMENT

The above-referenced matter having been amicably settled, the parties hereby agree as follows:

1. The petition will be dismissed with prejudice.

2. The district ~~agrees~~ represents that it will keep John Carroll at the Wilson School for the remainder of his elementary school years.

3. The district represents that it will keep Jamie Carroll at Washington School for the remainder of her elementary school years.

Lisa Carroll

Lisa Cartoll

Dated: August 12, 2005

Daniel A. Gerardi

319-05

OAL DKT. NO. EDU 4209-05
AGENCY DKT. NO. 97-4/05

M.N. and D.N., on behalf of minor child, P.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, parties' settlement agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/1/05

Date of Mailing: 9/7/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4209-05

AGENCY DKT. NO. 97-4/05

M.N. AND D.N., O/B/O P.B.,

R.B. III, AND R.B,

Petitioners,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF HAMILTON,

MERCER COUNTY,

Respondent.

M.N. and D.N., petitioners, *pro se*

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee and Staub, attorneys)

Record Closed: August 18, 2005 Decided: August 18, 2005

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 2, 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.

At the scheduled hearing scheduled for August 18, 2005, the parties entered into successful settlement negotiations. At that time, the parties executed an executed a Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 18, 2005

DATE

Patricia M. Kerins

PATRICIA M. KERINS, ALJ

Receipt Acknowledged:

August 24, 2005

DATE

Karen Kennedy

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 2005

DATE

James Beasley

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

M.N. & D.N. o/b/o
Minor children, P.B., R.B. III, & R.B.
Petitioners

v.

HAMILTON TOWNSHIP
BOARD OF EDUCATION
Respondent

OAL Docket No:
EDUOS-04209-2005 S
Agency Ref No. - 97-4/05

The parties agree as follows:

1. The children P.B., R.B. III & K.B shall not be enrolled in the Hamilton Township school system as of Sept. 1, 2005, and none of the children shall attend the Hamilton Township schools.

2. The Hamilton Township Board of Education withdraws its counterclaim for tuition without prejudice, should the Petitioners allow the children P.B., R.B. III &/or K.B to attend the Hamilton Township Schools then the Respondent may again file suit against the Petitioners for tuition from January 27, 2005, to the date of the children's return to the Hamilton Township School Systems pursuant to this matter.

Petitioners

Michael Newkirk
Michael Newkirk

Dennis Newkirk
Dennis Newkirk

Respondent
Hamilton Township Board
of Education

By: Dennis M DeSantis
Dennis M DeSantis

327-05

OAL DKT. NO. EDU 7320-00
AGENCY DKT. NO. 186-6/00

THERESA D'ELIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/9/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07320-00

AGENCY DKT. NO. 186-6/00

THERESA D'ELIA,

Petitioner,

v.

THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: July 8, 2005 Decided: July 21, 2005

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 8, 2000, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings **BE** (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

7/21/05
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

7-27-05
DATE

M. Kathleen Donovan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 JUL 11 P 1:43

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

THERESA D'ELIA, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	OAL DKT NO. EDU-07320-00N Agency Ref. No. 186-5/00
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	**STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Theresa D'Elia vs. Jersey City Board of Education, C.P. No. 2001-21666, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore all days which were deducted from Petitioner's sick leave bank on account of Petitioner's absence from work from February 18, 2000 through May 3, 2000, inclusive.

IT IS FURTHER STIPULATED AND AGREED that Respondent shall pay Petitioner her full wages and all other emoluments to which Petitioner would have been entitled for the period from February 18, 2000 through May 3, 2000, inclusive, had Respondent initially treated such absences as being related to a school accident.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 7/8/05

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: 3/15/05

#351-05

351-05

OAL DKT. NO. EDU 4306-05
AGENCY DKT. NO. 138-6/05

J.L. on behalf of minor child, A.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/29/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4306-05

AGENCY DKT. NO. 138-6/05

J.L., ON BEHALF OF MINOR CHILD, A.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

Steve Hallett, Esq., for petitioner

Jeffrey F. Belz, Esq., for respondent

Record Closed: August 25, 2005 Decided: August 25, 2005

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 14, 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 and Dismissal indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 25, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

8-29-05
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 30 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

J.L. o/b/o A.L. V. Ewing Twp. Bd. of Ed.	Agency Docket No.: 138-6/05 OAL Docket No.: EDU05 04306-200 Stipulation of Settlement and Dismissal

The matter having been amicably resolved between the parties, it is hereby stipulated and agreed as follows:

1) Based upon presentation of a deed showing that the Ewing residence has been transferred to petitioner solely, A.L. shall be allowed to attend the Ewing schools free of tuition;

2) Both parties hereby dismiss their petition and counterclaim.

Steve Hallett Esq
Steve J. Hallett, Atty. for Petitioner

Jeffrey F. Beck, Atty. for Respondent

352-05

JUDY A. MAZZEO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner contends that the respondent failed to assign her the duties of a principal, as required by an earlier Commissioner's Decision ordering respondent to reinstate the petitioner to the position of principal to rectify an illegal reassignment in violation of her tenure rights. Respondent filed a Motion to Dismiss based on untimely submission of the petition.

The ALJ found that respondent's action in appointing petitioner as a principal — but failing to assign her to a school, failing to change her duties and causing her to report to the middle school principal as she had done during the earlier reassignment that violated her tenure rights — was adequate notice to trigger the 90-day limitations period for filing petitions, pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioner's reassignment to a principal position without commensurate responsibilities occurred on August 23, 2004, following adjudication and an initial decision ordering her reinstatement as principal; the instant petition was filed on June 15, 2005. The ALJ, therefore, found that the petition was not filed in a timely manner, and concluded that the respondent is entitled to the granting of its Motion to Dismiss.

The Commissioner adopts the ALJ's decision with modification to the timeline for determining what constitutes an untimely filing in this matter, establishing the estimated date of receipt of the original Commissioner's decision as the accrual date. Additionally, the Commissioner notes that petitioner was advised that enforcement of agency orders may be sought in Superior Court pursuant to R. 4:67-6, and any petitioner choosing that avenue of remedy is not constrained by the 90-day rule if the case is later transferred by a Superior Court judge to the Commissioner for clarification of issues requiring administrative expertise. Because petitioner appealed directly to the Commissioner in this matter, she was bound by the procedural rules in *N.J.A.C.* 6A:3-1.3, including the 90-day rule. Accordingly, the Commissioner adopts the decision of the ALJ, and dismisses the petition for failure to timely file.

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 30, 2005

OAL DKT. NO. EDU 4561-05
AGENCY DKT. NO. 151-6/05

JUDY A. MAZZEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions have been independently reviewed.

From 1994 to 2002, petitioner was employed by the respondent district in the dual assignment of Principal/Basic Skills Supervisor. In June, 2002, she was reassigned to the position of "Director of Special Projects." It is undisputed that the reassignment switched petitioner from a position in which she had tenure rights to a position in which she did not have tenure rights.

Petitioner appealed the reassignment to the Commissioner, and the matter was adjudicated in the OAL, under docket number EDU 8384-02, by means of stipulated facts and briefs in lieu of a hearing. On December 23, 2004 the Commissioner adopted the administrative law judge's (ALJ) initial decision dated May 27, 2004, ordering that respondent reinstate petitioner to the position of principal, with back pay, benefits and emoluments.

The parties agree that respondent "reassigned" petitioner back to the position of principal on August 26, 2004, and that petitioner was notified of the reassignment by letter dated September 7, 2004. This was before the Commissioner's final decision was issued. However, the petitioner was not assigned to any school as a principal, but was rather kept in the same office she had been in as Director of Special Projects, performing the same duties and reporting to the same middle school principal. There is no record of petitioner taking any action to challenge respondent's course of action (or inaction) until April 13, 2005.

On or about April 13, 2005, petitioner filed a motion with the Bureau of Controversies and Disputes (the Bureau) seeking substantive enforcement of the Commissioner's December 23, 2004 order requiring her return to the position of principal, and alleging that respondent had complied only nominally with the Commissioner's mandate. The Bureau advised petitioner, by letter dated April 21, 2005, that motions to enforce orders of the Commissioner are properly brought before the trial division of Superior Court. *R.* 4:67-6. In the alternative, the Bureau explained that if the issues raised by petitioner in the motion required determinations by the Commissioner, she would have to file a petition of appeal conforming to the requirements of *N.J.A.C.* 6A:3-1.3 and *N.J.A.C.* 6A:3-1.4 .

Petitioner apparently decided that the issues for which she sought a determination required the Commissioner's expertise. Accordingly, she filed a petition, dated June 7, 2005, which was received by the Bureau on June 15, 2005. On June 23, 2005, respondent submitted a motion to dismiss the petition as untimely. More specifically, respondent asserted that petitioner had failed to file her petition within the ninety day period set forth in *N.J.A.C.* 6A:3-1.3(i). The matter was transmitted to the OAL and assigned docket number EDU 4561-05.

In her response to the motion to dismiss, filed with the Bureau on June 30, 2005 and with the OAL on July 29, 2005, petitioner claimed -- citing no authority -- that the ninety day rule does not apply because she is challenging an attempt by respondent to circumvent the requirements of the Commissioner's decision and the rights involved therein. Petitioner stated: "At issue are not only the rights of the petitioner but the effectiveness of the decision making authority of the Commissioner." Petitioner's letter dated July 27, 2005, in response to respondent's motion.

No affidavits or certifications were submitted by the parties in connection with the motion to dismiss, but the ALJ found that "the essential facts in this matter may be gleaned from reviewing the petition and from the arguments of the parties, and are not disputed." Initial Decision at 2. His "factual discussion" included most of the facts set forth above, and was not challenged by the parties' exceptions.

In his legal analysis, the ALJ referred to *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993), in which the Court explained that the 90-day rule for filing petitions with the Commissioner of Education is within the broad delegation of power the Commissioner received from the legislature to prosecute controversies, i*d.* at 582, and creates the repose necessary for the efficient administration of the school laws. *Ibid.* The *Kaprow* Court also approved of the regulatory focus on the date that petitioners receive written or actual notice of the board of education's wrongful act as the accrual date for a cause of action, as opposed to the date a petitioner feels the consequences of the wrongful act or receives formal notice of same. *Id.* at 588-89. *See also, Nissman v. Board of Educ. of Tp. Of Long Beach Island, Ocean County*, 272 *N.J. Super. 373 (*App. Div. 1994), *certif. den.* 137 *N.J.* 315 (1994).

Comparing the present case to *Kaprow*, the ALJ determined that respondent's failure to assign petitioner to a school, change her duties or eliminate her obligation to report to the same middle school principal, was adequate notice of respondent's adverse action and, thereby, petitioner's cause of action. Initial Decision at 5. Thus, he concluded that the 90-day rule was triggered on August 23, 2004. Initial Decision at 6. Consequently, he reasoned, the petition filed on June 15, 2005 was untimely. *Ibid.*

In her exceptions, petitioner continues to assert that the 90-day rule does not apply to the present case. She draws a distinction between contesting the Commissioner's decision of December 23, 2004, which she agrees would trigger the 90-day rule, and seeking compliance with same. Petitioner's exceptions at 2. In fact, petitioner maintains that her appeal does not rest upon an action of respondent, but rather upon an unfolding of every day assignments and duties during the course of the school year. *Ibid.*

The Commissioner is constrained to adopt, with some modifications, the ALJ's decision that petitioner did not meet the time requirements for pursuing her claim. *N.J.A.C.* 6A:3-1.3 (a) states, in pertinent part, that "[t]o initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal . . .," and *N.J.A.C.* 6A:3-1.3(i) directs petitioners to file their petitions "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." As stated above, the phrase "receipt of the notice of a final order, ruling or other action by the district board of education" has been interpreted in case law to mean even an informal awareness of adverse action by a board of education or other party.

The Commissioner agrees with the ALJ that petitioner would have been aware by early September 2004 that she was not given the principalship of an actual school, and that she was still reporting to the same middle school principal. These are adverse actions by respondent. However, it was not until the end of December 2004 that the Commissioner issued a decision ordering petitioner's reinstatement. Before that decision and order, any "appeal" by petitioner would have been premature and uncognizable. In other words, notwithstanding the fact that it appeared in September 2004 that respondent was not reinstating petitioner to full status as principal, respondent was not legally required to do so until it received the Commissioner's December 23, 2004 order. In light of the December holiday break, the likelihood that respondent would have seen the order before January 3, 2005 was small.

Thus, the 90-day limitations period should be deemed triggered on or about January 3, 2005. This is when respondent was obligated to reinstate petitioner to a principalship, and this is when petitioner should have paid heed to whether respondent assigned her a school and allowed her to perform the kind of duties she had performed previously as a principal. She had until April 4, 2005 to file a petition to bring before the Commissioner any disagreements she had concerning respondent's actions. The Commissioner does not agree with petitioner that respondent's failure to comply with the December 23, 2004 order could not be characterized as adverse action. Further, the Commissioner concludes that 90 days was enough time for petitioner to ascertain that the duties respondent assigned to her after January 3, 2005 were not compliant with the December 23, 2004 order, and that the assignment of those duties was an adverse action. Unfortunately, petitioner's first filing with the Bureau was on April 13, 2005, nine days past the deadline.

As mentioned *supra*, petitioner was advised by the Bureau in a letter dated April 21, 2005, that litigants may file motions for enforcement of agency orders in Superior Court, pursuant to *R.* 4:67-6. If a petitioner chooses that remedy, and his or her case is later transferred by a Superior Court judge to the Commissioner for clarification of issues which require administrative expertise, the 90-day rule does not apply. *Paul Metzger v. Board of Education of the Township of Willingboro,* 93 *N.J.A.R.* 2d 548, Initial Decision May 13, 1993, Final Agency Decision June 22, 1993, p.7. For instance, a Superior Court judge could, arguably, in a case such as the present one, have transferred the matter to the Commissioner for a determination as to whether petitioner's current duties are indeed not amenable to characterization as principal's duties. The arrival of the case at the Commissioner's office in such a scenario would not be subject to the 90-day rule.

Petitioner, however, appealed directly to the Commissioner for relief from an alleged wrong. She was consequently required to go forward in accordance with the procedural rules in *N.J.A.C.* 6A:3-1.3, including the rule concerning a limitations period, but did not. Accordingly, and for the reasons set forth above, the Commissioner adopts the decision of the ALJ and his order granting respondent's motion to dismiss the petition.

IT IS SO ORDERED*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/30/05

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION TO DISMISS

OAL DKT. NO. EDU 4561-05

AGENCY DKT. NO. 151-6/05

JUDY A. MAZZEO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

James F. Schwerin, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: August 11, 2005 Decided: August 18, 2005

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district. She was appointed as a Principal by respondent Board of Education, but contends that she was not assigned to any school and was not assigned to perform the duties of a Principal. Petitioner contends that this action by respondent failed to comply with a December 23, 2004, final decision by the Commissioner in a matter entitled *Mazzeo v. Board of Education of the Township of Barnegat,*

OAL Dkt. No. EDU 8384-02, requiring that she be assigned to a Principal position. Petitioner filed a Petition of appeal with the Commissioner of Education on June 15, 2005, seeking to enforce the final decision of the Commissioner. Respondent filed a Motion to Dismiss in lieu of answer on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C.* 6A:3-1.3(i). The matter was then transmitted to the Office of Administrative Law (OAL) on June 27, 2005, for hearing as a contested case. On July 11, 2005, I entered a letter order as to submissions, following which I closed the record with respect to respondent's Motion to Dismiss on August 11, 2005.

FACTUAL DISCUSSION

Despite the fact that neither party submitted any affidavit or certification to establish a factual record, I **FIND** that the essential facts in this matter may be gleaned from reviewing the petition and from the arguments of the parties, and are not disputed.

Petitioner is a tenured Principal employed by respondent school district. She had previously achieved tenure in the position of Principal. On July 8, 2002, petitioner was transferred from the position of Principal and Supervisor of Basic Skills to the position of Director Special Projects, a position in which petitioner did not have tenure. Petitioner then filed a Petition with the Commissioner of Education, alleging that the foregoing transfer violated her tenure in seniority rights. On May 27, 2004, I entered an Order requiring that petitioner be reinstated to her former position as Principal together with any back pay, benefits and other emoluments. I further ordered that the matter be scheduled for additional proceedings with respect to petitioner's claim of entitlement to the position of Supervisor of Basic Skills. Thereafter, petitioner elected not to proceed with her claim to the position of Supervisor of Basic Skills, and attorney for petitioner requested that the matter be transmitted to the Commissioner. Accordingly, on November 23, 2004, I ordered that petitioner's withdrawal of her claim to the position of Supervisor of Basic Skills be accepted, and I adopted the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal as the Initial Decision, thus concluding the matter. By a final decision of the Commissioner on December 23, 2004, the Initial Decision was affirmed.

On August 26, 2004, after the date of the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal, but prior to the Commissioner's final decision on December 23, 2004, respondent reassigned petitioner from the position of Director of Special Projects to a Principal position. However, for purposes of deciding the within motion, it is undisputed that petitioner was never assigned to a school as a Principal, she remained in the same office and performed the same duties as when she was Director of Special Projects, and she continued to report to the same middle school principal as she had when she was Director of Special Projects. In her petition, petitioner alleges that respondent has failed to comply substantively with the order of the Commissioner by failing to change her assignment and failing to provide her with a school in which to serve as Principal.

On April 13, 2005, petitioner filed a Notice of Motion with the Commissioner of Education seeking to enforce the Commissioner's order of December 23, 2004. On April 21, 2005, the Bureau of Controversies and Disputes of the Department of Education informed petitioner that enforcement of the Commissioner's decision is a matter for the Superior Court of New Jersey, but also indicated that if the issues raised in the petitioner's motion seeking enforcement required adjudication before the Commissioner, petitioner was required to submit the request for relief in the form of a Petition of Appeal. Petitioner thereafter filed the within Petition on June 15, 2005.

LEGAL DISCUSSION

Respondent school district has filed a Motion to Dismiss the Petition on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C.* 6A:3-1.3(i). This section of the New Jersey Administrative Code states:

> (i) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In the present matter, petitioner alleges that respondent has failed to comply substantively with the order of the Commissioner by failing to change petitioner's assignment and failing to provide her with a school in which to serve as Principal. Petitioner acknowledges that on August 26, 2004, after the date of the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal, but prior to the Commissioner's final decision, respondent reassigned petitioner from the position of Director of Special Projects to the position of Principal. However, petitioner further acknowledges that she was never assigned to a school and she remained in the same office and performed the same duties as when she was Director of Special Projects. She also continued to report to the same middle school Principal as she had when she was Director of Special Projects.

Despite these actions by respondent on and after August 26, 2004, petitioner took no action to challenge them until April 13, 2005, when she filed a Notice of Motion with the Commissioner of Education seeking to enforce the Commissioner's order of December 23, 2004. In fact, it was not until June 15, 2005, that petitioner filed a proper petition challenging the actions of the respondent.

N.J.S.A. 18A:6-26 delegates to the State Board and the Commissioner the "power to make rules governing the prosecution and hearing of controversies and disputes, under the school laws and the rules governing the particular prosecution or dispute when exercising original or appellate jurisdiction therein." *Kaprow v. Board of Educ. of Berkeley Tp.,* 131 *N.J.* 572, 581-582 (1993). The Court in *Kaprow* went on to state:

> The Legislature's broad delegation of power to the Commissioner and the State Board, particularly *N.J.S.A.* 18A:6-26, encompasses the authority to establish a time limitation for the resolution of disputes under the school laws. The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.
> [*Id.* at 582.]

In *Nissman v. Board of Educ. of the Township of Long Beach,* 272 *N.J. Super.* 373 (App. Div. 1994), petitioner claimed that she acquired tenure as a Principal by serving in the position for three calendar years as of August 31, 1990. This was notwithstanding the local board's resolution of April 23, 1990, that her employment contract expiring on August 31, 1990, would not be renewed. The Appellate Division held that the local board's resolution formulated a sufficient controversy to make it "the subject of [a] requested contested case hearing" within the meaning of *N.J.A.C.* 6:24-1.2(c) and is not contrary to legislative policy or existing law. *Id* at 379-380. The Court noted that in *Kaprow v. Berkeley Tp. Bd. of Educ.*, 131 *N.J.* 572, 582 (1993), the Supreme Court stated that the limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days. The Court indicated that it is not necessary to decide whether the local board acted correctly when it passed its resolution. What is important is that the local board had the right to know within 90 days whether its action was going to be challenged. To allow a teaching staff member, such as petitioner, to file a claim after the commencement of a new academic year in these circumstances defeats the principle of "repose, an essential element in the proper and efficient administration of the school laws." Citing *Kaprow, supra*, 131 *N.J.* at 582.

In *Kaprow* the Court held that an agency regulation that focuses on the date of the employer's wrongful act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee, such as termination, is not inherently arbitrary or capricious. (Citations omitted) The action of respondent herein in appointing petitioner as a Principal but failing to assign her to a school, failing to change her duties and causing her to report to the middle school building principal as she had previously done as Director of Special Projects, was adequate notice of this action. When a prospective petitioner knows or has reason to know that he has a cause of action against an identifiable respondent and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. *Kaprow, supra* at 245, [citing *Farrell, v. Votatur Div.,* 62 *N.J.* 111, 115 (1973)]. Adequate notice under *N.J.A.C.* 6:24-1.2 should effectuate concerns for individual justice by not triggering the limitations period until the effected individuals have been alerted to the existence of facts that may equate in law with a cause of action. At the same time, it should

further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Ibid.*

In this matter, similar to the facts in *Kaprow,* the final order, ruling, or other action by the respondent Board occurred when it appointed petitioner to the position of Principal on August 23, 2004, and had her report to the middle school building principal as she had previously done as Director of Special Projects, but did not assign her to a school and did not change her duties. It must be inferred that these actions and conduct continued from August 23, 2004, through April and June 2005. I **FIND** that these actions and this conduct, especially since they occurred over such an extended period of time, were sufficient to trigger the ninety-day limitations period on August 23, 2004. Therefore, I **FIND** that the Petition filed as it was on June 15, 2005, was not filed in a timely manner pursuant to *N.J.A.C.* 6A:3-1.3(i). Accordingly, I **CONCLUDE** that respondent is entitled to the granting of its motion and that the Petition should be dismissed as untimely.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that respondent's Motion to Dismiss in lieu of answer on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C.* 6A:3-1.3(i), 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 18, 2005
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Aug. 18, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 24 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

354-05

BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the Township of Nutley (Nutley) filed a Petition of Appeal seeking reversal of the decision of the New Jersey Interscholastic Athletic Association Executive Committee (NJSIAA) affirming a determination of the Northern New Jersey Interscholastic League (NNJIL) and the NJSIAA Special Committee on Leagues and Conferences (Special Committee) denying Nutley's request to withdraw from the NNJIL and join the Northern Hills Conference (NHC).

Nutley avers that the decisions denying its application to withdraw from the NNJIL were arbitrary, capricious and unreasonable. Nutley claims that its application to join the NHC was made due to an imbalance in the current makeup of the NNJIL, resulting in negative impact to competitiveness which, in turn, occasions health and safety concerns for its student-athletes. Nutley charges that the record is replete with recognition by NJSIAA committees that a problem exists due to unbalanced competition in the NNJIL, and further contends that attempts to achieve balanced scheduling have "failed miserably", pointing out that the NNJIL has not implemented "cross over" scheduling nor addressed scheduling based on "strength of programs" in regard to contests with the strong parochial school members of the NNJIL, as required by action of the NJSIAA Executive Committee in 2000.

The NJSIAA advances that the emphasis in realigning leagues has always been "to assure full scheduling for schools, particularly those with heavy minority populations or parochial schools who would otherwise be denied entrance into local Leagues and Conferences," and a school's win/loss record is not a concern of the Association or the Commissioner. It is well established that in order to assure stability of the leagues, a school wishing to withdraw without the permission of both leagues must present substantial reasons for doing so, and satisfy seven alignment criteria to justify a league transfer. Nutley failed to satisfy four of the seven criteria, in that a transfer: was not justified based on size or geography; would increase financial expenses; and would have a severe negative impact on the NNJIL. The NJSIAA avers that Nutley's application to change leagues is predicated upon its desire to have a winning sports program, especially in football.

On appeal, the Commissioner upholds NJSIAA's determination to deny petitioning Board's request to withdraw from the NNJIL, finding that: Nutley was accorded the full measure of due process to which it is entitled; that the determination of NJSIAA was well-grounded in the record; and that Nutley has failed to establish that the denial of their withdrawal from the NNJIL was arbitrary, capricious or unreasonable, and therefore, under the established standard of review of NJSIAA matters, there is no basis upon which the Commissioner can overturn the NJSIAA's decision here. However, the Commissioner emphasizes that the NNJIL must immediately act to implement, as directed by the NJSIAA's Executive Committee, inter-division or "cross over" game scheduling based upon the relative strength of programs of the competing schools to help insure a healthy competitive balance for all schools in parochial-public school competition.

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 3, 2005

AGENCY DKT. NO. 86-4/05

BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Robert J. Pansulla, Esq. (Gaccione, Pomaco & Malanga)

For Respondent, New Jersey State Interscholastic Athletic Association (NJSIAA), Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

PROCEDURAL HISTORY

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on April 6, 2005 by the Board of Education of the Township of Nutley ("Nutley"), Essex County, seeking reversal of the decision of the New Jersey Interscholastic Athletic Association Executive Committee ("NJSIAA Executive Committee"), dated March 2, 2005, which affirmed the determination of the Northern New Jersey Interscholastic League ("NNJIL") and the NJSIAA Special Committee on Leagues and Conferences ("NJSIAA Special Committee") denying Nutley's request to withdraw from the NNJIL and join the Northern Hills Conference ("NHC").[1]

[1] It is noted that subsequent to the NNJIL's denial of its request to withdraw from that Conference, Nutley went to Superior Court to attempt to secure a ruling allowing the change. That Court directed that Nutley first exhaust its administrative remedies.

On April 11, 2005, Nutley submitted copies of all exhibits filed with the NJSIAA Committees in support of its appeal, along with the transcripts of the hearing held on January 12, 2005 before the NJSIAA Special Committee and those of the March 2, 2005 hearing before the NJSIAA Executive Committee. Respondent NJSIAA filed its Answer to the Petition of Appeal, pursuant to *N.J.A.C.* 6A:3-7.2, on April 14, 2005. On May 3, 2005, Nutley submitted a brief in support of its position, and a reply brief was submitted by the NJSIAA on May 20, 2005, whereupon the record in this matter was closed.

BACKGROUND

The within record evidences the following:

- The NJSIAA is a voluntary association established pursuant to *N.J.S.A.* 18A:11-3, which organizes, oversees and governs high school athletics in the State of New Jersey.
- Nutley is a public school district in Essex County, and a member of the NJSIAA, and has adopted the Rules and Regulations of that body.
- Nutley is currently a member of the NNJIL and has been since 1982. (Nutley's Brief at 5)
- The NNJIL is currently comprised of 19 member schools. Nutley High School is one of the 13 Group III and Group IV public schools in Bergen, Essex and Passaic Counties included in that League. There are also six parochial school members, including two girls' schools (Holy Angels Academy and Immaculate Heart Academy), three boys' schools (Bergen Catholic, Don Bosco and St. Joseph's) and one co-ed school (Paramus Catholic). (NJSIAA Special Committee February 9, 2005 Decision at 1-2)
- Nutley applied, and was accepted for membership in the NHC. Such application was made, it avers, due to the imbalance that exists in the current makeup of the NNJIL,

resulting in negative impact to competitiveness which, in turn, occasions health and safety concerns for its students who participate in sports. (Petition of Appeal at 2-5) The NNJIL, however, rejected Nutley's request to withdraw from that Conference, thus preventing Nutley from entering the NHC.

- Almost since the inception of the NNJIL, a number of public schools have attempted to leave that league because of the perceived domination of competition by the parochial schools as a result of their ability to draw an enrollment from a larger geographic area. (NJSIAA Answer to Petition of Appeal at 3; NJSIAA Special Committee February 9, 2005 Decision at 2)
- Historically, the schools in the NNJIL were arranged by population in two divisions. However, in an attempt to address the issue of unfair competition, while also maintaining the viability of the NNJIL, the NJSIAA conducted hearings in 1999 and ultimately issued a report on January 3, 2000, which allowed for the creation of two separate divisions of public schools based upon population, and one division made up solely of parochial schools. The NNJIL was directed to provide for competition with parochial schools on the basis of competitive power and strength so as to mitigate any unfair competitive imbalance.[2] [3] (*Ibid.*; NJSIAA Special Committee February 9, 2005 Decision at 2-3)

---

[2] Specifically, this Special Committee urged that future scheduling take into account the relative strength of a school's athletic program for each sport. This was to be accomplished by dividing the League into three sections, based on the strength of a school's athletic program for each sport over the previous five years. Inter-division or "crossover" games would then be scheduled between programs of similar strength. Scheduling in this manner, based on strength of program, should insure that the League will maintain "a competitive balance that is healthy for all schools. It also has the added benefit of allowing schools to play games against a wider variety of opponents. As the strength of a school's program rises or falls each year, the school's opponents will change accordingly." (Special Committee on League and Conferences Decision, February 9, 2005 citing to January 2000 Special Committee Report, Attachment A, pp. 4, 5)

[3] This decision, on appeal by the parochial schools, was affirmed by the Commissioner of Education on June 23, 2000. *See In the Matter of the Divisional Realignment by the Northern New Jersey Interscholastic League*, Commissioner Decision No. 209-00.

- As a result of this realignment, the three divisions of the NNJIL are now configured thusly:

DIVISION A – (Smaller Public)

	Enrollment
Bloomfield	1,289
Hackensack	1,228
Ridgewood	1,164
Belleville	1,135
Teaneck	1,017
Nutley	1,008
Paramus	951

DIVISION B – (Larger Public)

	Enrollment
Clifton	2,435
Eastside	2,101
Passaic	1,948
J.F. Kennedy	1,628
Barringer	1,471
Montclair	1,316

DIVISION C – (Parochial)

	Enrollment
Immaculate Heart Academy	1,262
Bergen Catholic	1,236
Don Bosco Prep	1,136
Paramus Catholic	1,012
Academy of the Holy Angels	784
St. Josephs	664

(NJSIAA Special Committee February 9, 2005 Decision at 4-5)

- In contrast, the enrollment of the average school in the NHC is significantly smaller than the schools comprising the NNJIL:

	Enrollment
Passaic County Tech	1,464
West Orange	1,389
West Milford	1,088
Wayne Valley	1,055
West Side	976
Millburn	822
Passaic Valley	805
Montville	796
Lakeland	773
Orange	677
Delbarton	668
Caldwell	594
Pequannock	534
Mt. St. Dominic	492
Madison	480
DePaul	426
Butler	368
Academy of St. Elizabeth	338
Villa Walsh	294
Morris Catholic	270

(*Id.* at 5-6)

- For the years 2001-2003 Nutley maintained a strong baseball team and was competitive in soccer, wrestling and ice hockey. It also had strong girls' tennis and softball teams and was competitive in girls' soccer, cross country, volleyball and basketball. (Nutley's Application Athletic Results Exhibits)
- On January 12, 2005, Nutley appeared before the NJSIAA's Special Committee to appeal the NNJIL's denial of its application to leave that Conference. (Nutley's Brief in Support of Appeal, at 6).
- As has been its practice for over two decades, in considering requests for transfer of a school from one conference to another when one of the two conferences rejects the

transfer application, the NJSIAA Special Committee considered seven Realignment Criteria:

1. Size of schools involved;
2. Geographic location of schools;
3. Nature of total athletic program and facilities;
4. The effect on other leagues and their existing relationships should the request to move from one league to another be granted;
5. Administrative personnel for programs offered;
6. Consideration must be given to the financial burden placed upon the school;
7. Any negative effect that the transfer might have upon the present balance of minority and non-minority schools in a league or conference, at variance with the mandate of the Commissioner of Education in November 1979.

- By decision dated February 9, 2005, the NJSIAA Special Committee denied Nutley's application. In so concluding, the Committee made the following "Findings of Fact" and "Conclusions":

Findings of Fact

1. Nutley High School is one of 13 public schools in the NNJIL.

2. Nutley has the second smallest enrollment of any public school in the NNJIL but has been placed in a separate division where any enrollment disparity has been appreciably reduced.

3. With the exception of contests against parochial school members in the NNJIL, Nutley has had moderate success in its sports program, which the Committee finds is unrelated to its size.

4. If Nutley were to leave the NNJIL it would depart from a League division with schools of comparable size, in close geographic proximity and join a Conference with schools having widely diverse enrollments and geographic locations.

5. The departure of Nutley from the NNJIL would have a substantial adverse impact on that League. It would deprive several public schools, of comparable size in close geographic proximity, of a suitable opponent. It would also lead to applications being pursued by those very schools to leave the NNJIL since they have the same basic complaint as that articulated by Nutley High School. It would inevitably lead to further instability in the NNJIL.

6. The Committee further finds that if Nutley were to leave the NNJIL, it would disrupt the carefully designed divisional alignment which have (sic) received the approval of the NJSIAA and the Commissioner of Education.

Conclusions

1. The application of Nutley High School does not satisfy several of the criteria for realignment. Its size is more appropriate in the NNJIL, rather than the NHC, particularly in the context of its own division. It is surrounded by other member public schools in the NNJIL and its geographic location is much more appropriate within its existing Conference. Without question, there will be a further financial burden placed upon Nutley if it has to travel greater distances and there would be a comparable burden placed upon public schools in the NNJIL that now compete against Nutley within the framework of that League. More significantly, the transfer of Nutley from the NNJIL will have a severe adverse impact on that League.

2. The problems of competitive imbalance facing Nutley are indistinguishable from the problems facing comparably sized public schools in the "A" Division of the NNJIL. Indeed, the difficulties facing Nutley are shared by Paramus, Belleville, Bloomfield and Teaneck High Schools, all of which could present the same arguments as those advanced by Nutley to leave the NNJIL.

3. Since 1999, the NNJIL has attempted to address the competitive imbalance created by the presence of strong parochial schools as members. On January 12, 2000, the NJSIAA Executive Committee approved reports made by this Committee to maintain the three division structure, but to encourage the use of "strength of programs" in the scheduling of "cross over" contests with those parochial schools. On June 23, 2000, the Commissioner of Education approved those reports. Evidently, that aspect of the NJSIAA reports has not been followed by the NNJIL and the Committee encourages it to institute such a system so that Nutley and other schools can gain some degree of relief. Again, when arranging cross over contests, the NNJIL should consider scheduling public schools on the basis of competitive success or strength, on a program-by-program format.

4. There was no evidence there was any correlation between the size of Nutley High School and injuries that have occurred on the

> playing field. Instead, particularly in football, there might have been lopsided defeats against parochial schools which hopefully can be remedied by a resort to the recommended strength factor in arranging for cross over contests.

- On March 2, 2005, Nutley appealed the NJSIAA's Special Committee's decision to the NJSIAA Executive Committee which, by a vote of 21 in favor, 5 opposed, with 3 recusals, adopted the decision of the Special Committee denying Nutley's application to leave the NNJIL and join the NHC. The Executive Committee, however, went on to specifically direct that the NNJIL implement the cross over scheduling based on strength of programs ordered in 2000. (March 14, 2005 letter from Boyd A. Sands to Joseph Zara, Superintendent of Schools, Nutley)

NUTLEY'S POSITION

Nutley contends that the decisions of the NJSIAA Special Committee and the NJSIAA Executive Committee denying its application to withdraw from the NNJIL were arbitrary, capricious and unreasonable. It charges that, although the record is replete with recognition by these Committees that a problem exists due to unbalanced competition in this League, and – notwithstanding that Nutley has satisfied the requisite applicable criteria warranting a change in leagues – the NJSIAA's sole rationale for denial of its application is that if Nutley changes leagues, all the other schools experiencing similar disparity in competitiveness with the private and larger schools will want to move as well. (Nutley's Brief at 2)

Nutley claims that its application to change leagues was motivated by "an embarrassing lack of competitive balance in [its] games"[4] and increasing pressure from the parents of its students participating in sports who fear enhanced injuries as a result of this

[4]As an example, "football defeats by scores of 67-14, 55-0, and 42-13 against private or much larger schools."

competitive imbalance. (*Ibid.*) It seeks to correct this problem by competing in the NHC "where it is more suited as a Group 3 school." (*Id.* at 5) Pointing to testimony presented at the Special Committee hearing – ironically by representatives of the league preventing its withdrawal – which acknowledged and confirmed the existing disparity, Nutley observes that a stated goal of the NJSIAA is to "foster competition," and avers that for them to recognize the existence of a problem and ignore it "is arbitrary and unreasonable in and of itself." (*Id.* at 3)

Next, to support its contention that its application to withdraw from the NNJIL fully satisfied each of the seven requisite Realignment Criteria, Nutley presents the following discourse:

> **1. Size of Schools Involved**
>
> Of the nineteen (19) teams currently listed in Nutley's conference, only two (2) have a smaller enrollment and both of those are private institutions which can select [their] membership to improve [their] athletic programs from outside of [their] geographic region. As explained throughout, the imbalance of the member schools in the NNJIL has negatively impacted competition, which has been documented by Nutley in support of this appeal through injury reports, disparity in results and statistics. More importantly, Nutley has an obligation to respond to the concerns raised by the parents of its district, especially when the concern is prompted by the impact to health, safety and welfare of the participant students. Nutley has gone through the expense and effort of this process.
>
> As a result of the aforementioned imbalance in number of the present enrollment of the schools in its current conference, and resulting negative impact to competitiveness, Nutley presented its concern for injuries and incidents which impact the health, safety and welfare of the students who participate in sports at Nutley to NJSIAA. Yet Nutley was told that NJSIAA cannot address this obvious problem due to statewide balance concerns. However, that conclusion unreasonably ignores the neat fit of Nutley into the Northern Hills Conference.
>
> Nutley has already been accepted into the Northern Hills Conference because its addition would balance the competition for the conference and for Nutley. This is confirmed by the

enrollment numbers of the membership schools. The appropriateness of the size of schools in the Northern Hills Conference, as compared to Nutley, was confirmed through Mr. SanFillipo's testimony as Executive Director of the Northern Hills Conference, quoted in relevant part above, and found in its entirety in the transcript. [citation omitted] It is apparent that as a Group 3 school, Nutley is better suited in the Northern Hills Conference due to the comparable size of the schools involved. (emphasis in text)

2. Geographic Location of Schools

The geographic location of the schools is comparable as to each league. Nutley offered exact mileage calculations for each and every school of each conference in its submission, and the difference is negligible.

Important to note is both conferences are geographically diverse, and calls for Nutley to travel to urban and suburban areas. Nutley has a local county competition in each conference (i.e. Bloomfield, and Belleville currently, West Orange and Caldwell in the new conference). Each conference has a school within Newark. The geographical location of the schools involved justifies Nutley's attempt to change into the Northern Hills Conference.

3. Nature of Total Athletic Programs and Facilities, Administrative Personnel and Financial Burden

Grouping the next three items of the criteria, and as admitted at the hearings, Nutley would fit neatly into the Northern Hills Conference. In deliberations, an NJSIAA member went so far as to say that it should be Nutley, who considers its financial burden. The impact for the financial decisions are made locally. The point here is greater since it is the parents – the taxpayers of Nutley – that are pleading with Nutley to change leagues. Notwithstanding this analysis, there is no financial burden placed on Nutley for the change.

The nature of the total athletic programs is comparable in each league. The facilities and administrative personnel for these programs are all comparable among the leagues. This was also confirmed and admitted during the hearings, and justifies Nutley's entry into the Northern Hills Conference.

4. Impact on Other Leagues

> Nutley submits that it can be stipulated through the record developed that a balance dealing with minority or urban scheduling is not an issue here. In fact, as discussed above when summarizing the geographic locations for the schools, it was confirmed that each conference has a school in Newark, and an even mix of other schools in urban and/or minority areas. Thus, the only actual item to address from the criteria is the effect on the other leagues. As to the Northern Hills Conference, it has accepted Nutley, and the impact deemed favorable. Mr. SanFillipo confirmed this as the league's Executive Director, and it is not refuted.
>
> As to NNJIL, the member schools who appeared at the hearings below admitted that Nutley's request was legitimate and that a problem existed. But, they also confirmed that other schools were interested in joining NNJIL. Upon information and belief, Passaic County Tech was a school that had been voted out of its conference and, sought to enter NNJIL. There are other adjustments that can be made to balance the competitiveness without disrupting the continuation of NJSIAA's handling of the leagues. NJSIAA's goal of "fostering competition" would be enhanced by this change. (emphasis in text)
>
> Here, not only do we have a school board, but we have concerns of parents disgusted with the competitive imbalance being experienced by their children. Moreover, Nutley has to answer to the parents, as taxpayers of Essex County, as to the protection being afforded to their children. The parents are disgruntled and concerned about the unlevel competitive scheduling in the athletic programs that their children compete in for Nutley. Nutley's participation in the Northern Hills Conference cures the problem. (Nutley's Brief at 9-13)

Notwithstanding Nutley's manifest satisfaction of the criteria, it contends, the decision of the NJSIAA's Special Committee, adopted by the NJSIAA's Executive Committee, stated in a conclusory manner that Nutley's injuries claim is not substantiated and questioned the integrity of Nutley's geographic data. However, the "real reason" for its denial of the application is blended into the opinion's conclusions, where it states "that Nutley's appealing of the competitive imbalance cannot succeed because other schools have the same complaint."

(*Id.* at 14) It cannot be determined that Nutley was accorded due process at the two NJSIAA hearings, it proffers, when such hearings resulted in "conclusory" findings. (*Id.* at 18)

Finally, Nutley advances that attempts to achieve balanced scheduling have "failed miserably," as the NNJIL has neither successfully implemented cross over scheduling nor addressed scheduling based on strength of programs. (*Id.* at 15)

Nutley urges that it has gone through the effort and expense in support of its application and appeal, and has satisfied the necessary criteria. Therefore, it should be allowed to withdraw from the NNJIL to enter the NHC. (*Id.* at 19)

NJSIAA'S POSITION

The NJSIAA's brief initially presents a comprehensive overview of the history of the League and Conference realignment process begun in 1982 in response to a previously expressed concern of the Commissioner of Education "that a number of inner city and parochial schools were not being allowed to have a full schedule of contests because they were denied membership in local Leagues and Conferences." (NJSIAA Brief at 3) It stresses that the underlying focus of this and all subsequent realignment plans "has always been to assure full scheduling for schools, particularly those with heavy minority populations or parochial schools who would otherwise be denied entrance into local Leagues and Conferences."[5] (*Ibid.*) Although the NJSIAA has endeavored to have Conferences ordered by geography and size, it

[5] Succeeding statewide realignments of Leagues and Conferences to insure fulfillment of the Commissioner's directive took place in 1984, 1987 and 1998. In accomplishing such realignments the NJSIAA routinely applied seven criteria, *i.e.*, "size of school; geographic location; nature of the athletic programs and facilities; impact on existing relationship with leagues and conferences; administrative personnel; the financial impact; and any negative effect that a transfer might have on diversity concerns." (NJSIAA Brief at 5)

emphasizes that assuring schools' competitive success is not now, nor has it ever been, a consideration or concern of either the Commissioner or the NJSIAA. (*Id.* at 4)

The NJSIAA points out that since the third statewide realignment, a number of schools have voluntarily transferred from one League to another as school population fluctuated. Where a school desires such a transfer over the objection of its current League, rather than conduct a statewide realignment, the NJSIAA considers *ad hoc* applications. However, in order to insure that general instability is not occasioned throughout the 21 Conferences in New Jersey, such a school must demonstrate "some substantial need" to transfer and satisfy the seven established realignment criteria. (NJSIAA Brief at 6)

With the underlying intent and purpose of the realignment process detailed, the NJSIAA proposes that it cannot be credibly disputed that Nutley was provided a full measure of due process in consideration of its transfer application. There were seven published realignment criteria; they were permitted to submit a detailed application addressing those criteria; they were accorded two separate hearings and were represented by counsel at both of these proceedings. At the Special Committee hearing on January 12, 2005, they were allowed to fully advance their arguments and to cross-examine NNJIL witnesses. On February 10, 2005, this Committee issued a detailed decision, which fully set forth a discussion of the evidence and testimony, findings of fact and conclusions of law. At the NJSIAA Executive Committee hearing on March 2, 2005, Nutley was again provided an opportunity to present its arguments and, after lengthy consideration and debate, the Executive Committee ultimately adopted the report of the NJSIAA Special Committee's report by a vote of 21 to 5. (NJSIAA Brief at 14-15)

The NJSIAA next submits that Nutley has not sustained its burden of providing substantial reasons for withdrawal from the NNJIL. Initially in this regard, contrary to Nutley's assertion that denial of its application was solely because other teams would seek to leave the conference as well, the instant record establishes that Nutley failed to satisfy four of the seven alignment criteria to justify a transfer. As found by the Special Committee in its conclusions:

> 1. Its size is more appropriate in the NNJIL, rather than the NHC, particularly in the context of its own division. It is surrounded by other member public schools in the NNJIL and its geographic location is much more appropriate within its existing Conference. Without question, there will be a further financial burden placed upon Nutley if it has to travel greater distances and there would be a comparable burden placed upon public schools in the NNJIL that now compete against Nutley within the framework of that League. More significantly, the transfer of Nutley from the NNJIL will have a severe adverse impact on that League. (Decision at 9, emphasis supplied.)
>
> (NJSIAA's Brief at 15-16)

Furthermore, although Nutley proposed that district parents were increasingly concerned about "enhanced and significant injuries" brought about by the lack of competitive balance in the games, it "did not present any evidence to show that injuries in football were disproportionate or [that] there was any correlation between the perceived or actual competitive balance and injuries." (*Id.* at 16). The NJSIAA also points to a number of factual inaccuracies contained in Nutley's brief in this matter:

> First, the school claims that it has the smallest enrollment of the public schools. In fact, Paramus High School has a smaller enrollment and Nutley's size is comparable to the other schools placed in the Division A of the NNJIL. Nutley states that the difference in mileage between the two conferences "was negligible." In fact, as the Special Committee found, as set forth in Chart C of its decision, that the traveling distances were

substantial.[6] In addition, as also noted by the Special Committee, Nutley was surrounded by other NNJIL public high schools (Passaic, Belleville, Bloomfield and Montclair). Nutley claims that "on information and belief" Passaic County Tech had sought to enter the NNJIL. In fact, Passaic County Tech never applied to the NNJIL and was recently admitted to the NHC instead. Nutley states that the real reason for the transfer denial was that other schools had the same complaint about competitive imbalance. While it is correct that the Special Committee found that the problems facing Nutley were similar[ly] shared by Paramus, Belleville, Bloomfield and Teaneck High Schools, the Special Committee also acknowledged that these schools had been placed with Nutley in the smaller division in the hope that it would mitigate the "competitive imbalance" created by the parochial schools.

Nutley also contends that the NNJIL representatives testified that Nutley's request was legitimate. Just the opposite is true. In fact, George Middleton, the NNJIL Secretary, testified at length against the transfer. He first noted that the injuries suffered by Nutley were not unusual, noting that "inherent in football is injury." Mr. Middleton noted that on the subject of competitive balance that Nutley beat Clifton, the largest school in the NNJIL, in football the last two times that they played, demonstrating the lack of correlation between size and strength of program. He

---

[6] For ease of comparison, Chart C is reproduced below:

NNJIL – Distance	NHC – Distance
Academy of the Holy Angels (Demarest) – 22 miles	Academy of St. Elizabeth (Covent Station) – 22 miles
Barringer (Newark) – 5 miles	Butler – 19 miles
Belleville – 1.5 miles	Caldwell – 8 miles
Bergen Catholic (Oradell) – 15 miles	Delbarton (Morristown) – 27 miles
Bloomfield – 2 miles	DePaul Diocesan (Wayne) – 14 miles
Clifton – 2 miles	Lakeland Regional (Wanaque) – 20 miles
Don Bosco Prep (Ramsey) – 23 miles	Madison – 23 miles
Eastside (Paterson) – 6 miles	Millburn – 16 miles
Hackensack – 12 miles	Montville Township – 17 miles
Immaculate Heart Academy (Westwood) – 20 miles	Mount St. Dominic Academy – 7 miles
J.F. Kennedy (Paterson) – 6 miles	Orange – 9 miles
Montclair – 4 miles	Passaic Co. Tech. (Wayne) – 12 miles
Paramus – 13 miles	Passaic Valley (Little Falls) – 7 miles
Paramus Catholic – 12 miles	Pequannock Twp. (Pompton Plains) – 15 miles
Passaic – 2.5 miles	Villa Walsh Academy (Morristown) – 25 miles
Ridgewood – 16 miles	Wayne Valley (Wayne) – 12 miles
St. Joseph Regional (Montvale) – 24 miles	West Milford – 30 miles
Teaneck – 15 miles	West Orange – 7 miles
	West Side (Newark) – 8 miles

(NJSIAA Special Committee Decision, February 9, 2005, at 6-7)

> commented that "certainly Nutley is not the worse (sic) athletic program [in] the NNJIL." He also noted that by being placed in Division A, Nutley would have to play most of its schedule against smaller schools. Mr. Middleton went on to note that Paramus, a small public school in the NNJIL, had its best football season in 20 years and made the football playoffs this year. Again this demonstrated the lack of any correlation between size and competitive success. (citations omitted) (NJSIAA Brief at 16-17)

In conclusion, the NJSIAA urges that Nutley's application, in fact, is predicated on its desire to have a winning sports program, especially in football, which — pursuant to the realignment goals and objectives of the Association and the Commissioner — cannot be the basis for ordering a league transfer. Notwithstanding the considerable evidence supporting the Special Committee's conclusion that a transfer was not justified based on size or geography, and would undoubtedly impose a greater financial burden on Nutley due to a significantly increased travel requirement, and would have a severe negative impact on the NNJIL — whose stability must be one of the NJSIAA's prime objectives — Nutley is pursuing relief from the Commissioner because it wants to have a winning sports program. The NJSIAA submits, "[i]f that were the basis for schools transferring from one conference to another, then the process would be endless and conference structures would be eroded and scheduling of regular season contests would be chaotic." This is precisely the reason why schools such as Nutley have the burden of providing substantial reasons why they should be permitted to leave their current conference, without any consideration whatsoever to their win/loss football record. (NJSIAA Brief at 17-18)

COMMISSIONER'S DETERMINATION

It is well-established that the Commissioner's scope of review in NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188 (1992). That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules absent a finding that the NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. Nor may the Commissioner substitute her judgment for that of the NJSIAA, *even if she were to decide differently in a de novo hearing*, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. Further, the burden of proof rests with the person or entity challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960).

The arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey Courts provides:

> In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) ***Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citations omitted) 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. (citation omitted) (*Bayshore Sewerage Co. v. Dept. of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974)

Guided by these principles, having carefully reviewed and considered the record, including the transcripts of the Special Committee and Executive Committee hearings, all exhibits, and the parties' briefs on appeal, the Commissioner is persuaded that Nutley has been accorded the full measure of due process to which it is entitled, that the Special Committee's findings and conclusions are well-grounded in the record, and that Nutley, therefore, has failed to establish that the NJSIAA's determination upholding the denial of Nutley's withdrawal from the NNJIL was arbitrary, capricious or unreasonable. However, this said, the Commissioner is compelled to emphasize that the NNJIL must immediately act to implement, as directed by the NJSIAA's Executive Committee, inter-division or "cross over" game scheduling based upon the relative strength of programs of the competing schools to help insure a healthy competitive balance for all schools in parochial-public school competition.

Accordingly, having found that due process was granted Nutley and that there is sufficient credible evidence in the record to support the NJSIAA's denial of its request to leave the NNJIL, the Commissioner can find no basis under the established standard of review on which to overturn the NJSIAA's decision and, therefore, affirms its determination in this matter.

IT IS SO ORDERED.[7]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/03/05

Date of Mailing: 10/03/05

[7] This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

357-05

#357-05ER

OAL DKT. NO. EDU 6962-05
AGENCY DKT. NO. 250-9/05

MARICE GREENE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on September 30, 2005, along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order granting emergent relief in this matter as she concurs with the ALJ, for the reasons clearly stated in his decision, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. The Board of Education of the City of Camden is directed to immediately enroll petitioner as a student in its district and shall determine his appropriate program and placement in accordance with the terms outlined by the ALJ on pages 6-7 of his Order. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/06/05
Date of Mailing: 10/06/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 6962-05
AGENCY DKT. NO. 250-0/05

M.G.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE CITY OF CAMDEN
CAMDEN COUNTY,

Respondent.

Alan W. Lesso, Esq., for petitioner (South Jersey Legal Services, Inc.)

Harvey C. Johnson, Esq., for respondent

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner brings this action seeking emergency relief under *N.J.A.C.* 1:6A-12.1(e). Petitioner, an eighteen-year-old student, alleges that respondent has improperly refused to permit him to enroll in school while he appeals respondent's residency determination.

PROCEDURAL HISTORY

On September 23, 2005, the Commissioner of Education received petitioner's application for emergent relief. On September 27, 2005, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On September 30, 2005, oral argument was presented in the Trenton offices of the Office of Administrative Law.

STATEMENT OF THE ISSUES

Is petitioner entitled to immediate enrollment?

FACTUAL DISCUSSION

Petitioner is an eighteen-year-old individual who states that he currently resides in the City of Camden, New Jersey. Petitioner further states that it is his intention to permanently live in Camden. Petitioner claims that respondent refused to admit him to school.

Earlier, petitioner resided in the City of Philadelphia. At the time of his residence in Philadelphia, he became involved in legal matters that led to his involvement with the Juvenile Justice system. While in Philadelphia, he lived at the Youth Study Center in Philadelphia, as well as a residential program called the Devereaux Foundation, and the Glenn Mills School in Concordeville, Pennsylvania. On August 16, 2005, the judge in Pennsylvania released petitioner on probation. As part of the probation agreement, an Aftercare Supervision Plan through the First Judicial District of Pennsylvania, Juvenile Branch, was executed. A portion of the plan established that petitioner would reside with his aunt, who lives in Camden City. Additionally, supervision of his probation was transferred (or currently is in the process of being transferred) to New Jersey.

Petitioner has earlier been classified as a student with a disability who needs special education and related services. Petitioner represents that although he is eighteen years old and should enter twelfth grade, he currently exhibits significant deficits in his math and reading

skills. Additionally, petitioner has experienced emotional problems in the past involving depression and anxiety and currently receives medication for treatment of his physical and/or mental conditions. The Devereaux Foundation is an in-patient mental health facility and the Glenn Mills School is a residential therapeutic school.

Consistent with the Aftercare Supervision Plan, petitioner's aunt appeared at respondent's offices for purposes of arranging petitioner's enrollment. Respondent refused to enroll petitioner.

Respondent argues that enrollment was denied for several reasons. Respondent maintains that because petitioner's probation has not yet been formally or completely transferred to New Jersey, petitioner must still be considered a resident of the Commonwealth of Pennsylvania. Additionally, respondent asserts that insufficient school records have been submitted that would allow the Camden City Public School District to properly evaluate petitioner sufficient to permit a proper placement and program, even if admitted. Respondent further notes that petitioner never personally submitted an application for admission, but rather the effort was performed by his aunt. Respondent asserts that petitioner has failed to present any evidence that the aunt is a legal guardian or legal representative.

In addition to the above, respondent argues that petitioner has not made a voluntary decision to reside in the state, but rather was, according to the statements made in petitioner's emergent relief petition, ordered to reside in Camden. Consequently, respondent takes the position that Pennsylvania courts have no authority to order New Jersey school districts to bear the cost of educating special education students domiciled in Pennsylvania. Additionally, respondent observes that the Aftercare Supervision Plan envisions petitioner's participation in an adult education program so that he could receive a G.E.D. Parenthetically, respondent argues that if it is found that petitioner is still a citizen of Pennsylvania, the Camden City Public School District should receive remuneration from Pennsylvania for petitioner's education.

FACTUAL FINDINGS

I FIND:

(1) Petitioner is an eighteen-year-old male classified as a student with a disability who needs special education and related services.

(2) Chronologically, for the 2005/2006 school year, petitioner should be in the twelfth grade, although he exhibits significant deficits in grade level with regard to reading and math.

(3) Petitioner's aunt resides in the City of Camden.

(4) Petitioner asserts in his application for emergent relief that he currently resides with his aunt in the City of Camden and intends to do so for the foreseeable future.

(5) Petitioner's Aftercare Supervision Plan envisions that petitioner will reside with his aunt and that his probation case will be transferred to Camden County, New Jersey.

CONCLUSIONS OF LAW

The standards for the granting of emergency relief are set forth in *N.J.A.C.* 1:6A-12.1(e). It may be granted if the judge determines from the proofs that: (1) the petitioner will suffer irreparable harm if the requested relief is not granted; (2) the legal right underlying the petitioner's claim is settled; (3) the petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) when the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. In the instant case, after hearing the arguments of counsel and any other documentation submitted, I am satisfied that petitioner is entitled to emergent relief. Specifically, I am persuaded that the applicable regulations require enrollment to take place immediately.

Under *N.J.A.C.* 6A:22-3.1(a)2, a student is domiciled in the school district when he has reached the age of eighteen and has established a permanent home within the district. A home is permanent when the student intends to return to it when absent and has no present intent of moving from it. Given the statements set forth in petitioner's Petition, specifically that he now resides in the City of Camden and intends to live there permanently, together with the agreement to reside with his aunt in Camden pursuant to the Aftercare Supervision Plan, I am satisfied that if petitioner's claims are taken as true, petitioner is currently domiciled in the City of Camden Public School District. Accordingly, based upon *N.J.A.C.* 6A:22-4.1(c)2, respondent must permit immediate enrollment. I **FIND** that the facts presented to this tribunal are far from the "clear, uncontested denials" that would support and justify an initial determination of ineligibility for enrollment. *See, e.g., N.J.A.C.* 6A:22-4.1(c).

Based upon the foregoing regulations, I am satisfied that the proofs have established the necessary elements to grant emergent relief under *N.J.A.C.* 1:6A-12.1(e). I **FIND** that petitioner would suffer irreparable harm if denied enrollment within the school district. Additionally, as discussed hereinabove, I **FIND** that the legal right underlying petitioner's claim is settled and that no clear, uncontested denial has been brought forth by respondent. Additionally, I **FIND** that if an evidentiary hearing was undertaken, I **FIND** that there is a good likelihood of petitioner prevailing on the merits in that it would be my reasonable expectation that petitioner would testify consistent with the statements made in his written Petition for Emergent Relief and that those statements of residency would be corroborated by petitioner's aunt and his New Jersey probation officer. Lastly, I agree with the statement of petitioner's counsel that when the equities and interests of the parties are balanced, the petitioner would suffer greater harm than the respondent would suffer if the requested relief was not granted. Specifically, I am satisfied that the marginal cost to the school district of taking on an additional student would be significantly less by comparison to the harm that would inure to petitioner if he was denied the opportunity to go to school and complete his high school education.

The conclusion that petitioner must be permitted enrollment in the Camden City Public School District should not be the end of this matter. Based upon the proofs submitted and arguments raised by both counsel, it is my conclusion that it would be unwise and inappropriate

to simply order petitioner to enter twelfth grade in a mainstream setting. Although respondent has received some school record information from petitioner or petitioner's aunt, it is my conclusion that respondent should proceed with due diligence in determining the appropriate program and placement for petitioner, either within the school district or even potentially in an out-of-district setting. As the record currently stands, I am satisfied that respondent would be unable to make an appropriate determination as to a program and placement that would confer a meaningful educational benefit on petitioner. Accordingly, it is my conclusion that the school district should be afforded a reasonable amount of time in order to obtain prior school records, conduct a child study team meeting, prepare an interim IEP, and perform any evaluations deemed necessary. Therefore, it is my conclusion that although I **FIND** that petitioner should be granted immediate enrollment in the Camden City Public School District, such immediate enrollment should be on the following terms:

(1) During the week of October 3, 2005, respondent will arrange for petitioner to complete all enrollment applications and other related paperwork;

(2) During the week of October 3, 2005, respondent will schedule and arrange for the completion of a child study team meeting to be attended by petitioner at the child study team offices;

(3) During the week of October 3, 2005, respondent will arrange for student intake and also the review and receipt of petitioner's prior school records;

(4) With regard to the receipt of petitioner's prior school records, petitioner and petitioner's counsel will cooperate with respondent so that all necessary authorizations and record release documentation or permission slips are attended to so that all past records may be released;

(5) Petitioner will initially begin his education program and placement in a home instruction setting. Starting October 11, 2005, petitioner will receive ten hours per week of home instruction in areas that respondent is able to determine would be appropriate based upon the records currently available;

(6) During all home instruction sessions, petitioner's aunt, Sara Baldwin, shall be home, present and available;

(7) During the week of October 11, 2005, respondent will develop an interim or temporary IEP to include ten hours of home instruction as aforesaid;

(8) On or before October 31, 2005, respondent will determine whether any evaluations of petitioner are necessary and if any such evaluations are deemed necessary, will complete same within that time frame;

(9) On or before November 15, 2005, and based upon the accomplishment of the above-delineated items, petitioner's home instruction will cease and respondent will advise petitioner of respondent's decision as to the appropriate program and placement for him; and

(10) Respondent does not waive its ability to challenge the legitimacy of petitioner's residency within the school district by means of an evidentiary or plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

10-3-05
DATE

RICHARD F. WELLS, ALJ

jh

362-05

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, Gloucester County Institute of Technology (GCIT), seeks to recover nonresident fees from respondent Board for Lenape Regional High School students attending the GCIT performing arts program, as well as prejudgment interest. Respondent has argued that GCIT improperly calculated the nonresident fee it charges for out-of-county students. This case stems from a long standing dispute between the parties regarding whether the GCIT performing arts programs met the definition of vocational education, and— if so— whether GCIT is entitled to reimbursement from the home districts of their students. This issue was determined in the affirmative by a companion case decided in the Appellate Division November 12, 2004 (certification denied by Supreme Court on January 28, 2005).

The ALJ found, *inter alia,* that the nonresident fee for out-of-county secondary students should be based on secondary students in attendance at GCIT, and that the Court's January 28, 2005 denial of certification established that GCIT was eligible for payment of the nonresident fee from respondent Board. The ALJ concluded that the GCIT nonresident fee calculation is appropriate and that prejudgment interest is warranted for "tuition and transportation costs" beginning on March 1, 2005.

The Commissioner concurs with the ALJ that: 1) GCIT did not err by omitting nonresident post-secondary students from its calculation of the nonresident fee authorized by *N.J.S.A.* 18A:54-20.1(c); and 2) there was no reason why respondent Board should not have paid at least the undisputed amount due to GCIT as of March 1, 2005. The Commissioner adopts the Initial Decision of the OAL as the final decision in this matter, clarifying that the amount referenced in the recommended order is the nonresident fee, not "tuition and transportation costs." Respondent Board is directed to remit payment forthwith to GCIT, including both the disputed nonresident fee balance and interest on the undisputed amount.

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 11, 2005

OAL DKT. NO. EDU 4720-00
(EDU 10120-98 ON REMAND)
AGENCY DKT. NO. 444-9/98

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand[1] of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Lenape) in accordance with *N.J.A.C.* 1:1-18.4.[2]

In its exceptions, Lenape reiterates its arguments before the OAL with respect to statutory and regulatory construction, urging that Lenape's reading is the only one comporting with the plain language—as well as the history and intent—of the statutes and rules at issue. (Lenape's Exceptions at 3-11) Lenape also proposes findings of fact in addition to those reached by the Administrative Law Judge (ALJ), most notably with respect to events subsequent to March 1, 2005, when the Gloucester County Institute of Technology

[1] This matter was originally filed in 1998 and resulted in a Commissioner decision dated December 16, 1999, directing the respondent Board to pay tuition to petitioner. However, the State Board of Education, in its June 7, 2000 decision on appeal of the Commissioner's decision, remanded the matter to the Commissioner for determination consistent with the State Board's March 1, 2000 decision in the related matter of *K.B. v. Rancocas Valley, supra*. Accordingly, in June 2000, the Commissioner remanded the matter to the OAL for hearing consistent with the State Board's decision. (See Initial Decision at 1-2)

[2] The Gloucester County Institute of Technology's reply to Lenape's exceptions bore a face date of September 29, 2005 and was filed on October 3, 2005—well beyond the time frame permitted by *N.J.A.C.* 1:1-18.4(a). Since no extension was requested and granted pursuant to *N.J.A.C.* 1:1-18.8, the Institute's submission is not considered herein.

(GCIT) first presented its nonresident fee calculations. Lenape proffers that the amount due GCIT was not finally determined on that date—the date from which the ALJ ordered payment of prejudgment interest based on its being 30 days after resolution of the larger underlying dispute by the Supreme Court—and notes that the district is "currently processing a check for the undisputed amount of $257,042.22,[3] which will be promptly paid to GCIT without prejudice to Lenape." (*Id.* at 2, Note 2)

With respect to the central question of this matter, the Commissioner concurs with the ALJ that GCIT did not err by omitting nonresident post-secondary students from its calculation of the nonresident fee authorized by *N.J.S.A.* 18A:54-20.1(c). Notwithstanding Lenape's focus on the construction of particular words and phrases, it is clear from the overall statutory and regulatory scheme governing support of county vocational schools—as well as sound in terms of educational and fiscal policy—that the nonresident fee is intended to generate for out-of-county students the same level of support that the school's county of location provides for resident students.

Post-secondary county vocational education for nonresidents—including charges to such students' counties of residence where appropriate—is governed by its own separate statutory scheme, *N.J.S.A.* 18A:54-23.1 through 23.5 (*P.L.* 1973, c. 333), and indeed, was at the time *N.J.S.A.* 18A:54-20.1(c) was enacted and subsequently amended. Moreover, secondary and post-secondary students are generally funded in entirely different manners, with the result that, here, the school's post-secondary costs are covered in full by State aid and the county contribution is used in its entirety to support the secondary program. (Petitioner's Responsive Brief to Respondent's Cross Motion for Summary Judgment, Exhibit B; Petitioner's Cross Motion for Summary Decision, Exhibit B; Respondent's Cross

[3] Lenape contends that GCIT's methodology "improperly inflates the total nonresident fee from $257,042.22 to $368,900.00, not including interest." (Lenape's Exceptions at 3, Note 4)

Motion for Summary Decision, Exhibit D) Under these circumstances, it was entirely consistent with statute and rule for GCIT to have reckoned the county's per pupil contribution toward secondary-level vocational education based on the county tax levy divided by the number of resident students enrolled in the secondary program, and then to assess the resulting amount to nonresident students' home districts.

With respect to the question of prejudgment interest, the Commissioner concurs that, as of March 1, 2005, there was no reason why Lenape should not have paid at least the undisputed amount due to GCIT, as it represents it now has; therefore, the Commissioner directs that prejudgment interest be paid on the amount of $257,042.22[4] from March 1, 2005 to the date such funds were—or are, if the above-referenced payment has not yet been fully processed—disbursed to GCIT.

Accordingly, as amplified above, the Initial Decision of the OAL is adopted as the final decision in this matter and the Board of Education of the Lenape Regional High School District is directed to remit payment forthwith to the Gloucester County Institute of Technology, including both the disputed nonresident fee balance and interest on the undisputed amount as set forth herein.

IT IS SO ORDERED.[5]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/11/05

Date of Mailing: 10/12/05

[4] Although the ALJ references "interest for tuition and transportation," the Commissioner clarifies that the amount at issue herein is solely the nonresident fee, since GCIT did not additionally charge Lenape for tuition, and transportation costs were not involved in the underlying dispute.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4720-00

AGENCY DKT. NO. 444-9/98

GLOUCESTER COUNTY
INSTITUTE OF TECHNOLOGY,

Petitioner

v.

BOARD OF EDUCATION OF
LENAPE REGIONAL HIGH
SCHOOL DISTRICT,

Respondent

Louis Cappelli, Jr., Esq., for the petitioner

Trevor J. Cooney, Esq., for the respondent (Archer and Greiner, attorneys)

Record Closed: August 8, 2005 Decided: August 24, 2005

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed by the Gloucester County Institute of Technology (GCIT) pursuant to *N.J.S.A.* 18A:6-9, seeking to recover tuition, transportation costs and non-resident fees from Lenape Regional School District, which is located in Burlington County. The file was transmitted to the Office of Administrative Law by the Commissioner of Education in June 2000, and has for much of the intervening time awaited resolution of a companion case, *K.B. v. Rancocas Valley Regional High School District,* Appellate Docket No: A-6814-02-T5.

That matter was decided in the Appellate Division on November 12, 2004 and certification was denied on January 28, 2005. Both parties here intervened in that matter. The Court determined that the GCIT performing arts programs met the definition of vocational education and that GCIT was therefore entitled to reimbursement from the home districts of their students.

That baseline question having been resolved the parties have now fallen into a new dispute. Lenape argues that GCIT has not properly calculated the non-resident fee it charges out-of-county students. GCIT counters that Lenape is acting in bad faith and should be responsible for prejudgment interest, pursuant to N.J.A.C. 6A:3-1.17(c) (1).

The facts are substantially undisputed. During the 1997/98 school year and in each succeeding school year students from the Lenape District have attended GCIT. The non-resident fee for each student is derived using a formula that divides GCIT students into the County contribution to arrive at a maximum per pupil charge. GCIT has not, however, included its post-secondary students in this calculation and Lenape believes that this omission inflates per pupil costs, increasing the allowable non-resident fee. The issue was submitted on cross-motions for summary decision pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995).

The question is one of statutory construction[1]. *N.J.S.A.* 18A:54-20.1(c) authorizes County vocational schools to collect a fee in addition to tuition for out-of-county pupils. The legislature specifically limited tuition reimbursement from out-of-county districts to secondary school students. However, the formula for the non-resident fee does not address this secondary/post-secondary question. It simply sets an outer limit so that the fee cannot exceed the amount of the county's per pupil appropriation to the vocational education district. Neither does *N.J.A.C.* 6A:23-3.3(d)(1), the regulatory adoption on the point, address the issue specifically.

Lenape argues that when the legislature forbad County vocational schools from collecting tuition for out-of-county post-secondary students, it did so clearly in the very statutory section at bar here. The silence regarding non-resident fees must therefore mean that post-secondary

[1] Each side submitted certifications of former DOE employees with expertise in school financing to opine on the meaning of the law. No fact dispute was created thereby and ultimately the matter remains a question of statutory construction.

students are to be counted by GCIT in formulating the fee. I do not agree. N.J.S.A. 18A:54-20.1(c) does not allow an institution like GCIT to collect tuition from a school district like Lenape for students that have graduated from high school and are no longer the responsibility of the home district. The question here, however, is whether GCIT must include in-county post-secondary students in attendance at its programs, when calculating the non-resident fee for out-of-county secondary students. The better rational, it seems, is that the regulatory scheme would choose to compare like categories. Thus, the non-resident fee for out-of-county secondary students would be based on secondary students in attendance at GCIT.

The GCIT analysis is further buttressed by the fact that the legislature and State Board used this same non-resident fee language for county special services districts, which have no post-secondary students, see N.J.S.A. 18A:46-31; N.J.A.C. 6A:23-4(d)(1). If post-secondary students were not contemplated in the special services district example and the same language was used in our vocational education example, then it follows that post-secondary students were not contemplated in the latter case. Although both parties argue that theirs is a plain reading and cite cases that urge plain reading where possible, see, eg., *Brodsky v. Grinnell Haulers, Inc.,* 181 N.J. 102 (2004); *Nat'l Waste Recycling Inc., v. Middlesex County Improvement Auth.,* 150 N.J. 209 (1997), the subject is fairly arcane. The GCIT position is, however, a more logical fit for the language and for the circumstances.

Regarding prejudgment interest, eligibility for tuition and transportation reimbursement was finally resolved on January 28, 2005 with the denial of certification. Though a new debate surfaced regarding the non-resident fee calculation, payment for tuition/transportation should have been forthcoming shortly thereafter. Lenape has presented no good account for its failure to pay these sums timely and should not benefit from the delay. I would therefore impose interest for tuition and transportation commencing on March 1, 2005, which is 30 days from the date of the Supreme Court's order denying certification.

Based on the foregoing, I conclude that the GCIT non-resident fee calculation is appropriate and that prejudgment interest is warranted for tuition and transportation costs beginning on March 1, 2005. It is so ordered.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/24/05
DATE

SOLOMON A. METZGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/24/05
DATE

Mailed to Parties:

AUG 26 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

368-05

368-05

OAL DKT. NO. EDU 3307-05
AGENCY DKT. NO. 15-1/05

O.E. on behalf of minor child M.E.,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, : DECISION

RESPONDENT. :

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03307-05

AGENCY REF. NO.15-1/05

O.E., ON BEHALF OF MINOR M.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

Respondent.

Irving Tobin, Esq., for petitioner (Gluck and Tobin, attorneys)

John P. Harrington, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy)

Record Closed: August 19, 2005 Decided: August 30, 2005

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on March 22, 2004 for determination as a contested case. A hearing scheduled for April 15, 2005 was converted into an In Person Conference and the hearing was rescheduled for June 28, 2005.

On the date of the hearing, the parties were able to resolve the matter and submitted the attached Settlement. On August 19, 2005, respondent submitted the copy of the Board's Resolution approving the settlement agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 30, 2005
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

9-2-05
DATE

DEPARTMENT OF EDUCATION

SEP 6 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

O.E o/b/o M.E
Petitioner

✓

UNION TOWNSHIP BOARD
OF EDUCATION
Respondent

AGENCY REF 15-1/05
OAL Docket No. EDU-03307-05

The above matter having been settled by Petitioner agreeing to pay Respondent $700.00 in full settlement of the claim of Respondent

This settlement is not an admission on either party as to the claim of the other.

Said $700.00 to be paid within seven days by bank check or attorney trust check

The parties hereby release each other from any claims which were asserted in this action, except as set forth herein.

AGREED:

6/28/05

attorney for Respondent

IRVING TOBIN
attorney for Petitioner

6/28/05
PETITIONER
OSAMA K. ELTOUNY

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 AUG 19 A 11: 28

L-1. APPROVE SETTLEMENT – *O.E. O/B/O M.E. VS. UNION TOWNSHIP BOARD OF EDUCATION*

That the board approve settlement in connection with the matter of *O.E. o/b/o M.E. v. Union Township Board of Education* in connection with the information appended to the non public portion of these minutes.

I CERTIFY THAT THE FOREGOING RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS REGULAR MEETING ON AUGUST 16, 2005.

JAMES J. DAMATO
BOARD SECRETARY

359-05

IN THE MATTER OF THE DENIAL :

OF CERTIFICATION AFTER : COMMISSIONER OF EDUCATION

REVOCATION OF OTTO KRUPP. : DECISION

:

SYNOPSIS

Petitioner -- former mathematics teacher convicted of first-degree murder in 1979 -- appealed, for the second time, denial by State Board of Examiners (SBE) of his application for re-issuance of a teaching certificate. A previous Commissioner's Decision, dated June 24, 2004 and affirmed by the State Board on October 6, 2004, sustained the SBE's denial of petitioner's first request for re-issuance of certificate, finding that the petitioner was statutorily disqualified from holding a New Jersey teaching certificate by virtue of his murder conviction, pursuant to *N.J.S.A.* 18A:6-7.1. Petitioner did not appeal to the Appellate Division, but instead submitted another application for certification to the SBE.

The SBE denied petitioner's application on January 20, 2005, finding that, as was previously determined by the Commissioner and affirmed by the State Board, petitioner is permanently disqualified from teaching in any institution or agency under the supervision of the Department of Education. The SBE further determined that it did not have the authority under its own regulations to issue petitioner a certificate since he was statutorily barred from teaching pursuant to *N.J.S.A.* 18A:6-7.1. Petitioner subsequently filed the within appeal to the State Board, which was remanded to the Commissioner.

Upon thorough review of the submissions by petitioner and the arguments presented by the SBE, the Commissioner finds that no new substantive issue has been raised by petitioner that was not argued and considered in the Commissioner's 2004 decision. In that the issues and facts presented in the instant matter, as well as the substantive merits of petitioner's arguments, have previously been litigated and decided in the prior case involving the same parties, therefore, the Commissioner finds that the fundamental principle of *res judicata* precludes further litigation of this matter. Accordingly, the petition in this matter is 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 7, 2005

SBE #405-180
AGENCY DKT. NO. 208-8/05

IN THE MATTER OF THE DENIAL	:	
OF CERTIFICATION AFTER	:	COMMISSIONER OF EDUCATION
REVOCATION OF OTTO KRUPP.	:	DECISION
	:	

This matter was initiated by way of a Petition of Appeal, filed on August 24, 2005, following the State Board of Education's (State Board) August 3, 2005 remand of this matter to the Commissioner in accord with the Commissioner's jurisdiction to hear and issue determinations on appeals from decisions of the State Board of Examiners (SBE) denying issuance of certification.

On June 11, 1981, the SBE revoked petitioner's Teacher of Secondary School Mathematics certification following his May 21, 1979 conviction for first-degree murder. Upon petitioner's release after almost 23 years of incarceration, he applied for certification after revocation, claiming that he would waive any right to teach in the public school system and contending that he was solely requesting a conditional license restricting him to teach in correctional facilities operated by the Juvenile Justice System. On September 26, 2002, the SBE voted to deny petitioner's application for certification after revocation, finding that petitioner had not demonstrated rehabilitation sufficient to show that he could function effectively outside of confinement, and concluding that it had no authority to issue a limited or restricted certificate for the sole purpose of working within the correctional system.

Petitioner appealed the SBE's decision to the State Board. On May 7, 2003, the State Board remanded the matter to the Commissioner, finding that the jurisdiction to hear an

appeal of the SBE's denial of an application for a teaching certificate rests with the Commissioner. The State Board's remand required the Commissioner to resolve the issues relating to the application of *N.J.S.A.* 18A:6-7.1, noting that the SBE rendered its decision under the Rehabilitated Convicted Offenders Act (RCOA), *N.J.S.A.* 2A:158A-1 *et seq.*, and that it did not consider the effect of *N.J.S.A.* 18A:6-7.1 on the issue of whether or not a certificate should be issued to petitioner. Upon receipt of the case, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. In an Initial Decision issued on May 10, 2004, the Administrative Law Judge (ALJ) concluded that petitioner had demonstrated sufficient rehabilitation to warrant certification after revocation. However, he also found that respondent was statutorily disqualified from holding a teaching certificate which would allow him to teach in the public schools or in correctional facilities in that, pursuant to *N.J.S.A.* 18A:6-7.1, petitioner was permanently disqualified from employment in New Jersey public schools and any other facility under the supervision of the Department of Education.

Upon review, the Commissioner disagreed with the ALJ's conclusion that petitioner had demonstrated sufficient rehabilitation to warrant certification after revocation, but agreed with the ALJ's conclusion that petitioner was statutorily disqualified from holding a teaching certificate. Like the ALJ, the Commissioner rejected petitioner's contention that he was entitled to certification because he had satisfied the criteria of the RCOA. Specifically, the Commissioner found that application for a teaching certificate is solely within the jurisdiction of the SBE, and that "the RCOA provides no independent authorization for the issuance of a teaching certificate, but, rather, operates to preclude licensing authorities from disqualifying or discriminating against an applicant for these credentials based *solely* on his or her conviction of a crime." *In the Matter of the Denial of the Issuance of a Teaching Certificate to Otto Krupp*, Commissioner's Decision June 24, 2004, slip op. at 19. The Commissioner further found no

conflict or tension between the RCOA, *N.J.S.A.* 2A:168A-1 *et seq.*, which was originally enacted by the Legislature in 1968, and *N.J.S.A.* 18A:6-7.1, noting that:

> The intent of this Act is reflected in 2A:168A-1 **Legislative Findings**:
>
> > The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record.
> >
> > Therefore, the Legislature finds and declares that notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S. 2C:51-2 is applicable *or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.* (emphasis supplied in Commissioner's decision))

As such, pursuant to this statutory provision, the relevant inquiry in judging the propriety of disqualification or discrimination against an applicant for licensure or certification based on conviction of a crime is whether the conviction at issue has a direct relation to the license or certificate being sought. *See Storcella v. State Dept. of Treasury*, 296 *N.J. Super.* 238 (App. Div. 1997).

Turning to the provisions of *N.J.S.A.* 18A:6-7.1 *et seq.*, as recognized by the ALJ, pursuant to amendments enacted by the Legislature in 1998, this provision

> Disqualifies [an individual] from employment in "any facility, center, school or school system under the supervision of the Department of Education" if he had been convicted of certain crimes, including murder. Before the change in the law, subsection (e) of the statute allowed a person convicted of a disqualifying offense

> the opportunity to demonstrate affirmatively his or her rehabilitation by clear and convincing evidence. As a result of the 1998 amendments, however, *N.J.S.A.* 18A:6-7.1 now provides that an individual convicted of a disqualifying offense "shall be permanently disqualified from employment or service." Similarly, the Legislature expressly repealed the provision in the law that had previously granted such individual the opportunity to show rehabilitation. Instead, subsection (e) limits the individual to "an opportunity to challenge the accuracy of the disqualifying criminal record." (citation omitted) Initial Decision at 8.

The Commissioner notes that the Legislature in enacting the 1998 amendments to *N.J.S.A.* 18A:6-7.1 proclaimed that a conviction for a first or second degree crime was inimical to employment in the public schools. When these amendments were drafted, the Legislature declared that the interest and safety of school children in the State of New Jersey must prevail. Indeed, one of the sponsors of the amendments declared, "We are entrusting these people with our children's safety. The risk that these people have not been rehabilitated is a gamble that we are not willing to take." Senator Norman M. Robertson, Senate and Assembly News Release, GovNet #30085. The other sponsor of the amendments stated, "There is no good reason why we should have a child abuser or flasher working with our children. This legislation keeps these people where they belong -- far away from our kids." Senator Joseph A. Palaia, Senate and Assembly News Release, GovNet #30085.

Because the enactment of the 1998 amendments to *N.J.S.A.* 18A:6-7.1 is specifically predicated on the Legislature's belief that an individual's conviction for certain crimes, including murder, *relates adversely to employment in the public school system of New Jersey*, disqualification or discrimination against such an individual who has applied for a teaching certificate is specifically exempted from the dictates of the RCOA by that provision's clear language as a consequence of the relationship between the offense and the certification being sought.

Id., slip op. at 19-21

Additionally, the Commissioner concluded that:

> Most importantly, the award of a certificate by the Board of Examiners certifies that the holder has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey. As a consequence of *N.J.S.A.* 18A:6-7.1, petitioner is precluded from employment in any entity under the auspices of the Department of Education and the State Board of Education, rendering the award of certification to him a legal impossibility.
>
> *Id.*, slip op. at 22

Thus, the Commissioner found rehabilitation was not a consideration, as petitioner was statutorily disqualified from holding a New Jersey teaching certificate by virtue of his murder conviction, pursuant to *N.J.S.A.* 18A:6-7.1. Accordingly, the Commissioner adopted the Initial Decision of the OAL, as modified, sustaining the SBE's denial of petitioner's request for certification after revocation. On October 6, 2004, the State Board affirmed the Commissioner's determination "for the reasons expressed therein." Petitioner did not appeal to the Appellate Division. Instead, petitioner submitted another application for certification to the SBE. On January 20, 2005, the SBE denied petitioner's application for certification, finding that, as previously determined by the Commissioner and affirmed by the State Board, petitioner is permanently disqualified from teaching in any institution or agency under the supervision of the Department of Education. The SBE further determined that it did not have the authority under its own regulations to issue petitioner a certificate since he was statutorily barred from teaching, pursuant to *N.J.S.A.* 18A:6-7.1. Subsequently, petitioner filed the within appeal to the State Board, which was remanded to the Commissioner as noted above.

By letter of August 16, 2005, the Director of the Bureau of Controversies and Disputes requested that petitioner submit a petition of appeal, conforming to *N.J.A.C.* 6A:3-1.3 *et seq.*, and a legal memorandum or brief addressing why the issue raised in this matter has not already been decided by the Commissioner's June 24, 2004 determination, affirmed by the State Board on October 6, 2004, which found petitioner statutorily disqualified from holding a

New Jersey teaching certificate by virtue of his murder conviction. The SBE was directed to file its Answer and to respond to petitioner's legal memorandum upon its receipt.

Upon review, the arguments submitted by the petitioner[1] are essentially the same arguments presented in the previous matter, *i.e.*: 1) the legislative intent of *N.J.S.A.* 18A:6-7.1 "was not to totally bar rehabilitated offenders, just bar entry into the public schools," thus, he should be allowed to use certification in any other forum from which he is not barred; 2) the RCOA states that an applicant cannot be disqualified or discriminated against based on a prior conviction -- yet, in the instant matter, petitioner is being discriminated against based on a prior conviction; 3) he is being discriminated against because, prior to the enactment of the 1998 amendment (*N.J.S.A.* 18A:6-7.1), two similarly situated individuals with homicide convictions were issued teaching certificates after promising that they would not teach in a public school; 4) the Department of Corrections and the Juvenile Justice System do not have a board of education, and, thus, do not fall under the criteria listed in *N.J.S.A.* 18A:6-7.1; and 5) petitioner is not barred from teaching in the adult correctional system because *N.J.S.A.* 18A:6-7.1 would not apply as he would not be dealing with children under the age of 18. (Petitioner's Brief at 1-2 and Petitioner's Reply Brief at 2-3)

The SBE submits, *inter alia*, that petitioner is attempting to litigate again the issue of the effect of his disqualification from public school employment upon his eligibility for certification which was conclusively decided in the previous decision of the Commissioner (referenced above) regarding this same issue. (SBE Brief at 9) The SBE notes that petitioner did not appeal the State Board's affirmation of the Commissioner's finding to the Appellate Division, making the State Board's determination final. (*Id.* at 9-10) The SBE claims that petitioner is, therefore, barred from re-litigating the issue of the effect of his disqualification

[1] Although not requested to do so, petitioner additionally filed a reply to the SBE's brief.

from public school employment on his eligibility for certification and his petition should be dismissed. (*Id.* at 10)

Upon a thorough assessment of petitioner's submissions in this matter, as well as the arguments presented by the SBE, the Commissioner finds that no new substantive issue has been raised by petitioner that was not argued and considered in the Commissioner's June 24, 2004 decision, wherein it was determined that petitioner was statutorily disqualified from holding a New Jersey teaching certificate. In that the issues and facts presented in the instant matter, as well as the substantive merits of petitioner's arguments, have previously been litigated and decided in the prior case involving the same parties, therefore, the Commissioner finds that the fundamental principle of *res judicata* precludes further litigation of this matter. See *City of Hackensack v, Winner*, 82 *N.J.* 1, 31, 34 (1980) and *T.W. v. A.W.*, 224 N.J. Super. 675, 682 (App. Div. 1988).

Accordingly, for the reasons set forth above, the petition in this matter is dismissed, with prejudice.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/07/05

Date of Mailing: 10/07/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

353-05

353-05
OAL DKT. NO. EDU 5654-05
(EDU 1164-05 ON REMAND)
AGENCY DKT. NO. 374-10/04

JACK CORTEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT,	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF JACK CORTEZ, SCHOOL DISTRICT OF THE CITY OF GARFIELD, BERGEN COUNTY.	:	

The record, Settlement Agreement and Initial Decision on Remand issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/30/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05654-05

NO. EDU 01164-05 (**ON REMAND**)

AGENCY REF.NO.374-10/04

JACK CORTEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY and IN THE MATTER OF THE TENURE HEARING OF JACK CORTEZ, GARFIELD SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Bruce D. Leder, Esq., for petitioner (Cohen, Leder, Montalbano & Grossman, attorneys)

Toni Belford Damiano, Esq., for respondent

Record Closed: August 19, 2005 Decided: August 19, 2005

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 12, 2005 for determination as a contested case. A hearing was scheduled for February 1, 2005, which was adjourned because Ms. Damiano's father passed away. It was rescheduled to February 24, 2005.

On the date of the hearing the parties were able to resolve the matter. On March 1, 2005, the parties submitted the attached typewritten Settlement Agreement indicating the terms of the agreement. On March 10, 2005, the court received the original handwritten signed agreement. An Initial Decision Settlement was prepared on March 15, 2005 and mailed to the parties on March 24, 2005. On May 5, 2005 the Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL) for further expansion and revision of the documents consistent with the Cardonick standards. The file was returned to the OAL on May 26, 2005. On August 19, 2005 the attorneys sent a revised Settlement Agreement consistent with the Cardonick standards. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/19/05
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

August 23, 2005
DATE

Laura Sweeley
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 23 2005
DATE

Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

Damiano Law Offices

51 East Main Street
Little Falls, New Jersey 07424
---
(973) 890-1199
Fax (973) 890-1966

TONI BELFORD DAMIANO
Also PA & D.C. Bars

STEVEN M. SEGALAS
Also NY Bar

ALAN G. TRESSER
JOSEPH V. MACERI
**NICOLE A. CASCIOLA*

**Also PA Bar*

August 15, 2005

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 AUG 19 A 10: 27

Via UPS Overnight
Honorable Carol Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Cortez v. Garfield Board of Education
OAL Docket No(EDU1164-05- Remand)
EDU 05654-05

Dear Judge Cohen:

This letter is written with the authority and consent of Bruce Leder, attorney for Mr. Jack Cortez. Pursuant to N.J.A.C. 6A:3-5.6 - withdrawal, settlement or mooting tenure charges - the following information is submitted as required and 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. Enclosed is a copy of the filed tenure charges outlining the nature of the charges against Mr. Cortez; and,

2. In regard to the explanation of the circumstances justifying the settlement, please be advised that it is undisputed that Mr. Cortez suffers a physical disability that does not permit him to perform the duties required of him in the position he held with the Garfield Board of Education; and,

3. In regard to the consent of both the charged and charging parties, enclosed is a copy of the signed Stipulation of Settlement. Enclosed please also find a certified copy of the Garfield Board of Education Resolution No. 02-313-05 dated February 28, 2005, approving the settlement; and,

4. In regard to an indication that the charged party entered into the agreement with a full understanding of his rights, Mr. Cortez was extensively *voir dired* by Your Honor on the record, as well as having been asked questions

by counsel for the charged and charging party in addition to executing the Stipulation of Settlement; and,

5. It is clear that this agreement is in the public interest as the settlement financially benefits Mr. Cortez and does not detrimentally impact upon the District.

I trust the above is in full compliance with the Decision of the Commissioner of Education entered April 27, 2005, and acceptable as presented.

Very truly yours,

DAMIANO LAW OFFICES

TONI BELFORD DAMIANO, ESQ.

TBD:mr
Enclosures
cc: M. Kathleen Duncan, Director, Bureau Controversies & Disputes
Mr. Nicholas Perrapato, Superintendent w/o enclosures
Mr. Raymond Hryczyk, Assistant Superintendent w/o enclosures
Dr. Dennis Frohanpfel, Business Administrator w/o enclosures

The undersigned consent to the submission of the above.

Bruce Leder, Esq.
On behalf of Jack Cortez

Toni Belford Damiano, Esq.
On behalf of Garfield
Board of Education—
Duly Authorized Representative

02-313-05 **Whereas,** the Garfield Board of Education and Jack Cortez are parties to a matter pending before the Office of Administrative Law, Docket No. EDU-01 164-05; and Whereas, both parties desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter, **It Is Hereby Agreed as follows:**

1. Jack Cortez will file a disability retirement application. Jack Cortez understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education. The Garfield Board of Education takes no position as to whether or not Jack Cortez is eligible for a disability retirement. The Garfield Board of Education agrees to provide reasonable assistance to Jack Cortez in the preparation of the disability pension application.

2. Jack Cortez shall receive from the Garfield Board of Education a lump sum settlement equivalent to five and one-half (5.5) months of his present salary ($49,600) in return for the following release. Jack Cortez releases now and forever any and all claims, causes of action, petitions or demands against the Garfield Board of Education and its individual Board Members arising out of his employment, his termination, his tenure charges, his retirement and/or the end of his employment with the Garfield Board of Education. Notwithstanding this release, Jack Cortez has the right to pursue his workers' compensation claim.

3. Jack Cortez acknowledges that he has already received one and one-half (1.5) months of salary. This sum, in addition to the amount set forth in paragraph 2, shall be the total payable by the Garfield Board of Education to Jack Cortez for any claims. Upon receipt of the five and one-half (5/5) months as set forth in paragraph 2, Jack Cortez acknowledges that the Garfield Board of Education has completed its obligation to Jack Cortez and Jack Cortez agrees that the Garfield Board of Education will have satisfied its monetary obligations to him for any and all claims.

4. Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter.

5. The Garfield Board of Education will withdraw its Cross Petition in this matter.

Mrs. Aloia motioned to approve Resolution 02-313-05. Said motion was seconded by Mr. Hicks and carried by the following roll call vote: Mrs. Aloia, Ms. Visotcky, Dr. Conte, Mr. Hicks, Mr. DeMarco, Mr. Edward Puzio, and Mr. Wich voting YES.

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Garfield Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on February 28, 2005.

IN WITNESS WHEREOF, I have set my hand and the seal of the Garfield Board of Education, May 2, 2005.

Dennis R. Frohnapfel

Dennis R. Frohnapfel, Ed.D., Secretary
Garfield Board of Education

STATEMENT OF TENURE CHARGES

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I, DR. DENNIS R. FROHNAPFEL, of full age, being duly sworn according to law and upon my oath, deposes and says:

1. I am the Board Secretary/School Business Administrator of the School District of the City of Garfield.

2. My appointment to the position of Board Secretary/School Business Administrator in the School District of the City of Garfield became effective on or about September 15, 2003, and I have held such position continuously from that time to the present.

3. As the Board Secretary/School Business Administrator, one of my duties is to oversee and supervise the conduct of non-certified employees in the District, and to insure that the conduct of the non-certified staff members is becoming to their positions within the district, and to overlook that non-certified staff members perform their assigned duties in an efficient, appropriate, and diligent manner.

4. Mr. Jack D. Cortez, Jr. is a custodian employed in the district. He was initially hired in the district on or about September 4, 1990. While he started as a custodian, he was later transferred to the Maintenance Department. However, at his request, he was returned to the custodian's position.

5. I am hereby seeking to prefer tenure charges against Mr. Cortez as follows:

(a) Inability to adequately perform his duties as a custodian, due to incapacity, as set forth in the attached Statement of Evidence;

(b) Inefficiency for excessive absenteeism; and

(c) Other just cause.

6. With respect to the charges of inefficiency, Mr. Cortez has been afforded the opportunity to correct such inefficiency on February 9, 1999, January 14, 2000, January 2, 2001, and June 1, 2001, both verbally and in writing.

7. In view of the above charges, I have determined that Mr. Cortez's actions constitute incapacity in his job, and other just cause to warrant Mr. Cortez's termination from employment.

8. I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dennis R Frohnapfel 6/23/04

DR. DENNIS R. FROHNAPFEL
Board Secretary/School Business Administrator

Sworn to and subscribed before me
this 23rd day of June, 2004.

Donna Nazzaro

DATED: June 23, 2004

DONNA NAZZARO
A Notary Public of New Jersey
My Commission Expires Nov. 4, 2004

STATEMENT OF EVIDENCE

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I, DR. DENNIS R. FROHNAPFEL, of full age, being duly sworn according to law and upon my oath, deposes and says:

1. I am the Board Secretary/School Business Administrator of the School District of the City of Garfield.

2. My appointment to the position of Board Secretary/School Business Administrator in the School District of the City of Garfield became effective on or about September 15, 2003, and I have held such position continuously from that time to the present.

3. As the Board Secretary/School Business Administrator, one of my duties is to oversee and supervise the conduct of non-certified employees in the District, and to insure that the conduct of the non-certified staff members is becoming to their positions within the district, and to overlook that non-certified staff members perform their assigned duties in an efficient, appropriate, and diligent manner.

4. Mr. Jack D. Cortez, Jr. is a custodian employed in the district. He was initially hired in the district on or about September 4, 1990. While he started as a custodian, he was later transferred to the Maintenance Department. However, at his request, he was returned to the custodian's position

5. A review of Mr. Cortez's personnel file reveals that, throughout his employment in the district, Mr. Cortez has had a history of excessive absenteeism, injury, and disability. In any event, some examples of his history are as follows:

(a) On August 4, 1994, during his normal work hours, Mr. Cortez was observed drinking beer at a local tavern.

(b) During the 1997-1998 school year, Mr. Cortez was absent a total of 33 days from work for illness, vacation, and personal days. As early as September 17, 1997, Mr. Cortez complained of experiencing chest pains while performing work duties.

(c) On November 25, 1997, Mr. Cortez allegedly injured his back and hips while performing his duties. He filed a Workers' Compensation claim as a result and was absent for a significant time from his work.

(d) On July 28, 1998, Mr. Cortez asked to be transferred from the maintenance department to a custodial position as a result of medical problems. His request was accommodated. However, Mr. Cortez was excessively absent through 1998 and 1999, and, as such, his excessive absenteeism was discussed at a meeting of the Board's personnel committee on February 9, 1999.

(e) Following that meeting, Mr. Cortez's excessive absenteeism continued. In March 1999, he filed a temporary disability claim. Then in August, while cleaning gutters at his home, he fell from a ladder. He then filed another temporary disability claim on September 6, 1999. In the 1999/2000 school year, Mr. Cortez was absent a total of 82 days.

(f) After finally returning to work, on January 14, 2000, Mr. Cortez was reprimanded for his failure to adequately sweep the floor in a classroom. After this verbal reprimand, Mr. Cortez stated that he was ill, and he left work early.

(g) On September 11, 2000, Mr. Cortez alleged that he had fallen while carrying a package up stairs and that he had hyper extended his knee. He was absent for a few days as a result, though he refused medical treatment at the time. His excessive absenteeism continued. As a result, on January 2, 2001, Mr. Cortez met with the principal in the school where he was assigned to work, as well as the Board Secretary at the time, Edward Izbicki. Following this meeting, Mr. Cortez continued to be excessively absent. His annual written performance report, dated June 1, 2001 indicates that he needed improvement in his punctuality and attendance, as well as his performance of his duties and his general attitude.

(h) On or about June 29, 2001, Mr. Cortez filed another disability claim after he received treatment for a heart condition. He was absent for a significant time as a result. On July 6, 2001, the principal at the school where Mr. Cortez was assigned wrote a memorandum to the Superintendent indicating that Mr. Cortez's excessive absenteeism was negatively impacting upon his school's entire custodial staff. On or about July 9, 2001, Cortez was again absent. He continued to be absent for several days when the School Business Administrator at the time was advised that he had been admitted into the hospital for a coronary problem. He was absent for a significant time and he provided documentation indicating that he could return to work as of early September 2001. In early September, however, he called in

sick for work indicating that he could not get a doctor's appointment and he needed to see a doctor. On September 7, 2001, the school principal wrote another memo to the Superintendent expressing concerns about Mr. Cortez's physical well-being and his ability to perform custodial duties. Mr. Cortez continued to be absent for a significant period of time.

(i) After Mr. Cortez eventually returned to work, his excessive absenteeism continued. In January, February and March 2002, Mr. Cortez was absent for a few days in each of those months as a result of upper respiratory infections. Through the 2002/2003 school year, Mr. Cortez was absent a total of 185 days. This resulted from various physical ailments, as well as mental ailments such as depression. Further, in August 2002, Mr. Cortez fell and suffered a head injury which resulted in a concussion, and numbness in his extremities. Also, in August 2002, Mr. Cortez underwent treatment for psychological problems and alcohol detoxification.

(j) On September 17, 2002, Mr. Cortez fell while taking out garbage from the school cafeteria. He suffered contusions on his face, and a back injury. He filed a Workers' Compensation claim. He received benefits as a result of that claim until on or about September 15, 2003, at which time he was supposed to return to work. However, he did not do so. He has not returned to work since that time.

6. In view of the above-listed events, I have determined that Mr. Cortez's actions constitute inefficiency in his job, incapacity and other just cause to warrant Mr. Cortez's termination from employment.

7. I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dennis R Frohnapfel 6/23/04

DR. DENNIS R. FROHNAPFEL
Board Secretary/School Business Administrator

Sworn to and subscribed before me
this 23rd day of June, 2004.

Donna Nazzaro

DONNA NAZZARO
A Notary Public of New Jersey
My Commission Expires Nov. 4, 2004

DATED: June 23, 2004

COHEN, LEDER, MONTALBANO & GROSSMAN

A LIMITED LIABILITY COMPANY
COUNSELLORS AT LAW
1700 GALLOPING HILL ROAD
(AT GARDEN STATE PARKWAY, EXIT 138)
KENILWORTH, N.J. 07033

(908) 298-8800

FIRM E-MAIL
laborlaw@coopmail.net

FAX
(908) 298-9333

EDWARD A. COHEN
BRUCE D. LEDER[1]
PAUL A. MONTALBANO
DAVID GROSSMAN[1]

DONALD RAYMAR
MICHAEL A. McLAUGHLIN[1]

[1]ALSO N.Y. BAR

DIRECT E-MAIL
COHEN: edcohenesq@yahoo.com
LEDER: UNIONLEDER@YAHOO.COM
MONTALBANO: MONTALBANOEMAIL@YAHOO.COM
GROSSMAN: davegrossmanesq@yahoo.com
MCLAUGHLIN: mclaughlinesq@yahoo.com

MAR 1 2005

February 28, 2005

Honorable Carol I. Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Jack Cortez v. City of Garfield Board of Education
Docket No. EDUOA 01164-2005N

Dear Judge Cohen:

Enclosed please find typewritten Settlement Agreement in this matter.

Should you have any questions, please feel free to contact.

Very truly yours,

COHEN, LEDER, MONTALBANO & GROSSMAN

By: _____
BRUCE D. LEDER

BDL:cs
encl.
cc Toni Damiano, Esq.
Jack Cortez
Ken Bohan (L. 560)

SETTLEMENT AGREEMENT

In the matter of Jack Cortez v. Garfield Board of Education
OAL Docket No. EDU01164-05

WHEREAS, the Garfield Board of Education and Jack Cortez are parties to a matter pending before the Office of Administrative Law, Docket No. EDU-01164-05; and

WHEREAS, both parties desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter;

IT IS HEREBY AGREED AS FOLLOWS:

1. Jack Cortez will file a disability retirement application. Jack Cortez understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education. The Garfield Board of Education takes no position as to whether or nor Jack Cortez is eligible for a disability retirement. The Garfield Board of Education agrees to provide reasonable assistance to Jack Cortez in the preparation of the disability pension application.

2. Jack Cortez shall receive from the Garfield Board of Education a lump sum settlement equivalent to five and one-half (5.5) months of his present salary ($49,600.00) in return for the following release. Jack Cortez releases now and forever any and all claims, causes of action, petitions or demands against the Garfield Board of Education and its individual Board members arising out of his employment, his termination, his tenure charges, his retirement and/or the end of his employment with the Garfield Board of Education. Notwithstanding this release, Jack Cortez has the right to pursue his workers compensation claim.

3. Jack Cortez acknowledges that he has already received one and one-half (1.5) months of salary. This sum, in addition to the amount set forth in paragraph 2, shall be the total amount payable by the Garfield Board of Education to Jack Cortez for any claims. Upon receipt of the five

and one-half (5.5) months as set forth in paragraph 2, Jack Cortez acknowledges that the Garfield Board of Education has completed its obligation to Jack Cortez and Jack Cortez agrees that the Garfield Board of Education will have satisfied its monetary obligations to him for any and all claims.

4. Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter.

5. The Garfield Board of Education will withdraw its cross petition in this matter.

Garfield Board of Education

/s/ Jack Cortez
Jack Cortez

/s/ Dennis R. Frohnapfel

Dated: February 24, 2005

Dated: February 24, 2005

Whereas the Garfield Board of Education and Jack Carton are parties to a matter pending before the Office of Administrative Law, Docket EDU-01164-05 and

Whereas both parties ~~are desirous~~ desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter

It is hereby agreed as follow:

(1) Jack Carton will file a disability retirement application. Jack Carton understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education

no position as to whether or not Jack Carter is eligible for a disability retirement. The GBE agrees to provide reasonable assistance to Jack Carter in the preparation of the disability pension application

(2) Jack Carter shall receive from the GBE a lump sum settlement equivalent to five and ½ (5.5) months of his ~~present~~ salary ($49,600) in return for the following release. Jack Carter releases now and forever any and all claims, causes of action, petitions or demands against the GBE and its individual Board members arising out of his employment,

his retirement and/or [redacted] the end of his employment with the GBE. Notwithstanding this release, Jack Carter has the right to pursue his worker compensation claim

③ Jack Carter acknowledges that he has already received one and one half (1.5) months of salary. This sum in addition to the amount set forth in paragraph 2 shall be the total amount payable by the GBE to Jack Carter for any claims. Upon receipt of the five and one half (5.5) months as set forth in paragraph 2, Jack Carter acknowledges that the GBE has completed ~~this~~ its obligation to Jack Carter

will have satisfied its monetary obligations to him for any and all claims

(4) Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter

(5) GBE will withdraw its cross petition in this matter

Jack Cortez
Jack Cortez

Dennis R. Zuckerbrod
Garfield Board of Education

Feb 24, 05
Date

Damiano Law Offices

51 East Main Street
Little Falls, New Jersey 07424

---

(973) 890-1199
Fax (973) 890-1966

TONI BELFORD DAMIANO
Also PA & D.C. Bars

STEVEN M. SEGALAS
Also NY Bar

**ALAN G. TRESSER*
**MICHAEL E. CANNATARO*
JOSEPH V. MACERI

**Also Fla Bar*

June 23, 2004

VIA HAND DELIVERY
Mr. Jack D. Cortez
27 Commerce Street
Garfield, New Jersey 07026

Re: Tenure Charges

Dear Mr. Cortez:

Enclosed please find a Statement of Tenure Charges and Statement of Evidence, in accordance with *N.J.S.A.* 18A:6-11, which have been executed by Dr. Dennis R. Frohnapfel, the Board Secretary/School Business Administrator of the Garfield Board of Education.

Dr. Frohnapfel is seeking to prefer tenure charges against you for your inefficiency in your duties as a custodian/bus driver with the school district, and for other just cause.

N.J.S.A. 18A:6-11 provides that you may submit to the Board a written statement of position and a written statement of evidence, under oath, to the Board prior to the Board taking any action with respect to the charges being preferred by Dr. Frohnapfel. *N.J.A.C.* 6:24-5.1 provides that you may provide said written response to the Board within fifteen (15) days of receipt of these Tenure Charges and Statement of Evidence. It is the Board's intention to address this matter in executive session at the Board meeting scheduled for Monday, July 19, 2004 at 7:00 pm. Accordingly, if you so desire to refute the allegations as set forth in the enclosed Statement of Evidence, kindly do so in a writing, under oath, submitted to the Board Offices, within fifteen (15) days of receipt of this letter.

Very truly yours,

TONI BELFORD DAMIANO, ESQ.

cc: Mr. Nicholas Perrapato, Superintendent of Schools
Mr. Raymond Hryczyk, Assistant Superintendent of Schools
Dr. Dennis R. Frohnapfel, Board Secretary/School Business Administrator
Mr. Gerald Wich, Board President
Mr. Edward Puzio, Board Vice President

369-05

S.S. AND W.S., ON BEHALF OF MINOR CHILD, J.S.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY, ET AL.

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners seek to have a one-day suspension expunged from their son's record; suspension was imposed for violation of the Board's written policy against harassment, intimidation and bullying after J.S. added a yarmulke and curls to a portrait of another student while in art class. Petitioners contend that the penalty imposed was excessive, and a verbal or written warning would be a sufficient disciplinary action. Respondent Board maintains that the penalty is appropriate, and the Commissioner cannot set aside its determination unless she finds that the action was "arbitrary, capricious and unreasonable."

The ALJ found that: the target of J.S.'s hazing was a special education student with multiple disabilities; the intent of his action was to belittle and ridicule a classmate; the fact that J.S. shares a Jewish identity with the targeted student does not excuse his behavior or lessen its severity; educators and administrators in the school district took the incident very seriously, and determined that it violated the district policy against "defamation of a cultural, racial or religious group"; and both the building principal and the superintendent of schools agreed that a one-day suspension was a fitting penalty under district guidelines. The ALJ concluded that the nature of the offense, its foreseeable effect on the victim and the failure of petitioner to apologize for his actions are more than sufficient to warrant imposition of the one-day suspension. Therefore, the school administration did not act arbitrarily, capriciously or unreasonably by following its own guidelines and imposing a one-day suspension.

The Commissioner fully concurs with the ALJ that, under the circumstances, the respondent Board's imposition of a one-day suspension upon J.S. is properly upheld. The Initial Decision of the OAL dismissing the petition is adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 13, 2005

OAL DKT. NO. EDU 3683-04
AGENCY DKT. NO. 70-2/04

S.S. AND W.S., ON BEHALF OF MINOR CHILD, J.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY, ET AL.	:	
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 careful and independent review, the Commissioner fully concurs with the Administrative Law Judge that, under the circumstances here present, the Board of Education's imposition of a one-day suspension upon J.S. is properly upheld.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3683-04
AGENCY DKT. NO. 70-2/04

S.S. and W.S., on behalf of their minor child J.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,
Respondent.

S.S. and W.S., *pro se*

Alan P. Dzwilewski, Esq., for respondent
(Schartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 3, 2005 Decided: September 6, 2005

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal on behalf of an eighth-grade student seeking to expunge a one-day suspension from his pupil record. Hasbrouck Heights Board of Education

("Board") has imposed a one-day suspension on a thirteen-year old student (identified here as "J.S.") for violation of its written policy against "harassment, intimidation and bullying." School officials allege that, while in art class, J.S. added a yarmulke and curls to a portrait of another student.[1] The Board contends that such conduct violates a school policy prohibiting harassment "motivated by any actual or perceived characteristic, such as ...religion." Both students directly involved are Jewish. J.S.'s parents urge that no anti-Semitism was intended and that the Jewish symbols added to the portrait are not inherently defamatory. The victim, a special education student with distinctive facial characteristics and noticeable speech impairment, had been the brunt of prior teasing by a group of boys to which J.S. belongs.

While acknowledging that some disciplinary action is warranted, petitioner contends that the penalty is excessive and that a verbal or written warning would be been sufficient. Respondent maintains that the penalty was appropriate and that Commissioner of Education ("Commissioner") cannot set aside its determination unless he finds that the action was "arbitrary, capricious and unreasonable."

Procedural History

By notice dated December 9, 2003, the middle school principal notified J.S.'s parents that their child will receive a one day out of school suspension for having "depicted a defamatory picture of another student." Petitioner's parents sought a review of decision and were afforded the opportunity to make a presentation to the Board at its regularly scheduled meeting on January 29, 2004. Meanwhile, on December 10, 2003, J.S. had already served the one-day suspension. On February 3, 2004, the Board notified the parents in writing that it had voted to uphold and affirm the action taken by the middle school principal.

[1] A yarmulke (Yiddish) or kipa (Hebrew) is "a skullcap worn esp. by Orthodox and Conservative Jewish males in the synagogue and the home." WEBSTER'S NEW COLLEGIATE DICTIONARY 1366 (9th ed. 1988).

Petitioner's parents filed an appeal to the Commissioner on February 13, 2004 and the Board filed its answer on March 3, 2004. Subsequently, on April 21, 2004, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on May 18, 2005. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing briefs, the record closed on June 3, 2005.

Findings of Fact

Most of the relevant facts are undisputed. **I FIND** the following facts:

On December 8, 2003, J.S., thirteen years old, was an eighth grade student enrolled in the Hasbrouck Heights public school system. During the second period on that day, J.S. was attending art class. Barbara Kritzer, the art teacher, had assigned a project in which pairs of students, seated at tables, were asked to draw portraits of each other. There were roughly twenty students in the class, described by their teacher as "a pretty wild group." One of the students in the class, identified as T.D., was a special education student, who took "cycle classes," such as art, in the mainstream. Ms. Kritzer testified that T.D is small in stature, and that he walks differently, that his face is "a little deformed" and that he has a speech problem. Harriet Eisenberg, director of special services in the district, noted that T.D. is classified as "multiply-disabled," and that he exhibits "learning disabilities, physical deformities, facial distortion and speech impairment." T.D.'s physical characteristics "make him look different" from other children.

Art teacher Kritzer stated that T.D. was "out of the group" and seemed to get teased a lot, either because he was different or because of the way he reacted to teasing. However, Ms. Kritzer was unaware of anything unusual having happened in her class until a day or two after December 8, 2003 when the building principal, Edward Bolcar Jr. approached her about a complaint he had received from T.D.'s parents.

Mr. Bolcar, a school administrator with thirty years of experience, met with T.D. and his mother on December 9, 2003. According to Mr. Bolcar, the mother objected to certain alterations that J.S. had made to a portrait of T.D. in art class the day before, which she believed were intended to demean and embarrass her son. Mr. Bolcar questioned T.D., and he stated that he felt "insulted and humiliated." Characterizing T.D.'s demeanor, Mr. Bolcar said that T.D.'s "head was down," that his "eyes were downcast" and that he appeared "genuinely upset." Mr. Bolcar did not think he was merely repeating what his mother had told him to say.

In a letter to the Board dated December 17, 2003, the mother eloquently summarized her anguish at the ridicule to which her son had been subjected:

> The drawing depicting my son with a yarmulke and curls may seem to some as a classmate "joking around" but it was meant to be offensive. My son believes it was to point out that he has another issue that makes him different. He was upset to learn that someone would "make fun" of him because of his Jewish heritage.
>
> My son receives cruel insults on a daily basis and I encourage him to shrug off many of these harsh comments but this was different. I could see he was truly offended . . . victimized because of his religious values.

Ms. Kritzer was able to retrieve the drawing. The portrait portrays a male figure with long sideburns, similar to peyos typically worn by Orthodox Jewish men, to which someone has added curls covering the ears and a yarmulke on top of the head.

Testifying in his own defense, J.S., now age fourteen, admitted that he had drawn the curls and the yarmulke, although the sideburns had been part of the original drawing. J.S. explained that several other students had previously drawn on the portrait, but their markings had been erased and he was the last one who "drew over it." When J.S completed making his alterations on the portrait, "everyone was just laughing" and "joking around." Explaining that he belonged to a Reform Temple and had just had his bar mitzvah two months before the incident, J.S. denied any intent to

make fun of Jewish culture because, "I'm Jewish myself." On cross-examination, J.S. acknowledged that he was aware of the prohibition in the student handbook against hazing and bullying.

In further support for their position, the parents submitted a letter from Rabbi David Rosenberg of Temple Shuvah Yisrael in Westbury, New York. Rabbi Rosenberg explained that "'hazing' or 'making fun' of others is never acceptable in Jewish thought" and that J.S. "openly admits he participated in such an event." Instead of punishment, the Rabbi recommended that J.S. "should sincerely ask [T.D.] to forgive him for what he did." Curiously, J.S. never saw fit to follow the Rabbi's well-meaning advice, conceding that he had never apologized to T.D. for offending him. Indeed, J.S. seemed as much concerned about himself as his victim, saying that he now regrets the incident "because of what it caused both to me and to him."

Experienced educators in charge of running the Hasbrouck Heights school system took the incident very seriously. Director Eisenberg, who herself is Jewish, thought the act was designed to mock another child. She regarded the Jewish connotations as "even more offensive if the child who did it is Jewish." Building Principal Bolcar determined that singling out a particular child for his religious faith violated the district policy against "defamation of a cultural, racial or religious group." Petitioner's parents make much of the technical definition of "defamation," but Mr. Bolcar was clearly using the word in its generic sense as making disparaging or unfavorable statements about another person. Superintendent of Schools Joseph Luongo commented that the appropriate use of a symbol depends on its context and that even a religious icon can be offensive if used to show disrespect for a particular group or tradition. Given the circumstances, both Mr. Luongo and Mr. Bolcar agreed that a one-day suspension is a fitting penalty under district guidelines.

J.S.'s conduct had the foreseeable effect of isolating T.D. from the rest of the class and emphasizing his differences from everyone else. Clearly, J.S. understood that what he was doing would hurt T.D.'s feelings and would incite other children to laugh at the outsider. He intended to belittle and ridicule his classmate and to rally the

other children in the class against him. Certainly the fact that J.S. happens to share a Jewish identity with his victim does not excuse his behavior or lessen its severity.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's imposition of a one-day suspension for J.S.'s violation of its policy against harassment, intimidation or bullying should be upheld.

Establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. *R.R. v. Board of Educ., 109 N.J. Super.* 337 (Ch. Div. 1970). Recently, the New Jersey Legislature recognized that harassment, intimidation or bullying disrupts a student's ability to learn and hampers the school's ability to educate its students in a safe environment. *N.J.S.A.* 18A:37-13. In order to achieve a safe and secure school environment, the Legislature mandated that every public school district in New Jersey adopt a policy prohibiting harassment, intimidation or bullying on school property or at school-sponsored functions. *N.J.S.A.* 18A:37-15(a). Among other features, such policy must specify a description of the type of behavior expected from every student, the consequences and appropriate remedial action for anyone who fails to conform to such expectations, and the range of ways in which a school will respond once an incident has been reported. *N.J.S.A.* 18A:37-15(b).

Courts and administrative agencies have demonstrated an increased willingness to protect victims of bullying behavior and to require school districts to carry out their obligation to stop such abuse. Most notably, in *Shore Regional High School Bd. of Educ. v. P.S. ex rel. P.S.*, 381 *F.*3d 194 (3rd Cir. 2004), the Third Circuit held that a school district violated the Individuals With Disabilities Education Act because of its inability to protect a student from a pattern of bullying and harassment. Similarly, in *L.W. v. Toms River Reg. Sch. Dist. Bd. of Educ.*, OAL Dkt. No. CRT 8431-01, http://lawlibrary.rutgers.edu/oal/final/crt8535-01.pdf , the Director of the New Jersey

Division on Civil Rights held a school district liable for civil damages and penalties under the Law Against Discrimination for tolerating a hostile educational environment of intimidation and bullying based on sexual orientation.

Under federal and state law, therefore, the Board has a duty to implement strong measures to prevent bullying of students under its care. To carry out its responsibilities, the Board enacted Policy #5131.2, prohibiting hazing, bullying, harassment, and intimidation activities of any type inconsistent with the educational process. "Harassment, intimidation or bullying" is broadly defined to encompass any gesture or written, verbal or physical act "motivated by any actual or perceived characteristic," including religion, ancestry or mental or physical disability. It extends to any conduct that "has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school."

J.S. had received a copy of the student handbook and was familiar with its contents. The handbook put him on notice that he was expected to "behave in a manner that does not interfere with the education of others" and to "conduct [himself] in a manner that supports the physical and emotional well-being of others." Under the heading of "Bullying," the handbook states that students must "respect the rights and privacy of fellow students" and that "no student should be subject to bullying or unwarranted harassment." Once a report of suspected bullying is made, the school staff member must take appropriate action to remedy the situation "based on the severity of the problem." Disciplinary guidelines in the handbook set forth a wide range of potential consequences, from verbal warning to police intervention. The suggested penalty for "defamation of a cultural, racial or religious group" by an eighth grade student is an out-of-school suspension. School administrators, however, "reserve the prerogative to adjust the disciplinary process" to fit the nature of the offense.

Undoubtedly this incident has overtones of religious bigotry on J.S.'s part. Use of orthodox religious symbolism to taunt a Jewish student in his class suggests J.S.'s eagerness to dissociate himself from an unpopular child in the class whom others might

otherwise view as connected with him through common religious ties. Even if the religious aspect were purely incidental and J.S. picked on this particular target because of his handicap or just because he was "different," the conduct would be equally reprehensible and violative of the school policy against bullying. J.S.'s parents argue hollowly that the class was never disrupted because the teacher was unaware of the incident when it occurred. One has only to read the heartbreaking letter from the victim's mother to appreciate the adverse impact on T.D.'s educational opportunities and interference with the safety and security of the classroom.

Brief comment must be made about the scope of review of a school board's action on appeal to the Commissioner. *N.J.S.A.* 18A:6-9 confers extensive authority on the Commissioner to hear and determine "all controversies and disputes arising under the school law." Numerous reported opinions by New Jersey's highest court have broadly construed this unfettered legislative grant to allow the Commissioner to exercise independent judgment in finding facts and making legal conclusions. *See, e.g., Jenkins v. Township of Morris Sch. Dist.*, 58 *N.J.* 483, 494 (1971) (crossing school district lines to remedy segregation); *Board of Educ. of East Brunwick v. Township Council*, 48 *N.J.* 94,106 (1966) (ensuring that school district has adequate funds to deliver thorough and efficient education); *In re Masiello*, 25 *N.J.* 590, 606 (1958) (review of denial of administrator's certificate).

Nonetheless, the Board urges that the Commissioner's jurisdiction should be limited to determining whether it acted arbitrarily, capriciously and unreasonably. If it did not, then the Board insists that the Commissioner cannot substitute his own judgment for that of local authorities. Respondent cites a long line of administrative decisions, exemplified by *J.D. & E.D. ex rel. B.D. v. Bd. of Educ. of Toms River Reg. Sch. Dist,* OAL Dkt. No. EDU 6009-97, *1997 N.J. AGEN LEXIS 521* (Nov. 19, 1997), adopted (Comm. July 1, 1998) http://lawlibrary.rutgers.edu/oal/final/edu6009-97.pdf , in which the Commissioner appears to have confined himself to such narrow scope of review. *But cf., Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980), where the New Jersey Supreme Court rejected a similar "abuse of discretion" standard and directed the

Civil Service Commission [now Merit System Board] to conduct a *de novo* review in a public employee's appeal of a disciplinary action.

Here it is unnecessary to resolve these competing views of the breadth of the Commissioner's review powers. The result would be the same no matter which standard is applied. Under a *de novo* review standard, the nature of the offense, its foreseeable effect on the victim and the failure of petitioner to apologize for his actions are more than sufficient to warrant imposition of the one-day suspension. That being the case, the school administration did not act arbitrarily, capriciously or unreasonably by following its own guidelines and imposing a one-day suspension.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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. 6, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Appendix

List of Witnesses

1. Barbara Kritzer, art teacher, Hasbrouck Heights public school district

2. Harriet Eisenberg, director of special services, Hasbrouck Heights public school district

3. Edward J. Bolcar Jr., middle school principal, Hasbrouck Heights public school district

4. J.S.

5. Joseph Luongo, chief school administrator, Hasbrouck Heights public school district

6. W.S., mother of J.S.

List of Exhibits

No.	Description
J-1	Copy of policy No. 5131.2 of the Hasbrouck Heights Board of Education, entitled "Hazing/Bullying, Harassment & Intimidation," revised February 27, 2003
J-2	Copy of excerpt from the Hasbrouck Heights student handbook for the 2003-04 academic year, entitled "Student Behavior"

J-3 Copy of redacted report on bullying/harassment incident prepared by Edward J. Bolcar Jr., dated December 8, 2003

J-4 Copy of letter to Mr. and Mrs. S.S. from Edward J. Bolcar Jr., dated December 9, 2003

J-5 Copy of memorandum to Board of Education members from Joseph C. Luongo, dated December 12, 2003

J-6 Copy of letter to Board of Education members from T.D.'s parent, dated December 17, 2003

J-7 Copy of memorandum to board of education members from Joseph C. Luongo, dated January 23, 2004

J-8 Copy of letter to S.S. from Joseph C. Luongo, dated December 10, 2003

J-9 Copy of letter to Mr. and Mrs. S.S. from Joseph T. Bellino, dated February 3, 2004

P-1 Copy of various dictionary definitions of "defamation"

P-2 Id. Copy of legal argument submitted by S.S., undated

P-3 Copy of letter to Judge Ken Springer from Rabbi David Rosenberg, dated March 29, 2005

P-4 Copy of visual database of extremist symbols, logos and tattoos from the Anti-Defamation League website, dated December 22, 2003

329-05

OAL DKT. NO. EDU 6599-05
AGENCY DKT. NO. 206-8/05

L.A., on behalf of minor children, T.J.A. and P.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on September 2, 2005, along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order granting emergent relief in this matter as he concurs with the ALJ, for the reasons clearly stated in his decision, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter shall proceed to plenary hearing on its merits, scheduled for November 2, 2005, as directed by the ALJ.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05
Date of Mailing: 9/12/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER – EMERGENT RELIEF

OAL DKT. NO. EDU 6599-05

AGENCY DKT. NO. 206-8/05

L.A. ON BEHALF OF MINOR CHILDREN, T.J.A. AND P.M.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,

Respondent.

Duane T. Phillips, Esq., for petitioner

Clement F. Lisitski, Esq., for respondent

BEFORE **BRUCE M. GORMAN**, ALJ:

The New Jersey Department of Education (DOE) Bureau of Controversies received a request for emergent relief on August 25, 2005. Petitioner contends the Board of Education's refusal to promote her two children to the next grade for the 2005-2006 school year on the basis of their having too many absences was arbitrary and capricious. The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 2005. *N.J.S.A.* 18A:38-1. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The matter was scheduled for oral argument for September 2, 2005, at the OAL office in Atlantic City, New Jersey.

Petitioner brings this matter on an emergent basis seeking an Order requiring the respondent to start her children in the next grade (8th grade for T.J.A. and 2nd grade for P.A.). Respondent has determined to retain the children in their prior grades.

Petitioner offered the children's report cards. T.J.A.'s report card (P-1) reflects 5 final grades of A, four final grads of A+, and 2 final grades of A-. Because he is in a lower grade, P.A. was graded on a different system. His report card (P-2) reflects 8 final grades of O (the equivalent of A), four final grades of G+ (the equivalent of B+), one final grade of G (the equivalent of B), and one final grade of U (the equivalent of F). The U was in the subject of Health.

Rosemary Fiore, Superintendent, offered brief testimony. She attributed the decision to retain the children in their prior grades to their attendance records. The children's attendance records, in turn, are tied to an ongoing residency dispute between petitioner and respondent. That matter was originally before me in the matter of *L.A. v. Board of Education of the City of Port Republic*, Docket # EDU 34-05. Based upon the representations of both counsel, the residency dispute has apparently overflowed into the Superior Court.

The children's attendance records appear on the second pages of their respective report cards (P-1, P-2). T.J.A.'s record reflects 27 absences. However, nine days absence occurred in September 2004 when he attended no school because petitioner declined to enroll him in the Galloway Township school system. Two additional days absence occurred for the same reason in October. Four additional absences occurred in January when respondent barred T.J.A. and P.A. from attending its school because of the residency dispute. That situation was corrected when EDU 34-05, *supra*, was settled.

P.A.'s record is more complicated. His record reflects 41 absences. Those absences include the same 17 days described above for T.A. Additionally, his record reflects eight absences on Thursdays. Ms. Fiore testified petitioner removed P.A. from the school on

Thursdays at the time his Health class was scheduled. She would come to the school and sign him out to insure he could not attend that class. If she did not bring him back for his other classes, P.A. was marked absent for the day.

Petitioner's explanation for this conduct was that she had a conflict with the Health teacher that caused said teacher to be mean to P.A. Therefore, petitioner removed him from the school when he was scheduled for that class.

Ms. Fiore cited Board policy regarding promotion and attendance (R-1) in defense of the administration's decision to retain the children. That policy states in pertinent part:

> Excessive Absence
>
> Parents of students who miss 20 or more days of school, either excused or unexcused, will be notified by the Chief School Administrator that the student's attendance has placed him or her in danger of being retained in the same grade level for the next school year.
>
> The parents will be invited to attend a conference with the administrative principal, teacher and other appropriate school personnel to discuss the child(ren)'s attendance situation.
>
> Should the administrative principal feel it appropriate to do so, parents will be presented with a copy of *N.J.S.A.* 18A-29 detailing the parents' obligation to comply with the attendance regulations. *N.J.S.A.* 18A:38-29 provisions regarding the penalties for not complying with the law could also be addressed.
>
> Each student's case shall be evaluated on its own merits and documentation.
>
> The administrative principal shall initiate the appropriate legal proceedings, if necessary, to bring out parent compliance with attendance regulations.
>
> Should retention due to poor attendance be decided upon, parents of the child(ren) affected must be formally notified of such intent by June 1 and an opportunity provided for the parents to meet with school personnel regarding the decision.

Respondent alleged that it provided petitioner with the required notice (see R-3). Petitioner denied receiving the notice. At this early stage of the matter, I have no need to resolve this conflict in testimony.

I note that nothing contained in this policy *requires* retention of a student who exceeds the 20 day absence limitation. Breach of that standard merely triggers a parent conference, a conference geared toward advising the parent of his/her obligation to send the child to school. The policy does not define how the "danger" of retention is to be resolved.

Ms. Fiore stated that the children should not be promoted because they had missed more than 20 days each. She objected to petitioner's removal of P.A. from Health class. She complained that petitioner was uncooperative and disruptive. She would not follow school rules. Ms. Fiore was deeply concerned that promoting T.J.A. and P.A. would send a message to other parents that their children could flout the attendance rules and still be promoted.

However, Ms. Fiore could not explain why the children's academic achievements as reflected on their report cards did not warrant their promotion to the next grade level. When asked this question, she retreated into a dissertation about attendance rules and the uncooperativeness of petitioner. She also noted that the policy (R-1) allowed for an appeal to the Board of Education, and petitioner never perfected such an appeal.

I note that if the 15 absences resulting from the residency dispute are eliminated, T.J.A. missed only 12 days of school. Similarly, if those 15 days plus the 8 days when he attended school until his mother removed him from Health class are eliminated, P.A. missed only 18 days of school. Both of those figures fall below the 20 day benchmark contained in the policy (R-1).

The requirements for granting emergent relief are well settled. Petitioner carries the burden in seeking emergent relief. The standard is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), necessary for the awarding of this relief. See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 N.J. 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

Jersey State Constitution. *N.J. Const. art. VIII, Section 4.* That right entitles the children to promotion if their respective academic records warrant it.

Petitioner argues that the children's superior academic records as reflected in their report cards renders success reasonably probable in this case. Respondent argues that the school administration has the expertise to make the decision regarding promotion, and that discretion should not be disturbed by a non-professional educator such as myself. That argument might have some validity had Ms. Fiore been able to explain why children with either all A's (T.J.A.) or O's and G's (P.A.) would benefit educationally from repeating grades they had already successfully completed. She could not. Accordingly, I **FIND** that petitioner has demonstrated a reasonable probability of success.

Finally, petitioner argues that retaining the children in their prior grades will retard them academically by compelling them to repeat work already successfully completed, humiliate them, and damage them socially by separating them from their peers. Respondent retorts that promoting these children will send a message to other parents that school rules need not be followed. I **FIND** that the relative hardship will fall heavily upon these children if emergent relief is not granted. I further **FIND** that no real hardship will come to respondent if the children are promoted.

Therefore, I **FIND** and **CONCLUDE** that petitioner has met its burden and shown each of the factors necessary for the granting of emergent relief. Consequently, emergent relief should be **GRANTED.**

ORDER

I **ORDER** that petitioner's application for emergent relief by **GRANTED.**

I **ORDER** that T.J.A. be enrolled in Grade 8 pending final disposition of this matter.

I **ORDER** that P.A. be enrolled in Grade 2 pending final disposition of this matter.

A plenary hearing is scheduled for November 2, 2005, at 9:00 a.m. at the OAL office located at 1601 Atlantic Avenue, Atlantic City, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Bruce M. Gorman

September 6, 2005
DATE

BRUCE M. GORMAN, ALJ

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

L.A.

For Respondent:

Rosemary Fiore, Superintendent

EXHIBITS

For Petitioner:

P-1 Port Republic City School District Report Card for T.J.A.

P-2 Port Republic City School District Report Card for P.A.

For Respondent:

R-1 Port Republic School District School Attendance Policy

R-2 Letter to L.A. from Rose Anne Fiore, Superintendent, May 13, 2005

R-3 Letter to Mr. and Mrs. A. from Rose Anne Fiore, Superintendent, May 27, 2005

R-4 Handwritten notes, May 31, 2005, with 10 pages attached)

R-5 Letter to L.A. from Rose Anne Fiore, Superintendent, June 29, 2005 (2 pages) with 4 pages attached)

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

RICHARD ROSENBERG
Acting Commissioner

September 9, 2005

Michael S. Green, Esq.
86 Washington Avenue
Milltown, NJ 08850

Martin R. Pachman, P.C.
60 East Main Street
Freehold, NJ 07728

Dear Parties:

D.M.G, INDIVIDUALLY and on behalf of minor child, J.G. V. BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, AGENCY DKT. NO. 226-8/05, OAL DKT. NO. EDU 6600-05

We are enclosing a copy of the decision of the Commissioner of Education dated September 9, 2005 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/DMGandJG
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

328-05

OAL DKT. NO. EDU 6600-05
AGENCY DKT. NO. 226-8/05

D.M.G., individually and on behalf of minor child, J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law on September 2, 2005, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as he concurs with the ALJ's determination that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982): specifically, the existence of irreparable harm, that petitioner's claim is based upon a settled right, or that petitioner is likely to prevail on the merits of this matter.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits, scheduled for April 27 and 28, 2006, as directed by the ALJ.

IT IS SO ORDERED.*

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/12/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6542

Joseph F. Martone
Administrative Law Judge

VIA FAX TRANSMISSION

September 6, 2005

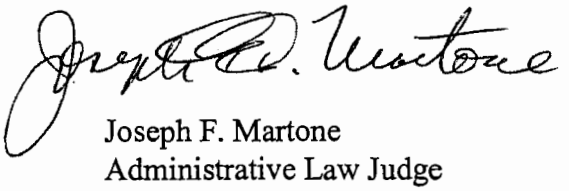
Honorable William L. Librera, Ed.D. (609) 777-4099
Commissioner
Department of Education
100 Riverview Plaza-4th Floor
P.O. Box 500
Trenton, NJ 08625-0500

RE: D.M.G., INDIVIDUALLY AND ON BEHALF OF J.G. V. BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK MIDDLESEX COUNTY
OAL DKT. NO. EDU 6600-05; AGENCY DKT. 226-8/05

Dear Commissioner Librera:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to *N.J.A.C.* 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown, under *N.J.A.C.* 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,



Joseph F. Martone
Administrative Law Judge

mph
c: Michael S. Green, Esq. (via fax transmission)
Martin Pachman, Esq. (via fax transmission)
Clerk, OAL Scheduling

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 6600-05

AGENCY DKT. NO. 226-8/05

D.M.G., INDIVIDUALLY AND ON BEHALF OF J.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Michael S. Green, Esq., for petitioners

Martin Pachman, Esq. for respondent

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks emergent relief to stay the transfer of her son, J.G. from Warnsdorfer Elementary School, which he attended for first and second grades, to Memorial School for third grade. The matter was transmitted to the Office of Administrative Law (OAL)

for hearing as a contested case on September 1, 2005, on petitioners' application for emergency relief. The matter was scheduled oral argument on September 2, 2005. On that date, oral argument was held and concluded. At the conclusion of the hearing, the record closed with respect to the application for emergent relief.

FACTUAL DISCUSSION

For purposes of deciding the application for emergent relief, the following facts are determined to be undisputed.

J.G., who is presently seven years of age, was placed by respondent board of education in Warnsdorfer Elementary School in September 2003, at the age of five. He was placed there at that time because of overcrowding in Memorial Elementary School which is within his district of residence. At the time of J.G.'s placement at Warnsdorfer, his older brother was attending Memorial in fifth grade. At the time of J.G.'s placement at Warnsdorfer, his parents were given no notice of any "unscheduled school transfer" and were not placed on notice that J.G. could be subsequently transferred to another school.

On or about June 3, 2005, respondent determined to transfer J.G. to Memorial Elementary School for attendance at third grade commencing on September 7, 2005. Petitioner requested a hearing on this transfer before the respondent board of education based on due process claims, but this request was denied.

LEGAL DISCUSSION AND ANALYSIS

Petitioners claim that respondent's actions in this matter are arbitrary and capricious, violate petitioners' due process rights because of the failure in refusal to provide to petitioner a notice and opportunity for hearing before effectuating the transfer. Petitioners also claim that this action violates the *No Child Left Behind Act,* the *Civil Rights Act, U.S.C.A.* §1983, negligently inflicts emotional distress on J.G., and violates due process rights accorded under respondent's own policies and the New Jersey Administrative Code.

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in *Crowe v. DeGioia,* 90 *N.J.* 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

Irreparable harm

As to the first requirement for a showing of irreparable harm, the petitioners, assert that respondent owes a duty of reasonable care to its students, and that by electing to transfer J.G. from Warnsdorfer School to Memorial School without notice and without having an appropriate transitional plan or school-based counseling will result in J.G.'s suffering emotional distress. Petitioner points out that school transitions are difficult for all children and are a major life event that can result in stress and dysfunction if transitional services are not provided. Specifically, petitioners contend that based on his social history, J.G. will be extraordinarily susceptible to adjustment problems resulting from this unscheduled transfer and that this transfer is not in his best interest.

While this may be the case, I am unable to determine the validity of this claim without conducting a full and complete hearing. The petitioner's contention is in the form of an opinion submitted by an expert. I have no expertise in this area and will require a full hearing in order to make the factual determination that J.G. will suffer emotional distress and that such distress will be irreparable. In the absence of such a factual determination, I **FIND** that petitioner has failed to establish the requirement of irreparable harm in this matter.

Right to underlying claim must be settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. *N.J. Const.* (1947), Art. VIII, ¶1, *N.J.S.A.* 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at *N.J.S.A.* 18A:11-1c. and d. to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, counsel for respondent has represented that respondent has a duly adopted plan for the allocation of children to the various schools within the school district. The parents acknowledge that Memorial School is J.G.'s home school, and that for first and second

grade J.G. was transferred from his home school to a school outside of his neighborhood because of overcrowding at his home school. Because the overcrowding of his home school no longer exists, respondent has determined that J.G. will be returned to his home school. Such a determination is entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. *Thomas v. Bd. of Educ. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *affirmed,* 46 *N.J.* 581 (1966). In assessing this, the local school board's factual determinations must be accepted if supported by substantial credible evidence. *Quinlan v. Bd. of Educ. of North Bergen Twp.*, 73 *N.J. Super.* 40 (App. Div. 1962). Such an assessment is only possible after a full hearing.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. *Schuster v. Ed. of Educ. Montgomery Twp.*, 96 *N.J.A.R.* 2d (EDU) 670, 676 *(citing Schnick v. Westwood Ed. of Educ.*, 60 *N.J. Super.* 448 (App. Div. 1960), and *Quinlan v. Bd. of Educ. of North Bergen Twp.*, 73 *N.J. Super.* 40 (App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the 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,* OAL DKT. EDU 1839-98 (January 22, 1999) *(citing Bayshore Sewage Co. v. Dent. of Envir. Protection,* 122 *N.J.*

Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 *N.J. Super.* 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. *Massaro v. Bd. of Educ. of the Boro. of Begenfie/d,* 1965 *S.L.D.* 84, 85. *In Kopera* v. *Bd. of Educ. of West Orange,* 60 *N.J. Super.* 288, 294 (App. Div. 1960), the Appellate Division stated, "the well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." *See also G.M.* v. *Roselle Park Boro. Bd. of Educ.,* 95 *N.J.A.R.* 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "it is the management prerogative of boards of education that will not 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."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be upheld. In the *G.M.* case, *supra,* the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Based upon the foregoing, I **FIND** that the right underlying petitioners' claim is settled against the petitioners' position. Therefore, I **FIND** that petitioners have failed to establish the right to relief in the absence of a full evidentiary hearing showing that the action of respondent is arbitrary, capricious and unreasonable.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish in order to show entitlement to emergency relief is the third factor. In order to prevail on their application for emergency relief, the party requesting the relief, the parent in this matter, must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that she will

probably win on the merits. It is with respect to this that petitioner has the greatest difficulty. Petitioners must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. However, petitioners' claim can only be established after a full hearing because of the presumption that respondent's actions are correct. Petitioners must show that respondent's actions violated petitioners' due process rights because of the failure in refusal to provide to petitioners a notice and opportunity for hearing before effectuating the transfer. However, petitioners have not shown a settled right to such a due process hearing before a local board of education in the present circumstances. While there is clearly a right to challenge the reasonableness of a school redistricting plan after its adoption, see, *Fullen v. Bd. of Educ. of Twp. of Middletown,* 1986 *S.L.D.* 603, there is no case of which I have been made aware that establishes a right to such a hearing to individual parents. Petitioners also claim that this action violates the *No Child Left Behind Act,* and the *Civil Rights Act, U.S.C.A.* §1983. While I question whether there is a personal right to pursue a claim for an alleged violation of *No Child Left Behind,* I **FIND** that the only way to determine if such claims exist is by conducting a full factual hearing on petitioners' assertions. Petitioners also claim that respondent's action negligently inflicts emotional distress on J.G. As I previously made clear, I cannot make such a determination without conducting a full hearing as to this issue. Therefore, I **FIND** that petitioner has failed to show the likelihood of prevailing on the merits.

Relative hardship to the parties.

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. While neither party specifically addressed this factor, it appears clear that any hardship which may result will fall upon petitioner and J.G. rather than upon respondent school district, and I so **FIND.**

Conclusion

Based upon the foregoing, I have found that for purposes of deciding this application for emergency relief, petitioners have failed to establish the existence of irreparable harm, that petitioners' claim is based upon a settled right, or that petitioners are likely to prevail on the

merits. In view of the fact that petitioners have failed to establish three of the four requirements for emergency relief, I **CONCLUDE** that petitioners' request should be **DENIED**.

As I have stated hereinabove, many of the claims made by petitioners require factual determinations made after a full hearing. Accordingly, I have scheduled this matter for hearing on my earliest available dates. I intend to contact the parties within the next 30 days in order to conduct a prehearing conference and deal with discovery and other issues in preparation for a full hearing in this matter.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief seeking to stay the transfer of her son, J.G. from Warnsdorfer Elementary School, which he attended for first and second grades, to Memorial School for third grade is hereby **DENIED**. It is further **ORDERED** that the matter is hereby scheduled for a full hearing to be held on **April 27 and 28, 2006,** commencing at 9:00 am at the OAL, 9 Quakerbridge Plaza, Trenton, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

September 6, 2005
DATE

JOSEPH F. MARTONE, ALJ

mph

330-0

LYNDHURST EDUCATION ASSOCIATION, ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	
RESPONDENT,	:	
AND	:	
TMC SERVICES, INC.,	:	
INTERVENOR-RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association and 21 former Board of Education employees alleged that the process used by the Board in subcontracting out custodial, maintenance and bus transportation services to TMC Services Inc. for the 2002-2005 school years violated the public school bidding laws, and, as a consequence, the legal rights of the 21 individual petitioners whose employment was terminated upon implementation of the contract. Petitioners asked that the Commissioner order the Board to cease and desist from continuing with the contract; declare the contract null and void; order petitioners' reinstatement to their previous positions; and order that petitioners be made whole with respect to back pay, benefits, and emoluments.

The ALJ concluded that petitioners did not have standing to pursue allegations of violation of bidding laws, particularly where the remedy sought was primarily private monetary compensation. The ALJ further concluded that even if the contract in question had been found defective, that would not in itself constitute illegal dismissal of the employees terminated as the result of a lawful decision to subcontract so as to entitle them to reinstatement and back pay. Finally, the ALJ noted that the contract was due to expire and was not expected to be renewed, so that the matter had additionally become moot. The ALJ noted that his decision should not be construed as a willingness to condone or ignore material procedural defects in the public bidding process, but, rather, as recognition that these must be challenged in the appropriate manner.

The Commissioner adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 1408-03
AGENCY DKT. NO. 345-10/02

LYNDHURST EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	
RESPONDENT,	:	
AND	:	
TMC SERVICES, INC.,	:	
INTERVENOR-RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioners' exceptions and the reply thereto filed by the Board of Education (Board) in accordance with *N.J.A.C.* 1:1-18.4. Neither exceptions nor replies were filed by Intervenor-Respondent TMC Services, Inc. (TMC).

On exception, petitioners urge rejection of the Initial Decision, which, they object, focuses on issues of standing, jurisdiction and appropriateness of individual remedy without ever reaching the merits of petitioners' claims. Petitioners contend that, contrary to the findings of the Administrative Law Judge (ALJ): 1) There is no conclusive proof of cancellation of the TMC contract by the Board so as to moot the appeal; 2) the contract between the Board and TMC is patently illegal under the public

public school contracts law, nor could any monetary relief be awarded them if they did. Similarly, the Commissioner concurs that violation of the bidding laws, even if proven by a party with standing, would not result in a finding that petitioners were "illegally dismissed" within the meaning of *N.J.S.A.* 18A:6-30. Therefore, even if the ALJ had not concluded that this matter was moot by virtue of termination of TMC's contract with the Board, there would be no basis on which to order the requested relief or direct further proceedings.[3]

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[4]

Richard Ramsey
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05
Date of Mailing: 9/12/05

[3] The Commissioner echoes the ALJ's statement, in the Initial Decision at 7 (Note 1), that: "This view should not be construed as a willingness by the undersigned to condone or ignore material procedural defects in the public bidding process," but that where challenges to such actions are to occur, they must be made in the appropriate manner and by appropriate parties.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1408-03

AGENCY DKT. NO. 345-10/02

LYNDHURST EDUCATION ASSOCIATION, *et al*,

Petitioners,

v.

LYNDHURST BOARD OF EDUCATION,

Respondent,

TMC SERVICES, INC.,

Third Party Intervenor-Respondent.

Louis P. Bucceri, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Vincent M. Giblin, Esq., for respondent
(Kroll Heineman Giblin, attorneys)

Keith A. Krauss, Esq., for Third Party Intervenor-Respondent

Record Closed: June 16, 2005 Decided: July 29, 2005

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in February 2003. In it, the Lyndhurst Education Association ("LEA"), together with 21 former Lyndhurst Board of Education

(Board) employees, alleged that the process used by the respondent in subcontracting out custodial, maintenance and bus transportation services to TMC Services Inc., ("TMC") for the 2002-2003, 2003-2004 and 2004-2005 school years violated various provisions of the public education bidding statutes. See, e.g., *N.J.S.A.* 18A:18A-42; *N.J.A.C.* 6A:27-9, 27-9.3, 27-9.9, 27-9.19. Thus, it was alleged the legal rights of the 21 individual petitioners (who are LEA members) were violated by the Board when it entered into the contract without first complying with the law. Petitioners contend that their terminations as Board employees (although many then were rehired by TMC) therefore violated their statutory rights (both tenured and non-tenured) and requested that the Commissioner: (1) order the Board to cease and desist from continuing with the contract; (2) declare the contract null and void; (3) order their reinstatement to their previous positions; and (4) be "made whole" *vis-à-vis* back pay, benefits, etc.

In its Verified Answer, the Board claimed that none of its actions were in violation of law or contrary to any of the petitioners' rights. By way of separate defense the Board argued that in any event the claims were barred, *inter alia,* since the Commissioner lacks subject matter jurisdiction in the circumstances of the case.

Following transmittal to the Office of Administrative Law, petitioners moved for partial summary judgment on the question of "liability", *i.e.*, the alleged statutory and regulatory violations. The "damages" issue was not addressed at that time. Thereafter, the Board responded and cross-moved for summary judgment on the jurisdiction issue. Some delay then was occasioned by the need to provide TMC an opportunity to enter the case as an intervenor. Since then, further delays resulted from a variety of other events, including on-going efforts to settle the case, especially since the Board-TMC contract was due to expire on June 30, 2005 and presumably would not be renewed for 2005-2006. Also, there were various discovery difficulties.

DISCUSSION

The following are the essential background facts pertinent to the cross-motions for summary decision as to the issue of "lack of jurisdiction" raised by the Board.

The LEA is the chosen majority representative for collective bargaining of the non-supervisory certified and support staff employed by the Board and the 21 individually named petitioners all were employed at the start of the 2002-2003 school year as custodial, maintenance and/or school bus transportation employees. Their employment ended on November 18, 2002 which they were terminated due to the following events.

On August 10, 2002, the Board published a notice in local newspapers soliciting bids for the subcontracting of its "facility management" services. Apparently, no prior public resolution was adopted to authorize the solicitation of such bids. Copies of the Board's bid specifications were sent to interested potential subcontractors, although the bid specifications were not adopted by public resolution of the Board either.

The specifications provided that the bidder was to provide all staff needed to perform described administrative/managerial, mechanical maintenance/operation, grounds maintenance, busing and cleaning tasks/functions. It further specified minimum staffing levels for the various positions including the custodians, mechanics and bus drivers. The specifications for bus services did not include route descriptions and were not submitted to the Bergen County Superintendent of Schools. On August 20, 2002, the Board adopted a resolution approving TMC's bid (the lowest of three) and in a resolution adopted on September 17, 2002, voted to abolish all of its custodial, maintenance and bus driver employee positions, effective November 18, 2002, including the positions of the individually name petitioners. Sometime in October 2002 a contract with TMC was signed by Lyndhurst's Superintendent of Schools, although no formal Board resolution approving the terms of that contract was adopted either. Those are the undisputed facts.

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any of the substantive issues in a case. *N.J.A.C.* 1:1-12.5(a). The motion may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). Thus, a motion for summary decision before OAL is almost identical to the standard used for

summary judgment under the New Jersey Rules of Court, R.4:46-2(c), which provides that summary judgment should be granted if:

> The pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

In its cross-motion the Board argues that its decision to subcontract or "outsource" its custodial and bus transportation activities (which led to the termination of the 21 individual petitioners' employment) was a perfectly legitimate exercise of its inherent managerial prerogatives and the petitioners' efforts under the guise of a "school law controversy" to interdict that managerial decision is wholly improper. The proper forum for seeking relief, if any, it argues was either to the Public Employment Relations Commission (PERC) or in a civil "taxpayer" suit in the judicial forum. To put it another way, the petitioners are attempting to pursue a purely "private right of action" for money and other compensatory damages and according to the Board, that action constitutes a collateral attack on an inherent management decision reviewable, if at all, in some other forum. Implicit in this argument is the Board's view that in all likelihood the petitioners concluded they could not prevail before PERC (subcontracting is a non-negotiable issue), or in a taxpayer suit (where the LEA would have no standing and where the 21 individuals faced a very serious "out-of-time" argument).

Another argument explicitly raised by the Board is that the circumstances surrounding the termination potentially are subject to the arbitration provisions of the Board-LEA collective negotiations agreement, yet another available forum for dealing with the dispute. Thus, as the Board puts it, the "strategic decision" by petitioner not to grieve the terminations, but rather to submit their private claims under the "guise" of a taxpayer challenge should not be allowed.

Following my receipt of the cross-motions I determined that oral argument would be appropriate and that argument took place in mid-May 2004. In addition, steps were

taken to include TMC as a party. Efforts also were stepped-up to obtain information to permit the damages issue (if reached) to be decided on affidavits rather than require in-person hearings on each of 21 individual claims. Although, at first, I contemplated ruling on the"liability" issue; subsequently, I determined to reserve on that issue given the voluminous nature of the pertinent payroll records and the need for additional discovery. In addition, I continued to encourage counsel to pursue the possibility of settlement.

Following oral argument on "liability" and jurisdiction the undersigned conducted additional, independent research and asked counsel to supplement their previous submissions. In response to my letter request, supplemental memoranda were submitted. In my request I asked counsel to comment upon certain administrative and court decisions which I believed might be pertinent to the standing issue and which had not previously been addressed. They included:

(a) *Yacenda Food Management Corp. v. New Jersey Highway Authority*, 203 *N.J. Super.* 264 (App. Div. 1985);
(b) *Angel v. Bd. of Ed. Of Englewood*, 94 *N.J.A.R.* 2d, (EDU) 423;
(c) *Comm. Workers of America, AFL-CIO v. Clymer*, 292 *N.J. Super.* 138 (Law Div. 1996); and
(d) *Bd. of Ed. Of Twp. of Middle v. N.J. State Department of Education*, OAL Docket No. EDU 10755-96 (April 20, 1996)

Major support for the Board's argument that the 21 individual petitioners do not have standing can be found in the State Board of Education decision in *Angel, supra*, which rejected the ALJ's and Commissioner of Education's determinations that both the individual petitioners, who were custodial-maintenance employees, and the Englewood Teachers' Association had standing. In *Angel*, the petitioners had challenged the validity of actions taken by the Englewood Board to subcontract out custodial services and terminate employment. Petitioners alleged that the decision to subcontract was made in bad faith, failed to satisfy bid specifications and violated their tenure rights. The Board replied that the petitioners had no standing to challenge the contract award as demonstrated, *inter alia*, by their sole claim for relief – private monetary damages for loss of employment.

In the initial decision the ALJ determined that the individual petitioners had standing to challenge the award because the issue concerned them as Englewood taxpayers and they were likely to suffer financial harm. The ALJ also determined that the Englewood Teachers' Association had standing to challenge the Board's action because of the effect on its members.

Although the Commissioner adopted the ALJ findings, the State Board reversed and rejected the conclusion that the petitioners had standing. In its decision the State Board said:

> We reject the ALJ's determination that petitioners had standing to challenge whether the bidder who was awarded the contract met the bid specifications. As the Board argues, the interest of the individual petitioners involved here was clearly in saving their jobs rather than in correcting public misdoing or compelling performance of a public duty. Consequently, they cannot be considered as taxpayers for purposes of this litigation.
>
> Furthermore, neither the individual petitioners nor the Association were potential bidders on the contract and their challenge to the qualifications of the successful bidder could not provide them with any remedy. Hence, under the bidding laws, they did not have standing to make this challenge. In essence, it was the Board's decision to subcontract, not its determination of which bidder would be awarded the contract, that had affected petitioners.
> [*Angel v. Bd. of Educ. of the City of Englewood*, 94 *N.J.A.R.* 2d (EDU) 423 (emphasis added) (citations omitted).]

Arguably, the reasoning in *Angel* can be applied to this matter. Here, too, the petitioners essentially seek reinstatement and monetary compensation based on the Board's alleged failure to comply with public bidding statutes and regulations. There was no request that the contact be rebid or awarded to another bidder. In other words, petitioners clearly were more interested in reinstatement and collecting compensation than in correcting any alleged misdoing and their status as "taxpayers", under these circumstances, as in the *Angel* case, basically is irrelevant since realistically no public right is sought to be vindicated.

I agree with the decision in the *Angel* case. Neither the *Yacenda* nor *Clymer* decisions have as much force as might first appear on the surface even though both cases commented that merely having a private interest in the outcome of such litigation

is not, *ipso facto*, a bar to pursuing a challenge to a bid award. See *Yacenda, supra* at 271; *Clymer, supra* at 146.

In *Yacenda,* the petitioner sought to enjoin performance of a no-bid contract between the Highway Authority and the Marriott Corporation and to compel the project to be publicly advertised for the receipt of bids. No compensatory damages were sought, except that the individual plaintiff (Hellman) was a principal in Yacenda Corporation – a potential bidder. The court found that although this status did give him a "technical" private interest in the outcome, he still had standing to sue as a taxpayer to "raise the important question of the need for public bidding of NJHA contracts." *Yacenda, Id.* Such is not the case here. The 21 individuals in this case likely care less about a rebid – they want to be rehired as Board employees! No overriding issue of public concern appears to me to be present in this context.

So too, in *Clymer*, when the individual plaintiffs (psychologists employed by the Department of Corrections) were added to the complaint the State challenged their inclusion arguing they were mere "nominees", stand-ins for the union. The court rejected the argument and held they did have independent standing to challenge the bid award. However, as in *Yacenda,* the court was persuaded by the existence of an overriding issue primarily of public concern; the potential indirect benefit to the individual plaintiffs clearly was secondary to that major interest. See *Clymer, Id.*

Accordingly, based upon my reading of the applicable law, given the essentially private nature of their claims and the relief sought, neither the LEA nor the 21 individual former employees have the requisite standing to challenge the Board's award to TMC in this forum.[1]

Even if I am in error in reaching this conclusion, I do not believe there is any appropriate relief. First, no case, not even *Yacenda* or *Clymer*, countenance the award of compensatory damages where, as here, the private parties claim they were harmed

[1] This view should not be construed as a willingness by the undersigned to condone or ignore material procedural defects in the public bidding process. Where those occur they should be challenged - but in the appropriate forum and for valid reasons.

by non-intentional bid violations. If, in fact, any individual petitioner suffered any monetary loss it is due solely to the fact that the low bidder was awarded a contract. In their verified petition, petitioners ask that I set aside the Board's contract with TMC because of the violations of the public bidding laws, and to reinstate them in their jobs with back-pay plus interest. Again, New Jersey case law does not support such a remedy - private parties are not entitled to recover money damages as a result of a public body's violation of the bidding statutes. For example, in *Feriozzi Co., Inc. v. Atlantic City*, 268 *N.J.Super.* 310 (Law Div. 1993) the award of money damages to a private individual or enterprise was held not to be in the public interest:

> The reason why an unsuccessful bidder may not receive money damages, even if the challenge to the award of the contract succeeds, is to prevent the public from paying twice. It is the public interest, not the private interest of the bidder, which is paramount. The purpose of competitive bidding is "to secure competition and to guard against favoritism, improvidence, extravagance and corruption."
> [*Id.* at 316 (citation omitted)(emphasis added).]

In *M.A. Stephen Const. Co., Inc. v .Borough of Rumson*, 125 *N.J.Super.* 67 (App.Div. 1973), *certif. denied*, 64 *N.J.* 315 (1973), the Court held that the purpose of the public bidding statutes was not to create a private right of action for damages against a public entity as follows:

> It is true that . . . a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him . . . But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.

Therefore, the 21 individual petitioners in this case have no legal claim to monetary damages because of the Board's violation of the public bidding laws. Challenges to the bidding process are meant to protect the public's interest, not to award the other bidder or, as in this case, the terminated employees, any money.

Arguably, awarding monetary damages would serve to punish the taxpayers of Lyndhurst – not the Lyndhurst Board – whose tax dollars would subsidize the award.[2]

In addition, petitioners are not entitled to compensation under *N.J.S.A.* 18A:6-30 because they simply were not "illegally' discharged. The statute states:

> *Any person holding* office, position or *employment in the public school system of the state, who shall be illegally dismissed or* suspended therefrom, *shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause*, upon making written application therefore with the board or body by who he was employed, within 30 days after such determination.
> [*Ibid*, (emphasis added).]

Also, even although some of the workers had acquired tenure, the Board's contract with TMC did not violate their tenure rights since the tenure statute for janitorial employees provides that they can be terminated as a result of a reduction in force:[3]

> 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 and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.
> [*N.J.S.A.* 18A:17-3]

Furthermore, *N.J.S.A.* 18A:17-4 permits the reduction in the work force of janitors except "by reason of residence, age, sex, race, religion or political affiliation." As the State Board observed in *Hunterdon Central High School Educ. Assoc. v.*

---

[2] I am not relying, either, upon the Board's essentially editorializing comments related to the "cost-savings" to the taxpayers of Lyndhurst - that is not a reason to condone material defects in a proper case.

[3] There is no comparable tenure statute for bus drivers, so it seems that they can only receive tenure if it is provided for in their employment contract with the school district. See Albert v. Bd. of Educ. of the Freehold Reg'l High School Dist., 1977 S.L.D. 598. Tenured bus drivers can be dismissed as a result of a reduction in force pursuant to N.J.S.A. 18A:6-10, which provides that "persons" under tenure in a public school system can be dismissed as a result of a reduction in force.

Hunterdon Central Reg'l High School Bd. of Educ., 1988 *S.L.D.* 2468, because there is no statutory authority prohibiting the dismissal of tenured custodians due to a Board's decision to subcontract, a reduction in force resulting from subcontracting does not violate tenure rights:

> In contrast to reductions affecting tenured teaching staff members . . . reduction in the number of custodians employed is permitted by the statute unless taken for one of the prohibited reasons. Thus, the terms of *N.J.S.A.* 18A:17-4 do not prohibit the dismissal of tenured custodians resulting from a decision to subcontract for custodial services. In the absence of statutory or regulatory prohibition of subcontracting for such services, we conclude that a reduction resulting from subcontracting does not in itself violate custodial tenure rights . . . .
> [*Id.* at 2475—2476]

In *In re IFPTE Local 195 v. State*, 88 *N.J.* 393 (1982), the Supreme Court held that a decision to subcontract must be related to a legitimate governmental purpose and not be made in bad faith. *Id.* at 411. The State cannot subcontract in "bad faith" for the sole purpose of laying off public employees or substituting private workers for public workers. Accordingly, where subcontracting results in the termination of tenured custodians (or bus drivers) the Board's actions must be examined to ensure it was undertaken in good faith. *Hunterdon Central High School Educ. Assoc. v. Hunterdon Central Reg'l High School Bd. of Educ., supra*, 1988 *S.L.D.* at 2476. Here, petitioners offered no evidence that their termination was due to anything other than the Board's desire to save the district $250,000 per year. Even if the Board violated public bidding laws, in the way it chose to subcontract out the janitorial, maintenance and/or transportation services, this is not evidence of a bad faith motive to deprive any tenured workers of their tenure rights. Indeed, if the Board did not (or had not) violated the subcontracting laws, the tenured workers would still have lost their jobs. The Board's failure to comply with the bidding laws even if proved, is not evidence of a deliberate laying off of public employees or substituting private workers for public workers.

In reaching the conclusion to dismiss the Verified Petition, I am not unmindful of the respectable arguments advanced by petitioners and the cases cited by them. Nonetheless, even if I am wrong and petitioners do have standing to challenge the

award despite their primary private interest, and even if statutory and/or regulatory requirements were not met, the three school year contract term is now over and I understand there is no successor agreement with TMC or any other private vendor. There is nothing to bid upon; there is nothing to enjoin – there simply is no practical reason to continue the litigation at further expense to the parties. In short, there is no Board liability, and even there is there is no cognizable damages claim. Accordingly, the Verified Petition is **ORDERED** to be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 1 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/mvh

331-05

Z.G., ON BEHALF OF MINOR CHILD, E.G.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the New Jersey Department of Education's assignment to his son, E.G., of a "V2" score on the March 2004 High School Proficiency Assessment (HSPA), and sought alteration of the Department's records reflecting such designation. "V2" indicates that the student "cheated or was disruptive on the exam" and was assigned to E.G. because he refused to take the math portion of the HSPA test. Petitioner maintained that E.G. was unable to take this section of the exam because he is physically handicapped and was not allowed an appropriate accommodation for his disability; specifically, E.G. was not allowed to use a Palm Pilot in place of the graphing calculator necessary to complete the math portion of the test, and was instead instructed to use a TI-83 emulator, on which he maintained he had not been adequately trained.

The ALJ recommended dismissal of the petition, finding that petitioner demonstrated no basis, either in law or fact, on which the Department could be compelled to set aside its policy—for which the Department had demonstrated a sound basis—of not permitting changes to the final report generated by the Department for any given administration of the HSPA test. The ALJ found petitioner's allegations of harm speculative at best, given that access to Department HSPA records is strictly controlled, and noted that the local school district is free to handle the designation in E.G.'s individual pupil record as it sees fit.

The Commissioner adopted the Initial Decision as his own for the reasons expressed therein, further noting that the "V2" score was appropriately assigned because E.G. began the math portion of the exam, but then refused to continue taking it—thus producing, for purposes of Department record-keeping, an answer book that needed to be voided for scoring purposes due to disruption of the standard testing procedure by the test-taking student.

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 9, 2005

OAL DKT. NO. EDU 11503-04
AGENCY DKT. NO. 343-9/04

Z.G., ON BEHALF OF MINOR CHILD, E.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply thereto filed by the Department of Education (Department) in accordance with *N.J.A.C.* 1:1-18.4.

On exception, petitioner reiterates his previously expressed contention that a Department policy rooted in "administrative convenience" should not be allowed to take precedence over the civil rights of a handicapped minor, either E.G. or any future student who may find himself in a similar situation. Petitioner further contends that the Administrative Law Judge (ALJ) erred in failing to consider—as she was required to do in a matter decided on a summary basis—the potential for outside access to E.G.'s "V2" designation in the light most favorable to E.G., who has additionally suffered emotional damage by being falsely labeled a "cheater." (Petitioner's Exceptions at 1-2)

In reply, the Department reiterates that petitioner has identified no basis in law that would compel the Department to alter procedures which have been specifically

developed to address the unique requirements of the State testing program and are enforced without exception so as to ensure the integrity of the score reporting and data compilation process for each test cycle; certainly, petitioner has not established that the Department in any way violated E.G.'s civil rights or caused him actionable harm. The Department further urges that the ALJ was correct in her assessment of petitioner's proffered concerns about possible release of E.G.'s "V2" Department test report, not only because such concerns were unsupported by any facts brought to the record, but also because—even if release were theoretically possible—there would still be no harm to E.G. since the "V2" designation is nothing more than an administrative code reflecting the fact that an irregularity occurred subsequent to the student's commencing the test such that the answer book for that particular test administration could not be scored. (Department's Reply at 1-4)

Upon his own independent review and consideration, the Commissioner determines to adopt the Initial Decision of the ALJ. It is clear from the record that there are sound reasons for the Department's policies and practices with respect to alteration of test reports, particularly given the nature and purpose of the final (Cycle II) report issued at the conclusion of any given test administration. (See Certification of Timothy A. Peters, appended to Brief in Opposition to Petitioner's Motion for Summary Decision and in Support of Respondent's Cross-Motion for Summary Decision) It is equally clear that, even assuming *arguendo* that such alteration could be compelled under appropriate circumstances, no change would be warranted in this case because E.G.'s actions did, in fact, fall within the purview of the "V2" administrative designation, which encompasses student-initiated disruption of testing procedures as well as cheating;

whatever issues E.G. may have had with the accommodation provided by the district, and, regardless of whether he was justified in his decision, E.G. undisputedly began taking the test and then refused to continue it, thus producing—for purposes of the Department's record-keeping—an answer book that needed to be voided for scoring purposes due to disruption of the standard testing procedure by the test-taking student. In this regard, the Commissioner concurs with the Department that: 1) allowing changes to test reports "without a cognizable legal basis or actionable harm alleged as the justification for doing so," would set a precedent allowing any unhappy test taker to seek alteration of reported results; 2) the Department should not be compelled to create new administrative classification categories every time a particular situation is perceived by an involved party as not "fitting comfortably into [the established] reporting and scoring scheme," and 3) to prevail in a claim of the type made herein, a petitioner must at the very least make some demonstration of an interest that outweighs the Department's demonstrated interest in "uniformity, efficiency, and security" with respect to administration of the Statewide testing program. (Reply in Opposition to Petitioner's Motion for Summary Decision and in Support of Respondent's Cross-Motion for Summary Decision at 3)[1]

[1] To the extent that petitioner remains concerned about disclosure of the "V2" designation on E.G.'s *local district* pupil record because petitioner and the district Board of Education entered—in the due process proceeding referenced in the Initial Decision at 2—into a settlement agreement providing that the district will enter into its pupil record for E.G. whatever test score designation is found appropriate in the instant matter (Exhibit E), the Commissioner concurs that the outcome of petitioner's dispute with the Department cannot be dictated by a settlement agreement reached between petitioner and the local district Board in a separate proceeding to which the Department was not a party. The Department correctly notes that nothing, save their own settlement agreement, prevents petitioner and the district from reaching independent accord on how the test score in question will be handled with respect to clarification or release of E.G.'s local district pupil record. (Reply in Opposition to Petitioner's Motion for Summary Decision and in Support of Respondent's Cross-Motion for Summary Decision at 6)

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

Richard Rosenberg
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05
Date of Mailing: 9/12/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11503-04

AGENCY DKT. NO. 343-9/04

Z.G. o/b/o MINOR CHILD E.G.,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Arthur L. Raynes, Esq., appearing for Petitioner
(Wiley, Malehorn & Sirotta, attorneys)

Melanie M. Brookes, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 17, 2005 Decided: July 29, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges Respondent's, New Jersey Department of Education (DOE), assignment of a "V2" score to E.G. for the High School Proficiency Assessment (HSPA) he took in March 2004. On November 10, 2004, the Department of Education

transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

Petitioner had also filed a due process petition against the Livingston Board of Education. That petition bore agency docket number 2005-9355; Petitioner withdrew the due process petition when the parties thereto reached a settlement agreement.

In this matter, the parties filed cross applications for summary decision and a briefing schedule was established. The record closed on June 17, 2005.

FINDINGS OF FACT

The following findings of fact are based on the record before me which consists of the verified petition, exhibits attached to the certification of Kristin V. Hayes, and the certification of Timothy A. Peters and are essentially undisputed.

1. E.G. is the natural child of Petitioner, Z.G., and resides with him in the Livingston School District, in the Township of Livingston, Essex County, State of New Jersey. E.G. has attended school under the jurisdiction of the Township of Livingston Board of Education from kindergarten through the present.

2. Respondent, the State of New Jersey Department of Education, has mandated each public school student pass the HSPA before being permitted to graduate.

3. E.G. was, at the time the petition was filed, seventeen years old, a junior in high school and eligible for accommodations, pursuant to §504 of the Rehabilitation Act, from the Livingston Township Board of Education, due to his physical handicap which substantially limits the use of his arms and hands.

4. During his tenth and eleventh grades, E.G. was enrolled in classes which required the use of a graphing calculator.

5. Due to the nature of E.G.'s disability, he was unable to use a graphing calculator. The District provided E.G. with a Palm Pilot containing a graphing calculator; however, at the time the petition was filed, E.G. had not been provided with training on the Palm Pilot.

6. The District also provided E.G. with a TI-83 emulator as an alternative accommodation to the Palm Pilot, the training for which was provided in April 2004.

7. Although he had not been provided with training on the Palm Pilot, E.G. chose to continue to use it because it was the accommodation with which he was most comfortable.

8. In March 2004, E.G. sat for the HSPA. Upon his arrival to take the math portion of the exam, he was informed he was unable to use the Palm Pilot; he was required to use the TI-83 emulator.

9. A scribe was assigned as a personal aide to E.G. as an accommodation; the aide acted as proctor for the HSPA; there were no other Board representatives or students present in E.G.'s testing room.

10. E.G. did not take the math portion of the test. [1]

11. Because he did not take the test, E.G. was assigned a "V2" score.[2]

12. Subsequently, E.G. took and passed the HSPA.

---

[1] There is some dispute in the record with respect to the circumstances of E.G.'s failure to take the math portion of the test. The District indicated, in its report to DOE, that E.G. refused to take that portion. In papers filed by Petitioner, there is a statement that E.G. reviewed the examination and determined he could not use it without the use of graphing calculator as well as a statement that E.G. attempted to take the exam. The resolution of this disparity is not material to the determination herein. The only material fact to be derived from these specific circumstances, with which no one disagrees, is E.G. did not take the exam in March 2004.

[2] The meanings of the "V" scores are discussed more fully below.

13. Respondent establishes guidelines for administering and scoring the HSPA as well as the guidelines regarding accommodations for the HSPA.

14. The HSPA is administered to first time eleventh-grade students each March and to retesters, defined as those who fail to demonstrate proficiency in each content area, the following October.

15. Approximately five weeks before each administration of the HSPA, Respondent DOE provides in-depth training to staff in the high schools of the state. Parents and students also receive advance information about the purpose and format of the HSPA.[3]

16. The Department responds to a host of queries during the testing period on a wide range of topics, including unanticipated accommodations needs.

17. Students are allowed to use calculators for the mathematics section of the HSPA and the districts are required to provide them. Students are expressly prohibited from using such items as computers, including laptops and palmtops, pocket organizers and calculators with typewriter keyboards during the administration of the HSPA. This is explained in the HSPA District/School Test Coordinator Manual published by the Department.

18. The gathering, scoring and reporting of HSPA results is a massive project. Multiple choice items are scored by optical scanners; open-ended items are scored by trained readers. Computers combine these open ended scores with the multiple-choice scores for each student. Students receive a score for each section of the HSPA; however, if an irregularity occurs during testing making it impossible for a student to complete a test that can be scored, the district must apply one of three void codes specified in the HSPA District/School Test Coordinator Manual.

[3] There is nothing in the record to indicate E.G. did not receive the materials or that he was unaware of the prohibition against the use of the Palm Pilot; the issue in this matter, however, is not to determine fault or make a character judgment; no such determination or judgment is intended in this decision. The only relevant issue is. as Respondent asserts, whether DOE is required to change the record and delete the V2 score.

19. The void codes are V1, to be applied when a student becomes ill during the test; V2 is applied when a student is disruptive or cheats during testing; V3 is applied when the student should not have taken the HSPA.

20. There are two other void codes which are only employed during the scoring process; they are not applicable in the situation giving rise to this application.

21. When a void code is employed, the answer folder is voided and the student may not resume the test section in which the situation giving rise to the void code occurred.

22. When the scoring is completed and approved by DOE, HSPA scores are reported to the districts in two cycles. In Cycle I, two copies of each student's individual report, a hard copy score report, are produced. One copy is sent to the parents and one is kept by the district.

23. Cycle II produces a revised and expanded set of summaries that reflect corrections requested by the districts. These reports are generated from "read-only" electronic files that are essentially frozen after the districts have been given time to confirm or correct demographic data.

24. DOE does not release individual student scores or student information of any kind to the media, colleges or employers, even by request of a student. No paper file copies of student score reports are maintained by the Department.

25. Once the Cycle II reports have been produced, the 'read-only" electronic files are considered "frozen" and no file can be amended. Errors can only be submitted for correction on future test administrations, if a student were to be retested.

ANALYSIS AND CONCLUSIONS

The rules of this forum provide a party may move for summary decision at any time after a case is determined to be contested. A motion for summary decision shall be rendered if the submissions, including discovery and affidavits, if any, show there is no genuine issue as to a material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to prevail, an adverse party must respond be setting forth specific facts showing there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(a).

In this case, the parties have filed cross applications for summary decision and essentially undisputed facts have been set forth above. For the reasons which follow, summary decision is granted in favor of Respondent.

Petitioner asserts the record is clear: E.G. did not cheat on or disrupt the administration of the HSPA; he was unable to take the exam because he lacked an appropriate accommodation; when he had a meaningful accommodation he was able to use, he successfully passed the examination.

On the other hand, Respondent claims it does not, as a practice, change records for two reasons. The first is to reduce file tampering; the second is to ease the Department's burden in processing, analyzing and disseminating the massive amount of information yielded by each administration of the HSPA. According to Respondent, errors are not corrected after the "read only" electronic files are created; to do so in this case would create a dangerous precedent.

Neither party cites legal authority to support the respective positions; Respondent, however, relies on public policy to support its position that the legal issue to be resolved in this matter is whether the Department is required, as a matter of law, to delete any reference to E.G.'s V2 score in its files, citing the need to preserve the integrity of the data yielded from the results of the HSPA, because the HSPA is used to evaluate the quality of education statewide.

To maintain the integrity of not only the results of the examination but the procedures used to compile and maintain the evaluative data as well, the risk that data will be corrupted must be minimized. For this reason, according to Respondent, the Department's electronic data files are made permanent at the conclusion of the scoring and reporting process which is accomplished by compiling data into "read-only" electronic files which are not altered, even if errors are subsequently discovered. It is a well established goal of public education in this state to continually evaluate and improve the quality of education.

Based on the foregoing, I **FIND** the Department has demonstrated the need to preserve the integrity of the procedures used in evaluating the data produced by the HSPA as well as the integrity of data itself to accurately and adequately evaluate the quality of education statewide.

On the other hand, although Petitioner alleges E.G. may be harmed by the V2 score, those allegations are speculative at best. In fact, Respondent clearly states that it does not release the scores to colleges or employers; moreover, in its brief, Respondent also notes the District is free to delete the score from its own records of E.G.'s individual HSPA performance. Accordingly, I further **FIND** Petitioner has failed to demonstrate E.G. has or will suffer actionable harm.

I **CONCLUDE**, therefore, Respondent is entitled to summary decision as a matter of law.

ORDER

Therefore, I hereby **ORDER** summary decision be and hereby is entered in favor of Respondent Department of Education; I further **ORDER** the petition in this matter be and hereby **is DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 29, 2005
DATE

Mailed to Parties:

AUG 1 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

#332-05

OAL DKT. NO. EDU 4243-02
AGENCY DKT. NO. 126-4/02

A.J. on behalf of minor child P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement and the Initial Decision issued by the Office of Administrative Law (OAL) have been independently reviewed.

Petitioner appealed respondent's denial to his granddaughter, P.B., of access to Delran High School in March 2002. Apparently, P.B. was allowed back in school on April 15, 2002, pending resolution of the controversy.

Although respondent, in its answer, agreed that it had told petitioner that three years of tuition were owed for P.B., respondent did not file a counterclaim for the tuition with its answer.

On July 19, 2005, petitioner's attorney forwarded to the OAL a stipulation of settlement, executed by counsel for both parties, in which they withdrew "all claims and counterclaims." There are no other facts or terms set forth in the stipulation of settlement which, by way of Initial Decision, the ALJ approved.

Because the only terms included in the "settlement" are the withdrawal of claims, the Commissioner regards the parties' action as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner also notes that disposition of this case is particularly appropriate at this time, insofar as a student who was in high school in the Spring of 2002 has most likely completed high school by now.

Accordingly, the Initial Decision is approved with the modification that it be deemed a withdrawal.

IT IS SO ORDERED

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/05

Date of Mailing: 9/14/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 4243-02
AGENCY DKT. NO. 126-4/02

A.J., O/B/O MINOR, P.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY
Respondent.

Richard A. Isolda, Esq., appearing for petitioner
John T. Barbour, Esq., appearing for respondent

Record Closed–July 21, 2005 Decided–July 28, 2005

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on June 17, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was heard for a pre-hearing at the OAL, Mercerville, N.J. on October 9, 2002.

The scheduled plenary hearing date of April 9 and 11, 2003, were adjourned in advance at the mutual request of the parties, who both needed more time to prepare. The next scheduled date of January 21, 2004, was adjourned to allow for the anticipated filing of cross motions for

summary decision. The next date of November 22, 2004, was adjourned at Mr. Isolda's request due to vacation plans. The next date of May 16, 2005, was adjourned due to an anticipated settlement. The matter was re-scheduled for July 25, 2005. Prior thereto, however, on July 21, 2005, the parties submitted a fully executed settlement agreement.

The parties have agreed to a settlement and have submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 28, 2001
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

8-1-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 2 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

John T. Barbour, Esquire
Staff Attorney, Delran Board of Education
11 Jewel Road
Millville, New Jersey 08332
Voice: 856-327-4374
Facsimile: 856-825-7508
e-mail: jtbarbour@comcast.net
Attorney for Respondent

RECEIVED
2005 JUL 21 A 10:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the matter of:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW FROM THE COMMISSIONER of EDUCATION, STATE of New Jersey
A.J. O/B/O Minor Child P.B., Petitioners,	
-and-	Hon. John F. Futey, ALJ
Twp of Delran BOE, et als BURLINGTON COUNTY Respondent.	DOCKET NO. OAL Dkt. #: EDUOS-04243-02S Agency Ref. No.: 126-4/02
	STIPULATION OF SETTLEMENT

The parties having mutually agreed to the withdrawal of all claims and counterclaims as a complete and final settlement of all claims and allegations that were or could have been brought by or against one another, HEREBY Settle and Resolve all issues involved herein.

Dated: 7.18.05

For Albert Jimenez as Legal Guardian
For PATRICIA BUCKLEY, a minor

Richard A. Isolda, Esquire

June 6, 2005

For Delran Board of Education

John T. Barbour, Esquire

333-05

THOMAS DERBY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT;	:	
AND	:	
IN THE MATTER OF THE CAMDEN BOARD OF EDUCATION, RESPONDENT, AND THOMAS DERBY, CHARGING PARTY.	:	

SYNOPSIS

In this consolidated matter, petitioner claimed the Board of Education violated his tenure and seniority rights by not appointing him—following abolition of a teaching staff position he claims to have held under the Reading Specialist endorsement on his Educational Services Certificate—to a newly created Educational Program Specialist position requiring the same endorsement. In his related unfair practice charge before the Public Employment Relations Commission (PERC), petitioner contended he was denied the position he sought in retaliation for engaging in protected activity. Petitioner sought retroactive reappointment to the position in question as his primary relief.

The ALJ found that petitioner acquired tenure as a teacher, and that his lawful reassignment to another position within the scope of his instructional certificate did not constitute a reduction in force so as to implicate his tenure or seniority rights; thus, petitioner had no claim under the school laws. The ALJ further dismissed the entire matter as moot, having found that—since the Educational Program Specialist title was not used in the district after 2001-02 and will not be used again in light of its rejection by the County Superintendent—no purpose would be served by continued proceedings since no relief is available to petitioner even if he prevails in his unfair practice charge.

The Commissioner adopted the ALJ's decision with respect to petitioner's tenure and seniority claims, but declined to rule on the mootness of petitioner's unfair practice charge. Consistent with the Joint Order of Consolidation, the Commissioner forwarded the matter to PERC for final decision on all remaining issues, including the question of mootness of the unfair practice charge.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 8516-01
AGENCY DKT. NO. 437-10/01;
OAL DKT. NO. PRC 2201-03
PERC DKT. NO. CI-2002-43
(CONSOLIDATED)

THOMAS DERBY,	:	
PETITIONER,	:	
V.	:	
		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT;	:	
AND	:	
IN THE MATTER OF THE CAMDEN BOARD OF EDUCATION, RESPONDENT, AND THOMAS DERBY, CHARGING PARTY.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, which did not comply with the time requirements of *N.J.A.C.* 1:1-18.4(a),[1] are not considered herein, and no reply to them was filed by the respondent Board of Education (Board).

Upon review and consideration of the school law claims before the Commissioner, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner's tenure was achieved under his instructional certificate, not under the reading specialist endorsement on his educational services certificate, so that petitioner has no

[1] Petitioner's exceptions bore a face date of August 16, 2005, and were filed via fax on August 17, 2005 (hard copy August 18, 2005). The Initial Decision was mailed to the parties on August 2, 2005, so that any exceptions to be filed in the absence of an extension requested and granted pursuant to *N.J.A.C.* 1:1-18.8 would have been due on or before August 15, 2005.

possible tenure claim to any position other than that of teacher. The Commissioner further concurs that petitioner was not subjected to a reduction in force (RIF), but was instead lawfully transferred to another teaching position within the scope of his instructional certificate, so that neither his tenure nor his seniority rights are implicated in this matter. Consequently, the Commissioner concludes, as did the ALJ, that petitioner has not demonstrated entitlement to relief under the school laws, as sought in his petition before the Commissioner.[2]

The Commissioner expressly declines, however, to reach the ALJ's recommendation—based on an undisputed finding that the title assigned to the position sought by petitioner in his pleadings is no longer in use and was not approved by the County Superintendent of Schools—that this matter is moot in its entirety. Instead, having ruled on the merits of petitioner's school law claims as set forth above, the Commissioner finds that the final decision on dismissal of petitioner's unfair practice claims is more properly made by the Public Employment Relations Commission (PERC), since, notwithstanding that petitioner has no entitlement by tenure or seniority to the position or back pay he seeks, PERC may not concur that the issues within its jurisdiction are mooted by the fact that the position sought by petitioner no longer exists under the title(s) it had during the period at issue.[3]

Accordingly, the Initial Decision of the OAL dismissing petitioner's tenure and seniority claims is adopted as the final decision in this matter with respect to

---

[2] Finding of Fact No. 2 is corrected to indicate that petitioner was hired by the Board on September 1, 1988, and Finding of Fact No. 18 is corrected to reference R-3, Exhibit 19.

[3] The Commissioner recognizes that, should PERC determine that this matter is not moot, and should it subsequently find that petitioner is entitled to relief in the form of appointment to a position that he sought and should have received, but did not because the Board violated employment law, further proceedings before the Commissioner may be necessary to determine the existence of such position(s), regardless of the title(s) assigned to them.

those claims, and—consistent the Joint Order of the Commissioner and the Chair of the Public Employment Relations Commission (PERC)—the Commissioner's decision herein, together with the full record of this matter, shall now be forwarded to PERC for final decision on all remaining issues, including the mootness of petitioner's unfair practice charge.[4]

IT IS SO ORDERED.[5]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/05

Date of Mailing: 9/14/05

[4] An extension has been requested pursuant to *N.J.A.C.* 1:1-17.8(c) to permit the rendering of a final decision by PERC.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION REGARDING EDUCATION ISSUES AND RECOMMENDING DISMISSAL OF UNFAIR PRACTICE CHARGE
OAL DKT. NO. EDU 8516-01
AGENCY DKT. NO. 437-10/01
OAL DKT. NO. PRC 2201-03
PERC DKT. NO. CI-H-2002-43
(CONSOLIDATED)

THOMAS DERBY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent;
and
IN THE MATTER OF THE CAMDEN BOARD OF EDUCATION, RESPONDENT, AND THOMAS DERBY, CHARGING PARTY

Michael Barrett, Esq., for petitioner-charging party (Bergman & Barrett, attorneys)
Harold W. George, Esq., for respondent-respondent (Sumners George, attorneys)

Record Closed: July 1, 2005 Decided: July 29, 2005

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the matter before the Commissioner of Education, petitioner filed a petition challenging the actions of respondent Board of Education of the City of Camden, abolishing a teaching staff position which he alleges he previously held under a Reading Specialist endorsement on an Educational Services Certificate and creating new positions with the title Educational Program Specialist that require a Reading Specialist endorsement. Petitioner asserts that he acquired tenure under his Reading Specialist endorsement and, therefore, he was and is entitled to the new position; however respondent has placed and continues to place non-tenured or less senior individuals to fill these positions in violation of petitioner's tenure and seniority rights.

This matter was transmitted to the Office of Administrative Law (OAL) on November 20, 2001, for hearing as a contested case. This matter was then assigned to me on December 17, 2001, and a telephone prehearing conference was scheduled for January 31, 2002. This was adjourned at the request of attorney for petitioner who was unavailable. Because the attorneys were of the opinion that a settlement was possible, I scheduled a number of telephone conferences which were held on March 7, April 11, April 29, May 29 (adjourned), June 19, and July 2, 2002. When it was determined that the matter could not be settled during the conference on July 2, 2002, the matter was scheduled for hearing on December 18, 2002. Additional conferences were held on October 17, 2002 and November 19, 2002. On November 19, 2002, it was determined that two hearing days would be required and the attorneys requested that the hearing scheduled for December 18, 2002, be adjourned and the matter be rescheduled for two days. This request was granted and the matter was rescheduled for hearing on January 30 and 31, 2003.

On January 9, 2003, attorney for respondent filed a motion to consolidate the within matter with a Charge filed by petitioner as the charging party with the Public Employees' Relations Commission (PERC) on February 21, 2002, entitled *In the Matter of Camden Board of Education, Respondent and Thomas Derby, Charging Party,* PERC Docket No. CI-H-2002-43.

In the Charge before PERC, petitioner alleged that he engaged in certain activities protected by the PERC Act of which respondent was aware. After respondent abolished petitioner's teaching staff position, it created new Educational Program Specialist positions for which petitioner contends he is uniquely qualified, and it placed less-qualified individuals in these positions. Petitioner contends that he was denied the opportunity to interview for and was denied placement in the new positions, and that those actions by respondent were retaliatory because of petitioner's engagement in the protected activity. Petitioner seeks a determination that the actions and conduct of respondent amounted to retaliatory action against petitioner for his engaging in protected activities and are unfair practices under the PERC Act, and he requests that PERC direct respondent to cease such conduct and retroactively appoint petitioner to one of the new positions.

By an Order entered on January 22, 2003, I ordered the consolidation of these two matters and provided for a procedure by which the Commissioner of Education and the Public Employment Relations Commission would decide those issues over which they each have the predominant interest. By a Joint Order on Consolidation and Predominant Interest entered by the Commissioner of Education on March 5, 2003, and the Chair of the Public Employment Relations Commission on February 24, 2003, the Commissioner of Education and the Public Employment Relations Commission ordered the consolidation of these matters and established the procedure for issuing the final administrative decision.

The PERC matter was then transmitted to the OAL on April 9, 2003. The Consolidated matter was then scheduled for hearing on October 15 and 17, 2003. These hearing dates were adjourned at the request of attorney for petitioner on October 14, 2003 because he had been newly retained, and the hearing was rescheduled for May 13 and 25, 2004.

The hearing commenced on May 13, 2004, and attorney for respondent submitted a motion for summary decision. The hearing was continued to May 25, 2004. On May 25, 2004, Karen Murray, Esq., but here it before me an advise that her services had been terminated by responding by correspondence faxed to her office. When she attempted to determine the name of substitute counsel, She could not confirm who this. However, she stated that she could not represent the interests of respondent because she had been terminated as its attorney.

In view of this, I released Ms. Murray and Mr. Barrett and instructed Ms. Murray to advise her former client that I required an explanation for the failure of any substitute counsel to appear on its behalf in order to decide whether to reschedule a matter. I also gave to Mr. Barrett the opportunity to respond to the respondent's motion for summary decision, and he did so.

In January 2005, substitute counsel entered an appearance in this matter. I was then advised that because of changed circumstances, the matter may be resolved, and I withheld any further action in the matter. Because of this, and through inadvertence, I did not close the record with respect to the respondent's motion until July 1, 2005.

ISSUES TO BE DECIDED

This matter is a consolidated case and involves two issues: an education issue and a PERC issue. The education issue as I see it and as set forth in the Order of Consolidation is whether the petitioner was and is entitled to the position entitled Educational Program Specialist (Literacy) and whether respondent's placement of non-tenured or less senior individuals to fill these positions violates petitioner's tenure and seniority rights? See the January 24, 2003, Order of Consolidation, page 5. The Commissioner of Education has the predominant issue on the educational issue dealing with petitioner's tenure and seniority rights. PERC has the predominant interest on the allegation of retaliation issue. *Id.* Thus, the respondent school district's summary decision motion is properly before me on the issues reserved for the Commissioner's jurisdiction in the Order of Consolidation. The issue of alleged retaliation is reserved for PERC and must be addressed by PERC if I grant the respondent's motion for summary decision and this decision is affirmed by the Commissioner of Education.

FACTUAL DISCUSSION

A review of petitioner's petition and his Certification (P-1) and respondent's answer and Certifications of Counsel (R-2 and R-5) with annexed exhibits reveals that most of the essential relevant facts are not in dispute. I **FIND** that following to be the relevant facts in this matter:

1. Petitioner holds an Instructional Certificate with a Teacher of English endorsement, and an Educational Services Certificate with a Reading Specialist Endorsement, both issued

in March 1988.

2. Petitioner was hired by respondent on September 1, 1999.
3. From September 1, 1988 through June 2001, the petitioner was employed as a Teacher of Reading.
4. At all pertinent times, petitioner held the proper certificate and endorsement for his assignment and was employed on a full-time basis.
5. During this time, because petitioner was employed as a teacher, he served under his Instructional Certificate and was assigned to a Teacher of Reading position resulting in his acquiring tenure with respondent.
6. On April 30, 2001, Reading, as a separate subject, was eliminated from the Camden School District's curriculum. The Official Board Minutes of April 30, 2001, shows that the Board voted on April 30, 2001, to eliminate reading. (R-2, Exhibit 6, Official Board Minutes of April 30, 2001 with vote page.) This action was not taken by resolution.
7. The petitioner was never employed as a Reading Specialist.
8. The petitioner applied for an Educational Program Specialist position in July 2001.
9. The job description for Educational Program Specialist was never approved by the County Superintendent. (R-2, para. 6)
10. The petitioner was not dismissed, laid off, or reduced in salary as a result of the elimination of Reading as a separate curriculum subject in the school district. (R-2, para. 9)
11. No teaching staff member was dismissed, laid off or reduced in salary as a result of the elimination of reading as a separate curriculum subject in the school district. (R-2, para. 10)
12. The position or title of Educational Program Specialist was unrecognized and was never approved as a tenurable position by the County Superintendent. (R-2, Exhibit 15)
13. The Educational Program Specialist position was officially abolished by the Board on May 24, 2004, as it had not been used for two years. (R-3, Exhibit 18).
14. The former position of Teacher of Reading worked directly with students. (R-2., para. 12)
15. The position of Educational Program Specialist for Literacy, prior to its abolition, was developed to work primarily with staff rather than students. (R-2, para. 12)
16. The position of Teacher (Sylvan Reading Lab) works directly with students and is the position to which petitioner was assigned. (R-2. para. 8 and 12)
17. The position of Literacy Teacher Coach has been developed to work primarily with staff,

rather than students.

18. The job descriptions for the following positions are not the same: Educational Program Specialist (R-2, Exhibit 9); Teacher (Sylvan Reading Lab) (R-2, Exhibit 10); Literacy Teacher Coach (R-3, Exhibit 18).
19. The petitioner is a member of the Camden Education Association, a bargaining unit representing all of the teachers. The Association has never filed any grievance or initiated any litigation relative to any of the changes in re-assignments of teachers of reading. (R-2, para. 19)
20. In 2001, the board of education appointed 10 individuals to the position of Educational Program Specialist Literacy. (R-2, Exhibit 16)
21. The title of Educational Program Specialist for Literacy was abandoned by the board and was not used in either the 2002-2003 or 2003-2004 school years (R-2 para. 16). No one has been assigned to the position or title of Educational Program Teacher Specialist for the 2002-2003 and 2003- 2004 school years.
22. The Board subsequently changed the title to Educational Program Specialist. On June 24, 2003, in response to the school district's request for approval by the County Superintendent of Schools to use a number of unrecognized titles, including the title of "Educational Program Specialist" the school district was advised by the County Superintendent of Schools, that he was concerned how appointees would accumulate tenure and seniority. He suggested that the school district use the title "Educational Program Teacher Specialist." (R-2, Exhibit 15).
23. On July 28, 2003, the school board abolished the title of Educational Program Specialist and created the title of Educational Program Teacher Specialist in order to comply with the County Superintendent's direction (R-2, Exhibit 17).
24. The County Superintendent recently advised the school district that he will not be approving any Educational Program Specialist title going forward beginning with the 2004-2005 school year.
25. Petitioner, through his counsel, was advised of the County Superintendent's rejection of the position in question in July 2003 and again in October 2003. However, petitioner has not yet amended his petition, and the petition claims entitlement to a position that does not exist.

LEGAL DISCUSSION AND ANALYSIS

Whether the petition should be dismissed as moot

In his petition, the petitioner claims entitlement to and seeks immediate and retroactive appointment to the position of Educational Program Specialist. Respondent school district argues that petitioner's claim is moot because he seeking the remedy of appointment to a position that no longer exists.

As stated above, from 1988 through 2001, the petitioner was assigned as a Teacher of Reading in one of respondent's high schools. (P-1, R-2, Exhibits 1, 2 and 3) Based upon petitioner's Certification (P-1) and the fact that his assignment from 1988 through 2001 was as a Teacher of Reading, I **FIND** that petitioner acquired tenure under his Instructional Certificate since the Teacher of Reading assignment was an instructional position.

Because the State does not offer Reading as a credit-bearing subject, the respondent board eliminated Reading from its middle and high school course curricula in April 2001, beginning with the 2001-2002 academic year. (R-2, Exhibit 6) All reading, writing and vocabulary development is taught within Language Arts at the middle school level, and English at the high school level.

Upon adoption by the board of education of a new curriculum and reading program, the Teacher of Reading positions in the school district were eliminated, and the positions of "Educational Program Specialist for Literacy" and "Teacher (Sylvan Reading Lab)" were open to all reading teachers in the district. (R-2, Exhibits 7 and 8) All reading teachers were reassigned as either a Sylvan Reading Lab Teacher or an Educational Program Specialist for Literacy. (R-2, Exhibit 12) Both positions were teaching positions paid on the teachers' salary guide.

The petitioner was reassigned as a Sylvan Reading Lab Teacher, effective September 1, 2001. (R-2, Exhibit 11) There was no change in petitioner's salary or benefits as a result of this reassignment. All teachers, regardless of assignments are paid on the same salary guide.

Petitioner contends that his tenure and seniority rights were violated because he was not reassigned as an Educational Program Specialist. It is noted that the Camden Education Association, a bargaining unit representing all of the teachers, including petitioner, never filed any grievance or initiated any litigation relative to any of the changes and reassignments of Teachers of Reading. (R-2, para. 19)

Respondent contends that since the petitioner seeks retroactive appointment as an Educational Program Specialist, a position that has been abolished, petitioner's claim is moot, and there is no reason to proceed regarding a position that cannot lawfully exist and has been abolished. Respondent also argues that since the Educational Program Specialist position was abolished in May 2004, and since petitioner has failed to amend his petition, he cannot claim entitlement to the new title of Educational Program Teacher Specialist established in July 2003. Further, respondent contends that based upon the County Superintendent's recent advice that he will not be approving any Educational Program Specialist title going forward beginning with the 2004-2005 school year, there is currently no such actual position in the school district.

In response to the foregoing, petitioner contends that whatever the new positions are called, the essence of these new positions from a content standpoint is "reading specialist" focused. Thus, the petitioner contends that by virtue of his education, certifications, endorsements, and actual experience, he was more legally qualified for appointment to the new positions than other individuals within the school district. He contends that despite this, he was denied one of these positions, and even denied an interview for one of them, because of personal and professional antipathy towards him.

I agree that the Commissioner of Education does not render decisions on cases that have become moot since a development or event renders a controversy moot where it precludes a court from granting effective relief. *Farmer v. Camden Bd. of Educ.*, EDU 6789-01 (Initial Decision (November 2003) Commissioner's Decision, No. 684-03 (December 2003) <*http://lawlibrary.rutgers.edu/oal/search*>; citing *J.B. v. Asbury Park Bd. of Ed.*, 1988 *S.L.D.* 2303; *Weehawken Educ. Assn., v. Weehawken Bd. of Ed.*, 1978 *S.L.D.* 924; *Nichols v. Jersey City Bd. of Educ.*, 65 *N.J. Super.* 45 (App. Div. 1961). An action is moot when it no longer presents a justiciable controversy because the question has become academic, or when a decision

on the controversy will have no practical effect. *Victoria v. Woodbridge Bd. of Educ.,* 1982 *S.L.D.* 1.

In *Farmer,* the ALJ dismissed as moot a petition which challenged an appointment to a position that was subsequently abolished and the board had created a restructured position. The Commissioner affirmed the ALJ's summary decision. In *Nichols,* the petitioner requested the Commissioner to order the Jersey City Board to appoint the petitioner as Assistant Superintendent of Schools in place of an individual. The petition was dismissed and the State of Board affirmed the dismissal. The Appellate Division held that the case was moot because the court could not order appointment to a position where the position had been abolished.

The primary relief sought herein by the petitioner, namely, appointment as Educational Program Specialist in place of another employee, cannot be ordered as a remedy in this matter because the position is presently non-existent. I **FIND** that this controversy is moot because significant events have occurred, *i.e.,* the lack of approval of the Educational Program Specialist position by the County Superintendent and the school district's abolishment of the position. The remedy that petitioner is seeking in this matter cannot be granted to him even if he prevails because the position he is seeking no longer exists. See, *Anderson v. Sills,* 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). There is no reason to conduct a factual hearing on the petition if there are no remedies available.

Respondent also argues that petitioner's claim is moot because he cannot be awarded the new title of Educational Program Teacher Specialist. As stated above, the school board created the new title of Educational Program Teacher Specialist when it abolished the disapproved title of Educational Program Specialist. (Certification, Exhibit 17) However, since the school board created the new title in July 2003, no person has been appointed to the position and the board does not have any individuals in the title of Educational Program Teacher Specialist. The school district did not use the title in the 2002-2003 or 2003-2004 school years and has abandoned its use. Thus, the petitioner cannot be awarded a title that is no longer in use in the school district.

Petitioner contends that the County Superintendent's determination to deny respondent the use of these titles is irrelevant, contending that only the Commissioner is authorized to make such a determination, citing *Pezzulo v. Willingboro Twp. Bd. of Educ.,* OAL Dkt. No. EDU 798-

86. However, the County Superintendent of Schools has the authority to take measures necessary to the enforcement of the State law requiring boards of education to employ only those teachers who are properly certificated for the positions held. See, *N.J.S.A.* 18A:7-8 and *N.J.A.C.* 6:56-1.1(d). *N.J.A.C.* 6:11-3.6(b)[1] gives authority to the county superintendent to exercise his discretion and approve a school district's request for permission to use an unrecognized position title and determine the appropriate certification and title for the position. Such permission has not been given in this case.

Petitioner argues in response that it is not a title that he is seeking, but rather a position consistent with his prior title of Reading Teacher. He asserts that he has legal entitlement to such a position and that he is at least entitled to have that assertion determined through a full hearing and an ultimate determination by the Commissioner of Education.

As stated above, from 1988 through 2001, the petitioner was assigned as a Teacher of Reading in one of respondent's high schools. (Certification, Exhibits 1, 2 & 3) It is undisputed that petitioner was employed as a Teacher of Reading until his reassignment to his current position as a Sylvan Lab Reading Teacher. Tenure is achieved by a teaching staff member who served the probationary period either in a specifically designated position, such as teacher, or in "positions which require them to hold appropriate certificates." *Ellicott v. Board of Educ., of Tp. of Frankford,* 251 *N.J. Super.* 342 (App. Div. 1991). In a case cited by respondent, *Wallen v. Bd. Educ. of Rancocas Valley Reg. H.S. Dist.,* 92 *N.J.A.R.* 2d. (EDU) 670, the Commissioner held that a media specialist was not entitled to claim a position as English teacher held by a non-tenured staff member even though the media specialist held an English endorsement under the instructional certificate. The media specialist also held an educational media specialist endorsement under an educational services certificate. The Commissioner stated that because the media specialist had been only employed as a librarian/media specialist and never as a teacher, she achieved tenure within the position of educational services but not within the position of teacher even though she held an instructional certificate.

In the present matter, from September 1988 through June 2001, the petitioner herein was employed as a Teacher of Reading. Petitioner acquired tenure in the position of teacher under

[1] Now repealed and replaced by *N.J.A.C.* 6A:9-5.5(b).

his instructional certificate and not in any other position. Even though the petitioner held an endorsement as a reading specialist under the educational services certificate, he did not achieve tenure under his educational services certificate because he was employed solely as a teacher. Petitioner was never employed as a reading specialist. Thus, even if the Education Program Specialist position still existed in the school district and a reading specialist certificate had been required, the petitioner would not have tenure rights to the subject position. Based upon petitioner's Certification and the fact that his assignment from 1988 through 2001 was as a Teacher of Reading, I **FIND** that petitioner acquired tenure under his Instructional Certificate since his Teacher of Reading assignment was an instructional position.

Additionally, the petitioner has no seniority in the position of Educational Program Specialist Literacy. Rather, the petitioner has accrued seniority credit as a secondary teacher. The Educational Program Specialist position in question is unrecognized, and even if the position was in existence in the school district, an individual could not accumulate seniority in the position.

Petitioner previously argued that the disapproved title and the new title have the same duties. Even if the job duties for both titles were the same, the new title has been abandoned as it has not been used in the school district. Since its creation in July 2003, no person has been appointed as an Educational Program Teacher Specialist. In fact, all the teachers who were appointed as Educational Program Specialist (Literacy) have been appointed to other positions. (Certification, Exhibit 16). Therefore, the petitioner cannot be awarded a new title of Educational Program Teacher Specialist since the title is not used in the school district, and since its creation, no individual has been appointed to this title.

It should also be noted that the board of education has no plans to use the Education Program Teacher Specialist title going forward since the board has been advised by the County Superintendent that all of the Educational Program Specialist titles will not approved in the 2004-2005 school year.

Whether the Commissioner has authority to order an appointment to a position

Respondent contends that the Commissioner does not have the authority to order an appointment to a position, especially where that position is non-existent. Thus, respondent

asserts that there is no authority permitting the Commissioner to award an employment contract to a new position.

N.J.S.A. 18A:16-1 provides the board of education with the sole authority to hire employees and to set the "length of terms of their employment." Respondent contends that a board of education, under *N.J.S.A.* 18A:27-4 and other sections of Education law, is vested with "the traditional management power to employ, promote, transfer and dismiss" employees and that "the boards were public officials charged with public responsibilities which they could not lawfully abdicate or bargain away" *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.,* 64 *N.J.* 17, 23 (1973) (Citations omitted).

N.J.S.A. 18A:27-4.1 provides sole authority to promote and appoint to the board of education. There is no express or implied authority that allows the Commissioner to award a position. The Supreme Court has admonished that, "(a) court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication" *I/M/O Jamesburg High School,* 83 *N.J.* 540, 550-551 (1980). In the *Jamesburg* case, the Supreme Court found that neither the inherent authority of the enabling statute for the Commissioner, *N.J.S.A.* 18A:6-9, or the tenure statute for teachers, *N.J.S.A.* 18A:28-6.1, gave the Commissioner the authority to order the transfer of teachers. The Court there stated "[w]here there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." *Id.* at 549.

Based upon the foregoing, I **FIND** that under the circumstances discussed above, the Commissioner does not have the authority to order an appointment to a position, especially where that position is non-existent.

Whether petitioner's tenure rights were triggered by the Board's action.

Respondent contends that rights emanating from the achievement of tenure are triggered only at the time of a reduction in force (RIF), and that since there was no RIF in this matter, petitioner's tenure rights were not triggered by the board's action, citing *Edison Twp. Educ. Asoc. v. Bd. of Ed. of Twp. of Edison,* Comm'n 1984 *S.L.D.* 1073, 1083, aff'd State Board of Education, 1984 *S.L.D.* 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986). Respondent

contends that since petitioner was not subjected to a RIF within the meaning of *N.J.S.A.* 18A:28-9, and that where there has been no reduction in the number of teaching staff, no RIF occurs, citing *Ivey Avery v. Bd. of Ed. of the City of Trenton,* OAL Dkt No. EDU 8316-93, Comm'n dec. 573-97 (November 3, 1997), <*http://www.state.nj.us/njded/legal/index.html*>.

In *Ivey Avery, Id.* the board abolished "teacher-specialist" positions and reassigned those teaching staff members holding the positions to classroom teaching assignments. The ALJ concluded that the board's action in abolishing petitioners' positions constituted a reduction in force. The Commissioner reversed, finding that no reduction in force had occurred because the board had not reduced the number of teaching staff members employed. The Commissioner further concluded that the board had acted within its managerial prerogative when it transferred the tenured individuals to alternative teaching assignments. The Commissioner determined that the individuals had acquired tenure as teachers and not as "teacher-specialists" and had been transferred within the scope of their certificates to alternative teaching assignments. *Id.,* at 35. The State Board of Education reversed the Commissioner's determination, State Board of Education Decision (July 10, 2001), <*http://www.state.nj.us/njded/legal/index.html*>, and held that there was a reduction in force because petitioner's positions were reduced from twelve months to ten months with a corresponding reduction in compensation. The State Board distinguished the facts in *Avery* from those in *Carpenito v. Board of Educ.,* 322 *N.J. Super.* 522, (App. Div. 1999), discussed *infra.* While the Commissioner's decision was reversed, the critical portion of the decision is the holding that where there is no RIF, an employee's tenure rights are not triggered by the board's action.

In *Carpenito v. Board of Educ.,* 322 *N.J. Super.* 522, (App. Div. 1999), the Court stated :

> Teaching staff members, including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents and school nurses, who have acquired tenure, "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause ...." *N.J.S.A.* 18A:28-5 (emphasis added). The Tenure laws create exceptions to the protections afforded to tenured teaching staff members. A school board has the managerial prerogative to transfer teaching staff members by a majority vote of the board. *N.J.S.A.* 18A:25-1.

"Transfer" refers to the right of a school board to assign a teacher to a position within the scope of his or her certification. A tenured teacher may be involuntarily transferred to another position within his or her certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis. See, e.g., *Greenway v. Board of Educ. City of Camden,* 129 *N.J.L.* 46 (E. & A.), aff'd, 129 *N.J.L.* 461 (1943) (finding that transfer of tenured teacher from high school to junior high school without reduction of salary and without impacting tenure rights gave teacher no cause of action); *Williams v. Plainfield Bd. of Educ.,* 176 *N.J. Super.* 154, 162-64, (App. Div. 1980) (holding that transfer of high school principal to position of elementary principal without any immediate reduction in compensation nor a reduction in rank did not violate principal's tenure rights), certif. denied, 87 *N.J.* 306 (1981); *Lascari v. Board of Educ. of Borough of Lodi,* 36 *N.J. Super.* 426, 430 (App. Div. 1955) (concluding that transfer of vice principal to regular teaching duties without reduction in salary was not a demotion or dismissal); *Moore v. Cherry Hill Township Bd. of Educ.,* 92 *N.J.A.R.*2d (Vol. 4) 585 (Div. on Educ.), aff'd, 93 *N.J.A.R.*2d (Vol. 4) 173 (Div. on Educ.) (determining that involuntary transfer of tenured teacher from position teaching reading in departmentalized junior high school to a position as third grade elementary teacher in connection with a district reorganization was not improper and teacher was not entitled to be returned to position); *Ciarcia v. Trenton City Bd. of Educ.*, 1991 *S.L.D.* 1422 (rejecting seniority claim of art teacher, who was reassigned from secondary to elementary level as part of district reorganization, where teacher suffered no loss of employment or salary reduction as a result of the transfer); *Stranzl v. Paterson Bd. of Educ.*, 2 *N.J.A.R.* 16 (Div. on Educ. 1980) (holding that tenure rights of elementary school principal were not violated when board involuntarily transferred principal from his position to the position of secondary school principal in the same district). A transfer is not a demotion or a dismissal under such circumstances. Indeed, transfers of teaching staff members are often advisable in the administration of schools for a variety of reasons.

Carpenito holds an instructional certificate with endorsements in English, social studies, and science. He also holds a tenure entitlement to any position for which a standard instructional certificate with any endorsement is the only necessary certification. The computer applications position to which he was assigned is such a position, because no particular certification, other than an instructional certificate, is required to teach computers. *Taxman v. Board of Educ. of Piscataway Township,* 92 *N.J.A.R.*2d (Vol. 4) 189 (Div. on Educ.). Thus, the transfer of Carpenito to teach computer applications was within the scope of his certification.*[Id.,* 322 *N.J. Super.* at 529-531]

Based on the foregoing, it is clear that a tenured teacher may be transferred or reassigned within the scope of his or her certificate. See, also, *Bonica v. Bd. of Ed. of River Dell Reg. Sch. Distr.*, EDU 5885-01; *Howley v. Bd. of Ed. of Ewing Twp.*, 1982 *S.L.D.* 1328, 1340, aff'd State Board of Education, 1983, *S.L.D.* 1554. In the present matter, the petitioner was reassigned from his Teacher of Reading position to an alternative teaching assignment, Teacher (Sylvan Reading Lab), which reassignment was within the scope of his certification. Therefore, I **FIND** that petitioner was not subject to a reduction in force so as to implicate tenure and seniority rights. I further **FIND** that petitioner was reassigned from his Teacher of Reading position to an alternative teaching assignment, Teacher (Sylvan Reading Lab), which reassignment was within the scope of his certification. In this matter, petitioner did not suffer a loss of compensation and is still employed by the respondent board of education. Thus, petitioner's tenure rights have been unharmed. I **FIND** that the transfer of petitioner from the position of Teacher of Reading to the position of Teacher (Sylvan Reading Lab) without any reduction in his salary and without impacting tenure rights give to the petitioner no cause of action.

Respondent also argues that petitioner's seniority rights are not implicated in this matter arguing that the Commissioner has concluded that the abolishment of positions with a reassignment or transfer to an alternative position within the scope of the individual's certification, with no dismissal from employment in the school district, does not compel the application of seniority regulations. *Ivey Avery v Bd. of the Cty of Trenton, supra.* In *Ivey Avery,* the Commissioner determined that even though tenured teachers' positions had been abolished, there had been no dismissal from employment and so to apply seniority regulations would "constitute a capitulation to semantics at the expense of sound educational policy." *Id.* at 35. In this case, petitioner's seniority rights were not violated as he did not suffer dismissal or any change in salary, and neither did any similarly situated teacher.

With regard to seniority, see the provisions of *N.J.S.A.* 18A:28-12 requiring that 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. The position espoused by respondent concerning petitioner's allegation that his seniority rights were violated was taken by

the Court in *Carpenito v. Board of Educ., supra,* wherein the Court held that a tenured teacher's seniority rights are not triggered when a school board abolishes the teacher's position and assigns the teacher to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefit. *Carpenito v. Board of Educ.,* 322 *N.J. Super.* at 542.

In this matter, petitioner was transferred from an abolished Teacher of Reading position to the position of Teacher (Sylvan Reading Lab), an equivalent position, with no impact on his tenure and seniority and no loss of pay or benefits. Therefore, I **FIND** that petitioner's seniority rights have not been impacted and that he has no basis to claim a new or different position.

Petitioner is now claiming entitlement to a retroactive appointment to the new position of Literacy Teacher Coach based on his allegation that this position is a successor position to the petitioner's former position and is the same or substantially similar to petitioner's former position of Teacher of Reading. However, respondent has submitted information, which petitioner has not disputed, that petitioner's former position of Teacher of Reading involved working with students, while the position of Literacy Teacher Coach is designed to be an aide for teachers. Thus, the position of Literacy Teacher Coach differs substantially from that of petitioner's abolished former position. "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." *Skowronski v. Bd. of Ed. of Twp. of Jackson,* 95 *N.J.A.R.*2d (EDU) 451, 453 (1995), citing *Dennery v. Bd. of Educ.,* 131 *N.J.* 626, 640 (1993).

Since the position of Teacher of Reading and Literacy Teacher Coach differ substantially, I **FIND** that petitioner has no legal entitlement to the Literacy Teacher Coach position. In addition, there is no indication in the record of this matter that petitioner has ever applied for the new position of Literacy Teacher Coach.

Unfair practice charge

In the Joint Order on Consolidation and Predominant Interest entered by the

Commissioner of Education on March 5, 2003, and the Chair of the Public Employment Relations Commission on February 24, 2003, a procedure was established for hearing and deciding this matter. Under this procedure, the ALJ is to offer recommended findings of fact and conclusions of law to both the Commissioner of Education and the Public Employment Relations Commission disposing of all issues in controversy through a single initial decision and transmit the initial decision to both agencies. Upon such transmittal, the underlying record is to be forwarded to the Commissioner of Education to resolve the tenure and seniority issues within the Commissioner's jurisdiction. The Commissioner's decision and the complete record is then to be sent to the Public Employment Relations Commission which will then decide any remaining unfair practice issues within its jurisdiction.

In petitioner's unfair practice charge before PERC, petitioner alleges that he engaged in certain activities protected by the PERC Act of which respondent was aware. After respondent abolished petitioner's teaching staff position, it created new Educational Program Specialist positions for which petitioner contends he is uniquely qualified, and it placed less-qualified individuals in these positions. Petitioner contends that he was denied the opportunity to interview for and was denied placement in the new positions, and that those actions by respondent were retaliatory because of petitioner's engagement in the protected activity. Petitioner seeks a determination that the actions and conduct of respondent amounted to retaliatory action against petitioner for his engaging in protected activities and are unfair practices under the PERC Act, and he requests that PERC direct respondent to cease such conduct and retroactively appoint petitioner to one of the new positions.

N.J.S.A. 34:13A-5.4.a prohibits public employers from:

> (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
>
> (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

Petitioner's own statement contained in his Certification at paragraph 22 is that,

> It is not clear to me or, in any event, probably not legally provable, that the Superintendent desired to abolish middle and high school reading as a subject because of me and in retaliation against my determination to voice my opinion but what is clear is that the initiation of the new content area (First Reading Specialist and later Education Program Specialist) and the subsequent method by which administration filled those positions was engineered to eliminate me from consideration and to "box me out."

In this initial decision, I have concluded that the actions of the respondent were lawful exercises of its managerial prerogatives and did not violate petitioner's tenure and seniority rights. Since these actions were lawful, and based on petitioner's own statement, I see no reason for proceeding with a hearing regarding petitioner's unfair practice charge. Therefore, I **CONCLUDE** that I shall issue an initial decision in this matter recommending no further proceedings with respect to the unfair practice charge.

DECISION AND ORDER

Based on my finding that the actions of the respondent were lawful exercises of its managerial prerogatives and did not violate petitioner's tenure and seniority rights, it is hereby **ORDERED** that respondent's motion for summary decision on the education issues is hereby **GRANTED**. Since I have concluded that the actions of respondent were lawful, and based on petitioner's own statement, I see no reason for proceeding with a hearing regarding petitioner's unfair practice charge. Therefore, I **ORDER** that no further proceedings are necessary with respect to the unfair practice charge, and it is hereby recommended that it be **DISMISSED**.

I hereby **FILE** this Initial Decision with **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. 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 on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering its final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the **COMMISSIONER'S** decision. If the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

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**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Aug. 1, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 2 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of Thomas Derby

P-2 Petitioner's Brief in Opposition to Motion for Summary Decision

For respondent:

R-1 Notice of Motion for Summary Decision and/or Dismissal

1. Letter dated August 26, 1988
2. Board minutes of August 29, 1988
3. Employment Agreement, August 30. 1988
4. Teacher of English Certificate
5. Reading Specialist Certificate
6. Board Minutes of April 30, 2001
7. Educational Program Specialist for Literacy Posting
8. Teachers (Sylvan Reading Lab) Posting
9. Educational Program Specialist for Literacy Job Description
10. Teacher (Sylvan Reading Lab) Job Description
11. Board Minutes of October 29, 2001
12. Board Minutes of September 24, 2001
13. Employment Histories
14. Camden Education Association Teacher's Handbook 1999-2002
15. County Superintendent letter of June 24, 2003
16. May 13, 2004, List of Appointments
17. Board Minutes of July 28, 2003

R-3 Brief in Support of Motion for Summary Judgment and/or Motion to Dismiss

R-4 Letter Reply Brief

R-5 Supplemental Certification of Karen A. Murray, Esq., with the following exhibits:

18. Board Minutes of May 24, 2004
19. Literacy Teacher Coach Job Description

20. Fax of January 30, 2004
21. Board Minutes, January 29, 2004
22. Teacher (Literacy Coach) Posting

337-05

MICHAEL GUNTHER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a former member of the Board of Education of Howell Township and a former officer with the municipality's police department, appealed the Board's refusal to pay attorney fees for defending a matter brought against him while a member of the Board. Respondent Board countered that the underlying conduct at issue did not arise out of the performance of Board member duties; underlying conduct relates to allegations that the petitioner obtained certain police reports and confidential information and disseminated same to members of the Board of Education without Board knowledge or authorization.

The ALJ denied a motion to bar testimony concerning, *inter alia*: petitioner's alleged violation of Howell Township Board of Education policy and the Board Member Code of Ethics; Monmouth County Prosecutor's Office return of indictment against the petitioner; and petitioner's entry into the Monmouth County Pretrial Intervention Program (PTI). The ALJ granted respondent Board's motion for summary judgment as there are no genuine issues of material fact in this case, and dismissed the petition. In doing so, the ALJ concludes that petitioner is not entitled to indemnification under *N.J.S.A.* 18A:12-20 because his entry into PTI was not a favorable disposition of criminal charges previously brought against him.

The Commissioner concurs with the ALJ's determination that petitioner has no right to indemnification pursuant to *N.J.S.A.* 18A:12-20, but finds that it is not necessary to reach to discussion of petitioner's participation in PTI. The Commissioner finds and concludes that petitioner's alleged conduct in the civil suit brought against him neither arose out of the performance of his board duties nor occurred in the course of performing those duties, but would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended at public expense. Accordingly, the Initial Decision is adopted with this modification, and the petition is dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 8380-02
AGENCY DKT. NO. 272-9/02

MICHAEL GUNTHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.[1]

Petitioner's exceptions, *inter alia*, contend that the Administrative Law Judge's (ALJ) reliance on *Cressinger,*[2] *supra*, in support of her determination that he was not entitled to indemnification in this matter, was misplaced. That case, he asserts, dealt with a teaching staff member seeking reimbursement, pursuant to *N.J.S.A.* 18A:16-6.1, not *N.J.S.A.* 18A:12-20, for legal expenses in connection with the defense of a criminal matter. Here, he professes, *N.J.S.A.*18A:12-20 is clear in mandating indemnification for a board member's counsel fees incurred in connection with the defense of a civil suit, notwithstanding the outcome of that action. Furthermore, the "favorable disposition" requirement of this statute is solely applicable

[1] It is noted that the Board did not file reply exceptions.

[2]The volume citation for this case is erroneously presented as 225 *N.J. Super.* on Page 12 of the Initial Decision. This should be 256 *N.J. Super.*

in instances where a board member is seeking reimbursement for defense of criminal charges. (Petitioner's Exceptions at 6) Petitioner further charges that "the ALJ's reference to Petitioner's criminal past manifests the prejudice suffered as a result of the improper introduction of this evidence which was entirely irrelevant on the issue of his reimbursement for counsel fees paid to his civil attorney," and urges that the Commissioner reject the Initial Decision and enter an Order directing petitioner's reimbursement of the costs of his defense of the Therien lawsuit. (*Id.* 6, 7)

Upon careful and independent review of the record, the Commissioner concurs with the ALJ's determination that petitioner has no right to indemnification pursuant to *N.J.S.A.* 18A:12-20 in this matter. However, contrary to the finding of the ALJ, the Commissioner concludes that such a determination is not a consequence of the ultimate result of the criminal charges previously brought against him. Consequently, the Initial Decision is adopted as modified below.

Initially, the Commissioner is compelled to clarify what appears to be confusion with respect to the applicability of the provisions of the governing statute vis-à-vis the situation existing herein. The statutory provision underlying petitioner's application for reimbursement is *N.J.S.A.* 18:12-20, which obligates a board of education to indemnify its members for the cost of defense of certain civil and criminal actions, and in its entirety specifies:

> Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in

> *N.J.S.* 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

By its very terms, central to qualifying for protection afforded under this statute -- which is intended to provide for the legal defense of a member of the board who is sued for official acts taken or omitted by him while actively engaged in carrying out his prescribed responsibilities as a board member – is that *the conduct triggering the legal action against him must have: 1) arisen out of the performance of his duties, and 2) occurred in the course of performing those duties.* In the context of the defense of a civil action, the outcome of the litigation is irrelevant; the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied. However, in the context of a *criminal or quasi-criminal* charge made against a board member, the statute imposes a third criteria as a prerequisite to indemnification, *i.e., the legal action must result in a final disposition in favor of the board member.* Here, it is uncontroverted that petitioner is seeking reimbursement for defending a *civil* lawsuit brought against him by Robert Therien and his wife. As such, notwithstanding that the gravamen of this civil litigation is related to the underlying factual conduct contained in the prior indictment returned against petitioner, the focus here is upon the lawsuit for which petitioner is seeking to be indemnified. As such, the Commissioner finds it unnecessary to reach to the ALJ's Initial Decision discussion of petitioner's acceptance into and completion of a Pre-Trial Intervention program or the effect of the subsequent expungement of his criminal record with respect to these charges.

Turning next to the issue of whether petitioner has satisfied the two statutory requisites entitling him to the relief he seeks, guidance in this respect is gleaned from

consideration of the underlying scope of the statute. As found by the Court in *Errington v. Mansfield Tp. Bd. of Ed.*, 100 *N.J.* Super. 130 (App. Div. 1968):

> The purpose of the ***statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his *prescribed duties. Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken.* (emphasis supplied)
> (at 138)

A review of the statement of material facts prepared by counsel for Mr. Gunther in support of his motion to dismiss the Therien suit (See Initial Decision, pp. 8-10), indicates that he was accused of obtaining certain police reports and information with respect to Mr. Therien and disseminating these to board of education members. The Commissioner's review discloses, and nowhere does petitioner dispute, that he was not in any manner authorized or directed on behalf of the Board to acquire or disclose any such information in his capacity as a board member. (See Board's Answer to Petition of Appeal at 4-5). Furthermore, the record establishes that such conduct would be in direct violation of a specific board policy which states that board members "have no authority as individuals except when authorized by the Board." (*Ibid.* – Certification of Ronald Sanasac, Board President, at 2) The Commissioner, therefore, finds and concludes that it is clearly evident that petitioner's alleged conduct in the civil suit lodged against him -- no matter what the personal motivation for such conduct may have been -- neither *arose out of the performance of his board duties* nor *occurred in the course of performing those duties*, but rather would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended against such allegations at public expense.

Accordingly, the Initial Decision of the OAL is adopted as modified above and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/16/05

Date of Mailing: 9/16/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8380-02
AGENCY REF. NO. 272-9/02

MICHAEL GUNTHER,
Petitioner,
v.
HOWELL TOWNSHIP BOARD OF EDUCAITON,
Respondent.

Edward G. O'Byrne, Esq., for petitioner
Michael M. DiCicco, Esq. (Bathgate, Wegener and Wolf, P.C.) for respondent

Record Closed: May 10, 2004 Decided: August 10, 2005

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a former member of the Howell Township Board of Education, appeals the respondent's refusal to pay attorneys' fees in the amount of $5,000.00 for defending a civil matter brought against him while a member of the Board. Respondent asserted the underlying conduct did not arise out of and in the course of the performance of Board

Member duties and thus, petitioner is not entitled to indemnification pursuant to *N.J.S.A.* 18A:12-20. Petitioner Gunther filed an appeal *pro se* before the Commissioner of Education and the matter was transmitted to the Office of Administrative Law (OAL) on December 9, 2002, for a hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13 and *N.J.S.A.* 52:14B-1 to –15. Petitioner subsequently retained present counsel. The matter was scheduled for a hearing on January 8, 2004, before the Honorable Robert Miller, ALJ but was reassigned to this ALJ due to his retirement. On January 7, 2004, respondent filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5 and a motion to quash subpoenas on various board members.[1] The hearing date was adjourned in order to allow the parties to respond to the cross motions. It was then rescheduled for June 3, 2004.

FACTUAL DISCUSSION

Petitioner herein was an elected member of the Howell Township Board of Education. In addition, he was also an officer for the municipality's police department. Robert Therien was employed by the Howell Township Board of Education as a custodian. The following facts are derived from the Monmouth County Grand Jury indictment and attached to respondent's moving papers as Exhibit A.[2] On September 28, 1998, Gunther was indicted on four counts of official misconduct. The first count averred that on July 28, 1997 he acquired a 1994 MDT[3] report on a closed incident contrary to the provisions of *N.J.S.A.* 2C: 30-2; the second count averred that in July 1997, he acquired a shoplifting incident report on a closed case, contrary to the provisions of *N.J.S.A.* 2C: 30-2; the third count averred that on July 18, 1997 and/or August 1, 1997, he acquired motor vehicle abstracts for two people, contrary to the provisions of *N.J.S.A.* 2C: 30-2; and the fourth count averred on or about the month of December 1996, Gunther acquired and disseminated incident reports on a closed police

[1] Petitioner had filed an *in limine* motion on December 29, 2003, seeking to "exclude the defense proffer" that a) a third party civil complaint alleged petitioner herein committed intentional torts; (b) petitioner violated various Board policies; c) petitioner was indicted by a Monmouth County Grand Jury; and d) petitioner entered the Monmouth County PTI program.

[2] As petitioner's *in limine* motion to bar evidence is denied for reasons set forth below in the Legal Analysis section of this opinion, these facts are included.

[3] The parties have not indicated the exact nature of an "MDT" report.

investigation contrary to the provisions of *N.J.S.A.* 2C:30-2.[4] On November 25, 1998, Monmouth County Assistant Prosecutor Richard Cremona forwarded correspondence to respondent Board's counsel indicating that "most of the counts of the indictment regard Mr. Robert Therien and his wife, Colleen Therien."[5] On August 13, 1999, Cremona advised Board counsel that as of August 10, 1999, Gunther had been admitted into Pre-Trial Intervention (PTI) program.[6] As part of the "several special conditions" that were set and "agreed to by all parties involved," Gunther executed an immediate resignation from all elective offices, included but not limited to the Board of Education of Howell Township. On April 6, 2000, Robert Therien and his wife Colleen filed a complaint with the Superior Court Law Division in Monmouth County against the Township of Howell, Howell Township Board of Education, Hopewell (improperly plead) Township Police Department, Michael Gunther, individually and in his capacity as an employee of the Howell Township Police Department and member of the Howell Board of Education and John Does one through ten. That complaint alleged, in part, that Gunther unlawfully obtained confidential information regarding Robert Therien from the Howell Township Board of Education files and forwarded the information to third party or parties at the Holland[7] Township Board of Education meetings between June of 1997 and October of 1997.[8] This civil action was dismissed on motion.[9] The fact that Gunther was indicted and had applied to be admitted into PTI was the subject of at least one article in the regional daily newspaper.[10] The indictment was later expunged by the February 23, 2001, Order for Expungement of Arrest Records.[11]

The parties submitted a Joint Statement of Stipulated Facts. (J-1) They have stipulated to the following:

---

[4] State of New Jersey v. Michael Gunther, Indictment No. 98-09-1781.
[5] See Exhibit A to respondent's cross motion for summary decision.
[6] See, Exhibit B to respondent's cross motion for summary decision.
[7] Error in Complaint
[8] *Robert S. Therien, Jr. et al v. Township of Howell, et al,* Docket No. L-1847-00 (Law Div.)
[9] The dismissal was based on plaintiff's failure to comply with the notice provisions of the New Jersey Tort Claims Act, *N.J.S.A.* 59:8-1 *et seq.* and on statute of limitations grounds. See page 2 of respondent's reply dated January 29, 2004.
[10] Howell cop applies for pretrial program, by Harriet Ryan, *Asbury Park Press,* July 3, 1999, p. B3 attached as Exhibit D to Respondent's Answer to Petition.
[11] See Exhibit D to petitioner's certification in support of *in limine* motion.

1. The Petitioner was elected as a member of the Respondent Board of Education in 1997.
2. Robert S. Therien, Jr. was employed by the Respondent Board of Education and served in its Transportation Department.
3. On April 6, 2000, Robert S. Therien, Jr. and Colleen Bay Therien, h/w filed a complaint in the Superior Court of New Jersey, Monmouth County, against the Township of Howell, the Township Board of Education, the Howell Township Police Department and Michael Gunther, individually and in the alternative. This matter was docketed as L-1847-00.
4. In defense of the Therien lawsuit, petitioner was represented by Daniel S. Waldman, Esq. (Waldman & Morierity), 212 Maple Ave., P.O. Box 578, Red Bank, New Jersey 07701.
5. On January 23, 2001, the Honorable Robert J. O'Hagen, J.S.C. granted petitioner's motion for summary judgment dismissing all claims set forth in the Therien lawsuit.
6. Petitioner requested that the Board of Education to (sic) reimburse him for the attorney's fees he incurred in the defense of the Therien lawsuit, as he was a member of the Board at the time the suit was filed. Respondent Board refused to indemnify Gunther maintaining that Gunther was not acting within the course of his duties by obtaining and disseminating information about Therien.
7. On September 6, 2002, Petitioner filed a "Petition of Appeal" from the Respondent Board's refusal to pay his legal fees in defense of the Therien lawsuit. (J-1)

LEGAL ANALYSIS

The following pleadings were considered in rendering this Initial Decision granting respondent's motion for summary decision:

*petitioner's *in limine* motion and certification in support of same received on December 29, 2003;
*respondent's opposition to petitioner's *in limine* motion to bar evidence and cross motions for summary decision and to quash subpoenas received on January 7, 2004;
*petitioner's opposition to respondent's cross motions received on January 20, 2004;
*respondent's reply to opposition to motion for summary decision received on January 30, 2004;
*petitioner's sur-reply received on February 9, 2004; and
*further legal argument submitted by respondent by date of May 5, 2004.

PETITIONER'S MOTION TO BAR EVIDENCE

Petitioner asserts that pursuant to *N.J.S.A.* 18A:12-20, the Board must, as a matter of law, indemnify a member of a Board of Education when he or she is sued by reason of such membership.[12] In addition, he asserts that evidence of the petitioner's later indictment violates the Superior Court Order expunging the indictment, is irrelevant to the reimbursement issue and violates *N.J.R.E.* 403(a)(b). Petitioner cites *N.J.S.A.* 2C:52-15 for the premise that after expungement, criminal records may no longer be disclosed and in response to an inquiry, the custodian must state there is "no record information." He further contends that disclosure of the existence of an arrest, conviction or legal proceeding with knowledge that the Expungement Order has been granted is a disorderly persons offense pursuant to *N.J.S.A.* 2C:52-30. In addition, petitioner asserts that disclosure of his entry into PTI violates confidentiality provisions set forth at *R.* 3:28(c)(5). Finally he asserts that the prejudice to petitioner in disclosing the indictment, expungement and entry into PTI far outweighs the probative value of such information.

[12] This issue will be further addressed below as part of the cross motion for summary decision.

Respondent asserts the Order of Expungement is inapplicable in this proceeding as an Order of Expungement only affects the ability of law enforcement personnel and criminal justice agencies to release expunged materials. Respondent relies on EA v New Jersey Real Estate Comm'n wherein the Appellate Division agreed with the lower court ruling that because the *N.J.R.E.C.* was not a law enforcement agency, it was beyond the reach of and not subject to the Expungement Order. 208 *NJ Super.* 65 (App Dive.) *certif. denied* 104 NJ 415(1986). The Court further found that plaintiff's claims of a violation of the Expungement Order had no merit and affirmed the dismissal of the plaintiff's complaint. Respondent asserts that in this matter, there are no issues whether law enforcement agencies or criminal justice agencies are releasing information. The dispute involves the Howell Township Board of Education, which is not subject to any of the confidentiality provisions of the expungement statute and order, and therefore the evidence is not barred. In addition, any bar that may have existed regarding the admissibility of the evidence related to the indictment and petitioner's entry into PTI has been waived by him by the filing of this petition of appeal.[13] Respondent asserts that petitioner cannot be permitted to place conduct at issue by raising the issue of entitlement to indemnification from the Board and then attempt to prevent the Board from addressing that issue. Petitioner has waived any bar that may have existed with respect to evidence of his alleged criminal conduct and entry into PTI. Respondent analogizes the factual scenario herein to an attorney malpractice lawsuit where confidential communications would have to be revealed to the Court in order to be able to adequately defend the malpractice allegation.

The language from United Jersey Bank v Wolosoff, 196 *N.J. Super* 553, 567 (App Div 1984) referenced by respondent merits recitation.

> . . .We note the inherent inequity in permitting plaintiff to use the privilege as a sword rather than a shield. If permitted to do so, plaintiff could

[13] Respondent stresses that it does not seek to admit into evidence the particulars regarding petitioner's entry into and completion of PTI. Rather, the only evidence it seeks to admit regarding petitioner's admission into PTI is the fact that he was admitted and the conditions of admission, both of which are matters of public record.

> divulge whatever information is favorable to its position and assert the privilege to preclude disclosure of the detrimental facts. The resulting half-truth that would be revealed might well be more disabling than a total distortion. We are persuaded that when confidential communications are made a material issue in a judicial proceeding, fairness demands waiver of the privilege.

Based on the foregoing, I **FIND** and **CONCLUDE** that petitioner has waived any bar that may have existed by placing his conduct at issue in this matter seeking reimbursement of attorneys' fees, that the respondent is beyond the reach of the Expungement Order and the fact that petitioner was admitted into PTI and the reasons thereof, are a matter of public record. Thus, the motion to bar testimony concerning: petitioner's alleged violation of Board policy #20[14] and the Board Member Code of Ethics;[15] the Monmouth County Prosecutor's Office return of an indictment against the petitioner; the petitioner having entered the Monmouth County Pretrial Intervention Program; and proof concerning allegations of defamation, tortious interference, etc. as set forth in the Complaint filed in the Monmouth County Superior Court by Robert S. Therien and Colleen Therien (Dkt. No. L-1847-00) is hereby **DENIED.**

RESPONDENT'S CROSS MOTION FOR SUMMARY DECISION

Respondent seeks summary decision pursuant to *N.J.A.C.* 1:1-12.5. In support thereof, the Board asserts petitioner is attempting to obfuscate the basis for the underlying Therien complaint in order to obtain indemnification for attorneys' fees. Respondent refers to the pleading filed by Gunther in connection with the underlying Therien matter. Specifically, in the statement of material facts pursuant to R. 4:46-2 in support of Gunther's procedural motions to dismiss the Therien civil suit, the following is indicated:

---

[14] Board policy #20 provides that Board members "have no authority as individuals except when authorized by the Board." See Answer to Petition.

[15] Section 10 of By-Law No. 31 of the Board Member Code of Ethics, provides as to each member, "I recognize that Authority rests with the whole Board assembled in [a] public meeting and will make no personal promises nor take any private action which may compromise the Board." Section 12 provides, "The Board will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools." See Answer to the Petition.

4. Plaintiffs alleged that defendant, Mr. Gunther, was a patrolman of the defendant, Howell Township Police Department, and also a member of the defendant, Howell Township, Board of Education. (Certification of Mr. Waldman, Exhibit B, Paras. 10 & 11)[16]

5. Plaintiffs alleged that defendant, Mr. Gunther, unlawfully forwarded the information to third parties at meetings of the defendant, Howell Township Board of Education. (Certification of Mr. Waldman, Exhibit B, para. 12)[17]

6. Plaintiffs admit they knew the above information was forwarded to defendant Howell Township Board of Education, between June 1997 and October 1997. (Certification of Mr. Waldman, Exhibit B, Para 13)[18]

7. Plaintiffs allege that, as a result of the disseminated information, plaintiff, Mr. Therien, was forced to resign his position with defendant, Howell Township Board Education, in December 1997. (Certification of Mr. Waldman, Exhibit B, para. 14)[19]

---

[16] Exhibit B of Mr. Waldman's certification attaches the Therien amended civil complaint. Paragraphs 10 and 11 provide,

> 10. At times unknown to Plaintiffs, Defendant Gunther and/or John Does 1-10 unlawfully obtained confidential information regarding Plaintiff Robert S. Therien, Jr. from the Howell Township Board of Education's files.
>
> 11. At times unknown to Plaintiffs, Defendant Gunther and/or John Does 1-10 unlawfully obtained information regarding Plaintiff Colleen A. Therien from unknown sources.

[17] Exhibit B of Mr. Waldman's certification attaches the Therien amended civil complaint. Paragraph 12 provides

> Thereafter, Defendants Gunther and/or John Does One through Ten unlawfully forwarded the information to a third party and/or third parties at Holland Township Board of Education meetings held between June of 1997 and October 1997.

[18] Paragraph 13 of the Therien amended civil complaint provides

> 13. Although Plaintiffs knew that said confidential information was forwarded to the Howell Township Board of Education between June of 1997 and October of 1997, plaintiffs did not know that Defendants Gunther and/or John Does 1-10 were responsible for unlawfully obtaining the information and for unlawfully forwarding the information until on or about April 7, 1999.

[19] Exhibit B of Mr. Waldman's certification is paragraph 14 of the Therien amended civil complaint. It provides,

> Due to the unlawful actions of Defendants Michael Gunther and John Does One through Ten, Plaintiff Robert S. Therien, Jr. was forced to resign from his position with the Howell Township Board of Education in December of 1997.

8. Stephen Pepe, Esquire, former attorney of plaintiffs, by letters advised the defendant, Howell Township Police Department, of the unlawful dissemination of the police department records and reports in September 1997. (Certification of Mr. Waldman, Exhibit C, attaching three September 1997 letters of Mr. Pepe)[20] ...

---

[20] By letter of September 18, 1997, Mr. Pepe advised Chief of Police Ronald Carter, in pertinent part,

> My client is a custodian employed by the Board. Recently, members of the Board of Education of Howell Township were handed a copy of a Howell Township Police Department Investigative Report, dated November 18, 1987, concerning a very foolish act by my client, approximately ten years ago. We are very concerned as to how this material was removed from the Howell Township Board of Education. I enclose for you a front page copy of the report indicating in fact this is a report that was given to the members of the Board of Education. I would appreciate it if you would advise me as to the status of your investigation with regards to this matter and what action, if any, has been taken.
>
> Additionally, it has also come to our attention that a copy of my client's driver's abstract has been turned over to members of the Board of Education. Again, it is our understanding that this came from the Howell Township Police Department. Please advise me as to the authority upon which an abstract of my client's driving record was obtained and under whose authority was it turned over to the members of the Howell Township Board of Education.

By letter of September 19, 1997 to Chief Carter, Mr. Pepe wrote,

> Please be advised that I represent Alphosne Trocchia , Jr., on certain matters involving his position in the Howell Township Board of Education. My client is an employee of the Howell Township Board of Education and was recently asked to provide certain information to the Superintendent of Schools. I enclose for you a list of the materials that was requested from my client. While my client takes no issue in providing most of the information to the Board of Education, we are somewhat concerned about the attempt to influence him in some fashion by placing it on Police Department Momouth County Uniform Crime Report, stationery. It is our understanding that this material came from the Howell Township Police Department. We are concerned about the fact that someone within the police department would be utilizing their stationery in an attempt influence my particular client. ...

Finally, by letter of September 24, 1997, Mr. Pepe advised Chief Carter,

> I had just written to you with regards to Mr. Therien, in a matter going back to 1987. Additionally, turned over to the Board of Education was a motor vehicle incident report concerning Mr. Therien, of a minor motor vehicle accident which occurred on February 8, 1994. If you will note on the copy, I have attached hereto and made a part hereof, this matter was obviously called up on July 28, 1997, somewhere in the Howell Township Police Department. We are at a loss to understand how this material is being turned over to members of the Howell Township Board of Education. ...

13. Defendant, Michael Gunther, was an employee of the defendant, Howell Township Police Department as a patrolman, and an agent of the defendant, Howell Township Board of Education, as a board member.

14. Defendant, Howell Township Police Department, began an internal investigation within its department in late September 1997 as a result of the letters from Stephen Pepe, Esquire, on behalf of the plaintiffs. The internal investigation was directed to Mr. Pepe's allegations that police information and reports were leaving the defendant, Howell Township Police Department and being turned over to defendant Howell Township BOE. The internal investigation resulted in defendant, Mr. Gunther being responsible. (Certification of Mr. Waldman, Exhibit E, Cert. of Captain Bryan Ehret.)[21]

---

[21] Exhibit E, which was filed in support of the Township of Howell and the Howell Police Department's motion for summary judgment provides in its entirety,

Bryan Ehret, of full age, hereby certifies:

1. I am a Captain of the Howell Township Police Department and as such am fully familiar with the facts herein.
2. On or about September 29, 1997, I began an internal affairs investigation at the direction of Chief Ronald Carter as a result of receiving three (3) letters of complaint from a Mr. Stephen Pepe, Esq., an attorney representing Board of Education employees, one of whom was Plaintiff, Robert Therien, Jr.
3. The allegations brought forth by Mr. Pepe were that police information and reports were leaving the Howell Township Police Department and being turned over to the Howell Township Board of Education.
4. My investigation revealed that Defendant Gunther, a Howell Township Patrolman, was responsible for the release of police information and reports from the Howell Township Police Department to the Howell Township Board of Education.
5. Howell Township Police Department Rules and Regulations 4.1.3 entitled "Obedience to Laws and Rules" states that members and employees shall obey all laws, ordinances, rules, policies and procedures and directives of the Department.
6. Howell Township Police Department Rules and Regulations 4.3.1 entitled "Release of Information" states that members shall not release any information nor reveal any confidential business of the Department to the public or the press except as provided in Department policy or procedure.
7. Howell Township Police Department Rules and Regulations 4.3.2 entitled "Department Records" states that contents of any record or report filed within the Department shall not be exhibited or divulged to any person other than a duly authorized police officer, except with the approval of the appropriate superior officer or under due process of law, or as permitted, under Departmental policy or procedures.
8. Howell Township Police Department Rules and Regulations 4.8.5 entitled "Use of Department Property and Equipment" states that members shall not use any Department property or equipment for personal business or pleasure.
9. Howell Township Police Department Rules and Regulations 4.12.6 entitled "Truthfulness" states that members are required to be truthful at all times whether under oath or not.
10. As a result of my investigation, it was determined that Defendant Gunther violated the above-referenced Department Rules and Regulations by his actions.
11. Additionally, as a result of his actions, Defendant Gunther was indicted by a grand jury.

Further, respondent asserts that the underlying factual conduct in the indictment deals with Gunther's procurement of documents relating to Therien. Respondent contends that petitioner's assertion that Assistant Superintendent/Board Secretary Herbert Massa disseminated the information ignores the fact that Gunther illegally obtained the documents and disseminated them to Board members. He also improperly obtained the results of a drug test administered to Mr. Therien.

Petitioner asserts that the mere fact he was a Board member entitles him to indemnification pursuant to *N.J.S.A.* 18A:12-20, which provides,

> Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting there from. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in *N.J.S.A.* 59:10-4. Any board of education may arrange for and maintain appropriate insurance to coverall all such damages, loses and expenses.

He further asserts that neither the allegations of the underlying complaint filed by the Theriens nor the Board policies are pertinent to his right to reimbursement as, he contends, the filing of the complaint obligates the Board to indemnify him. He also cites his previous argument in support of his *in limine* motion to bar evidence.

I hereby certify that the statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

Respondent asserts that as a matter of law, unlawfully obtaining and disseminating records cannot be construed as "arising out of and in the course of the performance of his duties as a member of a board of education." Additionally, respondent asserts that the unfavorable disposition of the indictment, *vis `a vis* , entry into PTI, is dispositive on the issue against indemnification. Respondent cites Cressinger v Bd of Educ. of City of Newark, 225 *N.J. Super* 155, 157 (App. Div. 1992) and Grant v Board of Education of the Township of Green Brook, Docket No. A-2109-01T2 (App. Div., March 11, 2003.)

N.J.A.C. 1:1-12.5 sets forth the standard for consideration of a summary decision motion. The standard in this administrative setting is the same standard as set forth in the New Jersey Court Rules, *R.* 4:46-2 for summary judgment motions. Paragraph b of that rule sets forth the requirements in opposing a summary judgment motion.

> A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a),[22] all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purpose 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. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

[22] R. 4:46-5(a) provides,

> Specific Facts Required of Adverse Party unless Affidavits are Unavailable. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted for reasons therein stated, that the party was unable to present by affidavits facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such other order as may be appropriate.

Similarly, *N.J.A.C.* 1:1-12.5 (b) provides, in pertinent part,

> .... When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The petitioner herein, who bears the burden of proof in this administrative proceeding seeking indemnification of counsel fees, never submits an affidavit setting forth the existence of a genuine issue of fact.

Ultimately, respondent's motion must be granted as there can be no indemnification pursuant to *N.J.S.A.* 18A:12-20 because petitioner's entry into PTI is not, as a matter of law, a favorable disposition. In Cressinger, *supra,* the Appellate Division upheld the lower court ruling interpreting a similar statute[23] whereby the court found that successful completion of PTI by an employee of a school board was not a favorable termination of the criminal proceeding and he was not entitled to reimbursement of counsel fees pursuant to that statute. Similarly, the Appellate Division favorably quoted from a lower court ruling[24] interpreting a statute[25] which provided for indemnification to police officers when criminal charges were dismissed or determined in the officer's favor.

---

[23] *N.J.S.A.* 18A:16-6.1. This statute provided,

> Should any criminal action be instituted against any ... person [holding any office, position, or employment under the jurisdiction of any board of education] for any ... act or omission [arising out of and in the performance of his duties; and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

[24] Kerwick v Trenton, 184 NJ Super 235 (Law Div. 1982)

[25] *N.J.S.A.* 40A:14-155

> Clearly the statute intends that only an exoneration of the officer will entitle him to reimbursement of legal expenses. By taking advantage of ... diversionary treatment plaintiff cannot use a legal fiction to support a conclusion that there was a final determination in his favor. Disposition in his favor means exculpation and not some lesser degree of success.[26]

DECISION AND ORDER

Respondent's motion for summary decision dismissing the within matter as petitioner is not entitled to indemnification pursuant to *N.J.S.A.* 18A:12-20 is hereby **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[26] Kerwick, *supra,* at 240.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 2005
DATE

ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 10, 2005
DATE

Mailed to Parties:

AUG 1 2 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

340-05

OAL DKT. NO. EDU 7931-05
(EDU 7964-04 ON REMAND)
AGENCY NO. 231-7/04

O.F., on behalf of minor children C.F., S.F. and K.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, as revised on remand, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner approves the terms of the settlement, as revised on remand, and adopts same as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/19/05

Date of Mailing: 9/19/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07931-05

EDU 07964-04 **(REMAND)**

AGENCY REF.NO.231-7/04

O.F., ON BEHALF OF MINOR CHILDREN, C.F., S.F. AND K.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLVILLE, ESSEX COUNTY,

Respondent.

Felix Lopez Montalvo, Esq., for petitioner

Mark A. Wenczel, Esq., (Gaccione, Pomaco & Malanga, attorneys) for respondent

Record Closed: July 28, 2005 Decided: August 4, 2005

BEFORE **JESSE H. STRAUSS**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on August 17, 2004 for determination as a contested case. A hearing scheduled for December 23, 2004 was adjourned by the respondent due to the unavailability of essential witnesses. The record opened on February 9, 2005 and the matter was continued to March 3, 2005.

However, on March 2, 2005 the parties were able to resolve the matter. The parties submitted a signed Settlement Agreement on April 21, 2005 whereafter the

undersigned issued an Initial Decision- Settlement on April 25, 2005. The Commissioner remanded the matter for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Dr. Kliszus to sign on behalf of the Board. The Board has submitted a modified Settlement Agreement bearing the signature of Mark A. Wenczel, Esq., Attorney for the Belleville Board of Education, attached hereto. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 4, 2005
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

8-10-05
DATE

DEPARTMENT OF EDUCATION

AUG 11 2005
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

GACCIONE, POMACO & MALANGA, P.C.
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
(973) 759-6968 (fax)
Attorneys for Respondent

O.F on behalf of minor children, C.F., S.F. and K.F., Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 231-7/04 SETTLEMENT AGREEMENT

WHEREAS this matter was brought before the court by the Petitioner for review of the Respondent's determination that his children, C.F., S.F. and K.F., were not domiciled in the Township of Belleville during the 2003-2004 school year and were therefore ineligible to attend the Belleville Public Schools during the 2003-2004 school year, and the Respondent, Belleville Board of Education, having filed an Answer and Counterclaim seeking tuition reimbursement in the amount of $21,778.00 for the attendance of C.F., S.F., and K.F. in the Belleville Public Schools during the 2003-2004 school year, and the parties having reached a settlement to amicably adjust their differences;

IT IS HEREBY AGREED AS FOLLOWS:

1. O.F. shall deliver the sum of $7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of $625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. $625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. $21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: _____
DR. EDWARD KLISZUS
Superintendent
Dated: 4/13/5

_____
OSWALDO FLORES
Dated: 4/4/05

BY: _____
MARK A. WENCZEL, ESQ.
Attorney, Belleville Board of Education

343-05

AGENCY DKT. NO. 196-8/05

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
KATHLEEN CONNNORS RYAN,	:	DECISION
RESPONDENT.	:	

For Petitioner, Stephen J. Edelstein, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)
For Respondent, Joyce Wan, DAG (Peter C. Harvey, Attorney General)

This matter was initiated by way of the filing of a Petition of Appeal with Application for Emergent Relief on August 5, 2005 by the Board of Education of the Freehold Regional High School District (Board). As set forth by the Board in its petition, respondent was employed as a teacher by the Board from September 12, 1977 through September 2, 1991. (Petition at 2) In or about February 1990, the Board granted respondent a leave of absence for maternity and child care purposes through September 1, 1990. (*Ibid.*) Respondent's leave of absence was subsequently extended through June 30, 1991. (*Ibid.*) When respondent requested an additional extension of her leave of absence through September 1, 1992, the Board denied her request. (*Ibid.*) On September 3, 1991, respondent notified the Board that she would not report for duty pursuant to her rights under the New Jersey Family Leave Act (FLA). (*Ibid.*) In January 1992, respondent petitioned the Commissioner for an order compelling the Board to grant her request for an extension of her leave of absence. (*Id.* at 3) About the same time, the Board filed tenure charges against respondent for abandoning her teaching position and for

insubordination. (*Ibid.*) These two petitions were transmitted to the Office of Administrative Law (OAL) for hearing, and were then consolidated. (*Ibid.*) The parties subsequently reached a settlement agreement wherein respondent agreed to submit an irrevocable letter of resignation from the District with an effective date of June 30, 1991 (the effective date was later modified by mutual agreement) and withdraw her FLA claims. (*Ibid.* and Exhibit C) The Board agreed to withdraw its tenure charges and to provide respondent a letter of recommendation with agreed-upon language. (*Ibid.*)

Six years later, in July 1999, respondent applied for a psychology teaching job in the District. (*Id.* at 4) The Board avers that respondent did not mention in her application letter, resume or interview that she had previously tendered an irrevocable letter of resignation, and that the individuals who were responsible for recruiting in 1999 were thus unaware that respondent had previously tendered an irrevocable letter of resignation. (*Id.* at 4-5) The Board further asserts that respondent did not interview well and that she was, therefore, not hired for the position. (*Id.* at 5-6) Instead, a teacher was transferred from the Marlboro High School to fill the position and the Board hired two individuals to fill the vacancy created by the transfer. (*Id.* at 6)

In or about July 2000, respondent filed a Verified Complaint with the Division on Civil Rights (DCR) alleging that: 1) the Board discriminated against her on the basis of her sex by denying her employment application and hiring two less qualified males to fill the positions in violation of the Law Against Discrimination (LAD); and 2) she was denied employment in reprisal for previously filing a discrimination complaint against the Board. (*Id.* at 6-7) In February 2001, respondent amended her complaint, changing her reprisal allegations to read that the Board had retaliated against her for previously filing an action based on the denial of leave under the FLA. (*Id.* at 7) On May 12, 2005, the Administrative Law Judge (ALJ) hearing the matter issued an Initial Decision wherein he concluded that respondent had established a prima

facie case of sexual discrimination and found that the legitimate, articulated reason provided by the Board for not hiring respondent "was merely a pretext for improper retaliatory intent." (Exhibit M, Initial Decision at 13-16) As a result, the ALJ recommended to the Director of the DCR that the Board be ordered to pay respondent $50,000 in compensatory damages; back pay, with interest, in the amount of $102,763.95; penalties of $12,000; and reasonable attorney fees and costs. (*Id.* at 17-19) Moreover, the ALJ found that respondent should be hired by the Board for a position sufficiently similar to the one she was wrongfully denied when such position becomes available and that back pay should continue until such time as respondent is so hired. (*Id.* at 18)

In the instant matter, the Board claims that respondent's failure to disclose the parties' 1993 settlement agreement and the Commissioner's decision approving the settlement when she applied for the vacant teaching position in 1999 constitutes conduct unbecoming a teacher and it seeks an order from the Commissioner that:

> 1) declares respondent unfit and/or unqualified to teach in the district;
> 2) enforces the parties' 1993 settlement agreement, including respondent's irrevocable resignation;
> 3) rejects "Judge Fidler's Initial Decision in its entirety and dismiss[es] Ryan's LAD and FLA claims with prejudice" and
> 4) grants other relief as the Commissioner deems just and equitable, including an award of fees and costs to the Board."
>
> (Verified Petition and Application for Emergent Relief at 10-15)

In reviewing the petition, there was a question as to whether the Commissioner has jurisdiction to consider this matter, particularly with respect to the rejection of an Initial Decision issued in respondent's LAD and FLA claim filed with DCR. Accordingly, by letter of August 9, 2005, the Acting Director of the Bureau of Controversies and Disputes established a briefing schedule whereby the parties could brief the issue of the Commissioner's jurisdiction to

consider this matter. The Board, therefore, was requested to submit a memorandum of law or letter brief addressing why the Commissioner should not dismiss the within petition and emergent relief application for lack of jurisdiction in that the relief sought is: 1) an enforcement of a 1993 settlement agreement, which, under *N.J. Court Rule* 4:67-6, is a matter for New Jersey Superior Court; and 2) the rejection of an Initial Decision in a matter transmitted to the OAL by a different agency. Respondent was provided an opportunity to respond to the Board's arguments.[1]

In its submission, filed August 22, 2005, the Board contends that the principal relief it is seeking is a determination that respondent's dishonesty in not disclosing her previous settlement agreement with the Board and irrevocable resignation from the District when she applied for a teaching position in 1999 made her unqualified and unfit to teach in the Freehold Regional High School District. (Board's Brief at 2) The Board states that enforcement of the 1993 settlement is a secondary issue. (*Ibid.*) In support of its primary issue, the Board argues that respondent's fitness to teach clearly falls within the Commissioner's jurisdiction and is the gateway through which respondent must pass to reach the civil rights issues. (*Ibid.*) The Board points out that *N.J.S.A.* 18A:6-9 gives the Commissioner jurisdiction to hear and determine all controversies and disputes arising under the school laws. (*Id.* at 4) Moreover, pointing to *N.J.S.A.* 18:6-16, governing tenure charges, and *N.J.A.C.* 6A:9-17.23, governing appeals of Board of Examiners' decisions regarding certifications, the Board asserts that it is well-established that the school laws impart upon the Commissioner the duty to determine whether an individual is qualified for employment in the public schools and that the Commissioner has exclusive jurisdiction to determine fitness for teaching. (*Id.* at 4-5) Finally, citing two tenure cases and a case involving a claim of violation of tenure rights, the Board claims that submitting

[1] It is noted that both parties requested and received approvals for extensions of time in which to file the requested briefs. Additionally, the Board requested and received approval to file an additional brief in reply to respondent's brief.

false information or omitting pertinent facts on an application for employment may constitute conduct unbecoming a teaching staff member. (*Id.* at 5)

In reply, respondent[2] states that she filed a complaint with the DCR on July 29, 2000 alleging that the Board discriminated against her in employment on account of her sex and in reprisal for filing a previous action under the New Jersey FLA in violation of the LAD. (Respondent's Brief at 2-3) After investigation, the Director of the DCR issued a finding of probable cause on July 10, 2001, crediting respondent's allegations. (*Id.* at 3) The matter was then transmitted to the Office of Administrative Law (OAL) on August 12, 2003, and was heard as a contested case on March 31 and April 1, 2004. (*Ibid.*) Respondent avers that at no time during the pendency of this action did the Board raise any issue about, or in any way question, her fitness to teach. (*Ibid.*) Respondent reiterates that the ALJ's Initial Decision found that the Board had failed to hire respondent in 1999 on the basis of her sex and in reprisal for attempting to invoke her perceived rights under the FLA in 1991, and determined that she was entitled to, *inter alia*, back pay, damages and reinstatement to a position similar to the one she was denied at such time as a comparable position becomes available. (*Ibid.*) The final decision of the Director of the DCR is expected on September 26, 2005. (*Id.* at 4)

With respect to the Commissioner's jurisdiction to consider this matter, respondent asserts that there is absolutely no legal basis for the Commissioner to disturb the process for litigating civil rights cases and points out that the Board cites no authority for such intervention. (*Ibid.*) Respondent also points out that the rule for emergent relief specifically states that emergent relief may be granted where authorized by law, yet there is no law that authorizes the Commissioner to grant emergent relief in a matter under the jurisdiction of a

[2] It is noted that a Deputy Attorney General representing the Division on Civil Rights filed the brief on respondent's behalf.

completely different state agency. (*Ibid.*) Moreover, citing *N.J.A.C.* 6A:3-1.6(a), respondent contends that the Commissioner may only consider emergent relief if (s)he is already involved in the contested case. (*Id.* at 5) Since the contested case in this matter is before DCR, respondent avers that the Commissioner has no authority to grant the emergent relief sought.

Finally, respondent contends that the motivation behind the Board's request before the Commissioner is the desire to circumvent the DCR litigation, which is based upon rights to which she is entitled pursuant to the LAD and FLA. (*Id.* at 5-6) Having failed to challenge her fitness to teach during the DCR litigation at the OAL, respondent claims, the Board is now seeking to "get a second bite at the apple." (*Ibid.*) According to respondent, the Board asks the Commissioner to take *ultra vires* action in a vain attempt to undermine the statutory authority of DCR to enforce the LAD and the FLA. (*Ibid.*)

In a response submitted on September 16, 2005, the Board claims that respondent's opposition papers are deficient in that respondent makes no attempt to oppose the Board's contention that she is unfit to teach within the District, nor does she dispute that she failed to disclose pertinent information about her background or that she exhibited conduct unbecoming of a teacher as a result of such omissions. (Board's Reply Brief at 2) In this regard, the Board asserts that, because respondent misrepresented her background by omitting the information that tenure charges had previously been filed against her by the District and omitting the information that she had entered into a settlement agreement which resulted in her irrevocable resignation, the Board was released of any obligation to hire her for a teaching job in 1999. (*Ibid.*) Accordingly, the Board argues, respondent's discrimination claims against the Board should have never reached the DCR. (*Ibid.*)

Moreover, the Board points out that respondent failed to dispute the irreparable injury the Board will suffer as a result of continuation of respondent's claims with the DCR if the

Board is forced to place an unfit and unqualified teacher in a classroom, which would be detrimental to the students and the community. (*Id.* at 2-3) The Board further argues that respondent's allegations that it is trying to circumvent its obligations and undermine the authority of the DCR to enforce the LAD and FLA is nothing more than an attempt to portray the Board in a bad light and confuse the true issues presented in its petition, *i.e.,* the Commissioner is responsible for determining an individual's fitness to teach in a public school. (*Id.* at 3) Thus, the Board avers that it was not required to raise the question of respondent's fitness to teach in the DCR proceedings, asserting that, instead, it is an issue that should be decided through the Board's application for emergent relief. (*Ibid.*) "The importance of protecting school districts from unfit and unqualified teachers," the Board argues, "takes precedence over the non-existent rights of Ryan [respondent]." (*Ibid.*)

Upon a thorough review of the parties' submissions, the Commissioner finds no basis upon which she may consider the issues raised or grant the relief sought by the Board in this matter. Initially, with respect to whether the Commissioner may declare an individual unfit to teach, the circumstances under which the Commissioner may render such a determination are specifically set forth in statute; for example: as the result of tenure charges against a teaching staff member that have been certified to and sustained by the Commissioner; as the result of a criminal history background check; as the result of a psychiatric exam; or in the course of a review of an appeal of a denial of issuance of certification by the State Board of Examiners (SBE),[3] *etc.* The Board has not provided any statutory authority, nor is the Commissioner aware of any, which would authorize the Commissioner to make such a determination under the circumstances presented herein. Moreover, as stated above, under *N.J. Court Rule* 4:67-6,

[3] The Commissioner notes that, in contrast to SBE denial of issuance of certification determinations, suspension or revocation determinations of the SBE are appealable to the State Board of Education.

enforcement of a settlement agreement is a matter for the New Jersey Superior Court. Thus, the Commissioner is not authorized to enforce the 1993 settlement agreement. Certainly, there is no legal basis or statutory authority that would permit the Commissioner to effectively usurp the jurisdiction of a completely different State agency by "rejecting" the Initial Decision rendered in a contested case over which that agency has taken jurisdiction. Accordingly, as the Board has failed to state a claim which the Commissioner may grant, the petition must be dismissed.

Finally, an application for emergent for relief may be considered pending the Commissioner's final decision in a contested case. See *N.J.A.C.* 6A:3-1.6(a). In that the Commissioner has determined to dismiss the petition in this matter, and in that there is no authority for the Commissioner to grant emergent relief in a contested matter before another State agency, the Board's request for emergent relief is concomitantly denied.

Accordingly, for the reasons set forth above, the Board's request for emergent relief is denied and the appeal in this matter is dismissed in its entirety for failure to state a claim upon which relief may be granted by the Commissioner.

IT IS SO ORDERED.[4]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/05

Date of Mailing: 9/26/05

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

344-05

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, R.T.C., JR., individually and on behalf of minor child, R.T.C., III, C.S., individually and on behalf of minor child, R.S., and D.A.D., individually and on behalf of minor child, J.D.D.,

PETITIONERS,

V.

NEW JERSEY INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board, together with parents of three student-athletes, sought waiver of the "70% Rule" of the New Jersey Interscholastic Athletic Association (NJSIAA), which requires that a school play at least 70% of its regular season games against New Jersey schools in order to compete for a State championship. The request was based on a claim of hardship resulting from the extensive travel necessary to play New Jersey schools, and the availability of Pennsylvania schools in closer geographic proximity.

Pursuant to procedural rules agreed to by the parties, the NJSIAA Special Committee on Leagues and Conferences (SCLC) heard petitioners' request. The SCLC's denial was upheld by NJSIAA's Executive Committee on grounds that Phillipsburg's hardship was not significantly greater than that of other member schools, and that the school's reduced availability for New Jersey play would negatively impact on the Skyland Conference of which it is presently a member.

On appeal, the Commissioner upheld NJSIAA's position that: 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to the Moorestown Friends School does not compel a similar grant to Phillipsburg; 3) NJSIAA is entitled to bring broader policy considerations into its decisions in matters of this type; and 4) the Commissioner's review is to be conducted under the established "arbitrary and capricious" standard. However, due to procedural deficiencies in the NJSIAA hearings relating to the participation of Skyland Conference officials and the involvement of SCLC members in Executive Committee deliberations, the Commissioner remanded the matter to NJSIAA for proceedings as necessary to make a decision in the first instance—based upon a properly developed factual record, with no ambiguity as to appearance(s) by the adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by the party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg's situation is, in fact, so extreme relative to other member schools, that the hardship imposed on it by the 70% Rule outweighs any hardship that will result from its reduced availability for in-state play if a waiver is granted. Petitioners' federal claims were preserved for future litigation, and their claims with respect to NJSIAA's assessment of legal fees were reserved for such appeal of NJSIAA's decision on remand as petitioners deem 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.

AGENCY DKT. NO. 369-10/03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, R.T.C., JR., individually and on behalf of minor child, R.T.C., III, C.S., individually and on behalf of minor child, R.S., and D.A.D., individually and on behalf of minor child, J.D.D.,

PETITIONERS,

V.

NEW JERSEY INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioners, David B. Rubin, Esq.

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on October 3, 2003, through the filing of a Petition of Appeal by the Phillipsburg Board of Education and three citizen-taxpayers who are also parents of minor student-athletes attending the Phillipsburg public schools ("petitioners"). In their filing, petitioners sought declarations invalidating: 1) the so-called "70% Rule" of the New Jersey Interscholastic Athletic Association (NJSIAA),[1] either on its face or as applied to petitioners; and 2) Article XIII, Section 8 of NJSIAA's bylaws,[2] either on its face or as

[1] Requires that, in order to compete in State tournament games, an entrant must have competed against New Jersey schools in 70% or more of their regular season games.

[2] Provides that a member school will be assessed for NJSIAA's litigation expenses if it is unsuccessful in appealing an action or decision of NJSIAA.

applied to appeals which are non-frivolous and brought in good faith. Petitioners sought a plenary hearing before the Commissioner because they were not appealing from a quasi-judicial determination of NJSIAA based on an existing evidentiary record, as contemplated by then-applicable rules for the hearing of appeals from NJSIAA decisions, *N.J.A.C.* 6A:3-7.1 *et seq.* (31 *N.J.R.* 4173(a), 32 *N.J.R.* 1177(a)) However, the parties and the Department subsequently agreed that, in lieu of a plenary hearing at the Office of Administrative Law (OAL), NJSIAA would: 1) convene its Special Committee on Leagues and Conferences (SCLC) to conduct a quasi-judicial hearing—complete with a record, sworn testimony and discovery rights comparable to those of an OAL hearing—prior to issuing a recommendation on petitioners' request for a waiver of the 70% Rule; and 2) render a final decision through its Executive Committee which would then be appealable to the Commissioner in accordance with the above-noted rules.[3] Pursuant to this procedure, a hearing before the SCLC was duly held on October 6, 2004, resulting in a written decision of November 9, 2004 recommending denial of petitioners' request; the Executive Committee adopted this recommendation as NJSIAA's final decision on January 12, 2005. On February 15, 2005, petitioners filed an Amended Petition of Appeal retaining the substance of their original submission and additionally pressing claims arising from subsequent proceedings at NJSIAA; NJSIAA's Answer, the Record on Appeal, and briefs setting forth the positions of the parties were then filed in accordance with *N.J.A.C.* 6A:3-7.1 *et seq.*

[3] Appeals of the type filed by petitioners are now addressed by *N.J.A.C.* 6A:3-7.1(b)1, which requires aggrieved party(ies) and NJSIAA to make mutually acceptable provisions for a hearing at NJSIAA prior to any request for review by the Commissioner. 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b)

As part of the above-referenced discussions, it was agreed that the issue to be addressed during NJSIAA proceedings would be whether the impact of the 70% Rule upon the Phillipsburg Board of Education, when weighed against the impact upon other NJSIAA members and conferences, constituted undue hardship upon Phillipsburg. It was further agreed that the OAL standard for intervention would be liberalized to allow other districts, upon request, to present testimony and evidence at hearing, provided that any such district would be subject to pre-hearing discovery to the same extent as a party. Petitioners' federal claims and NJSIAA's defenses to them were preserved for future litigation.

Consistent with the above, in proceedings before NJSIAA, petitioners did not pursue the claim made in their petition that the 70% Rule was facially invalid; rather, they argued that it did not apply to Phillipsburg based on its legislative intent, or—if applicable—that it necessitated a waiver in Phillipsburg's case because of the demonstrably greater hardship imposed on the district's student-athletes relative to others in purportedly similar situations, and because of the precedent set by a prior waiver granted to Moorestown Friends School, a private religiously affiliated school (Moorestown). Petitioners deferred addressing their other claims, and, in their brief before the Commissioner on appeal (at 45), indicated that they continued to reserve their constitutional claims and would withhold argument, if not otherwise directed, on NJSIAA's assessment of litigation costs unless and until NJSIAA prevailed on the issue of the 70% Rule.

BACKGROUND OF THE DISPUTE

The following undisputed facts are necessary to an understanding of the present controversy:

1. Phillipsburg High School is a Group IV NJSIAA member school located along the Delaware River in Warren County, across from Easton, Pennsylvania. It is contained within a legislatively designated "Abbott" school district (*N.J.S.A.* 18A:7F-3) and serves a community with longstanding ties to Pennsylvania's Lehigh Valley.

2. Prior to 1976, Phillipsburg belonged to football conferences (Big 4 and Big 5) in which all other members were Pennsylvania schools. During the 1970s, Phillipsburg was a "football powerhouse."

3. Beginning in 1976, Phillipsburg was a member of Pennsylvania's East Penn Conference (predecessor to the Lehigh Valley Athletic Conference) for football, having joined for basketball in 1963 and baseball in 1958. The school was permitted by NJSIAA to engage in New Jersey championship competition, which it did as a "powerhouse" team for several years; however, in 1980 an NJSIAA rule was adopted requiring entrants into championship games to have played at least 50% of their regular season games against New Jersey schools, and in the 1982 settlement of Phillipsburg's challenge to that rule, the school was barred from NJSIAA championship play in football, although an exception was made for other sports with the admonition that Phillipsburg was required to make a concerted effort to increase scheduling within New Jersey schools whenever possible.

4. When the East Penn conference increased its required regular season schedule in 1982-83 beyond the nine games permitted by NJSIAA, Phillipsburg was granted an exception from the nine-game rule due to the school's unique circumstances: These were identified as location, unavailability of regular season contests with reasonably close New Jersey Schools of comparable size, and the requirements of the Pennsylvania conference to which the school then belonged. In subsequent years, NJSIAA continued to grant nine-game-rule waivers to Phillipsburg to enable it to comply with the East Penn schedule.

5. In 1987, Phillipsburg applied for membership in New Jersey's then-existing Mid-State Conference, but was rejected in part because Phillipsburg was too distant from the other members and in part because the conference wished to retain its ten-team structure. On appeal of the Conference's decision, NJSIAA granted Phillipsburg's request to join the Conference, so long as it adhered to the required nine-game schedule. Phillipsburg declined to meet this condition because it would mean relinquishing the annual Thanksgiving football game against Easton, Pennsylvania; it withdrew its request for Conference membership

and elected to remain as a member of the East Penn Conference in Pennsylvania while still playing some games against NJSIAA schools.

6. In Fall 1995, because of the increasing difficulty in reconciling East Penn and NJSIAA requirements and the continuing impact of the 50% Rule on the school's ability to enter championship competition, Phillipsburg joined the newly-created Skyland Conference in New Jersey. This conference consisted of NJSIAA members in Somerset, Hunterdon and Warren Counties, essentially uniting the former Mid-State Conference (consisting primarily of Group III and IV schools) with the former Delaware River Conference (consisting primarily of Group I and II schools); its creation had been suggested in 1987 by Phillipsburg itself as a solution not only to its own situation, but to the problem generally of providing for meaningful athletic competition in the Northwest New Jersey region. The Skyland Conference arranged its schedule so that Phillipsburg could continue to play its traditional season-opening and Thanksgiving football games against Pennsylvania teams.

7. After a few years, Phillipsburg became dissatisfied with membership in the Skyland Conference and began exploring the possibility of returning to a Pennsylvania league through membership in the Lehigh Valley Athletic Conference, successor to the East Penn Conference. However, it has viewed NJSIAA's 70% Rule, adopted in 1999 as an amendment to the previously referenced 50% Rule, as an impediment to further consideration of this option, since, if Phillipsburg increases the number of regular season games it plays against Pennsylvania opponents, the 70% Rule—absent a waiver or finding of inapplicability—would prevent it from participating in New Jersey State championship competition.[4]

Petitioners take the position that Phillipsburg students suffer undue and ever-increasing hardship as a result of NJSIAA's requirement that they play 70% of their games in-state in order to be eligible for championship competition. They allege that the lack of nearby New Jersey opponents results in extraordinary travel times, necessitating that students: 1) miss classes (a problem made worse by the district's use of block scheduling); 2) lose the opportunity to use the district's after-school assistance programs; and 3) experience frequent late returns so as to deprive them of time needed for homework, study and rest. They also allege increased transportation costs and diminution of gate receipts which are used to offset the cost of the district's athletic

[4] As a New Jersey school district, Phillipsburg is ineligible for Pennsylvania State tournament competition.

programs, causing fiscal problems in an already stressed district as evidenced by its "Abbott" status. Petitioners contend that Phillipsburg's unique circumstances should compel that the school be permitted to enter NJSIAA championship competition notwithstanding that fewer than 70% of its regular season games are played against New Jersey opponents, and that there is precedent for doing so because a waiver of this type was previously granted to Moorestown.

NJSIAA takes the position that: 1) the hardship imposed on Phillipsburg as a result of its geographical location is not substantially greater than that of other Skyland Conference and NJSIAA member schools who must travel substantial distances to events; 2) the Moorestown situation was factually distinguishable; and 3) the requested waiver would be inherently unfair to other schools and student-athletes, since they must qualify for tournament eligibility based on competition against New Jersey opponents, and since the viability of NJSIAA's leagues and conferences will be compromised by the inevitable absence of Phillipsburg from a conference having few other nearby options for competitors of comparable size.

POSITIONS OF THE PARTIES

Standard of Review

Petitioners argue that this matter should be judged under a heightened standard of review, positing that NJSIAA is subject to the same scrutiny as a government agency because of its domination by public school districts, funding by tax dollars and virtual monopoly over interscholastic sports; in order to prevail on appeal, therefore, it must be found to have exercised its powers in furtherance of the public interest rather than the narrow self-interest of its members. (Petitioners' Brief at 14-18)

NJSIAA stresses that it is a fully voluntary organization, that the absence of any constitutional right to participate in sports is by now well established at both the state and federal levels, and that the "arbitrary and capricious" standard for review of NJSIAA actions has long since been accepted both by the courts and by the Commissioner and State Board (the latter through adoption of memorializing regulations at *N.J.A.C.* 6A:3-7.5). Therefore, because the decision under review in this matter has a rational basis, the NJSIAA urges, it must be upheld by the Commissioner on appeal. (NJSIAA Brief at 19-22)

Applicability of the 70% Rule

Petitioners contend that while the plain language of the 70% Rule applies without exception to any NJSIAA member school, it is necessary to look beyond plain language to legislative intent. In this regard, petitioners proffer that the rule, adopted in 1999 as an amendment to the existing rule requiring 50% of regular season games to be played in-state, was proposed to address the specific evil of certain small parochial schools scheduling large numbers of out-of-state basketball games so as to give them an unfair advantage in New Jersey tournament competition; according to the proposal's sponsor and NJSIAA subcommittee discussion, such scheduling enabled these schools to obtain additional funding, engage in enhanced recruitment through national exposure, escape the degree of accountability associated with in-conference play, and increase the strength of the team by arranging for "powerhouse" schedules. Petitioners argue that there is no relationship whatsoever between a rule intended to discourage national schedules—with their concomitant recruitment and financial advantages—and the situation of Phillipsburg: a uniquely placed border school which seeks for historical and

geographical reasons to compete against Pennsylvania schools within a maximum distance of 30-45 minutes. According to petitioners, what must control in determining whether the rule applies to Phillipsburg is "not what some Committee sitting in 2004 wishes [the rule] meant, but what the Commissioner [who has statutory authority to approve or disapprove proposed amendments to the bylaws] was entitled to assume it meant [at the time of approval in 1999], based on the purposes that were apparent at that time." (Petitioners' Brief at 18-25, quotation at 25)

NJSIAA counters that, while reducing recruitment was unquestionably an important impetus for initial proposal of the rule, the discussion surrounding its adoption clearly shows its larger purpose to have been ensuring that schools qualifying for NJSIAA tournaments did so based on competition at the same level of their tournament opponents, that is, other New Jersey schools. NJSIAA finds it "self-evident" that entry into State tournaments should be based upon competitive success against schools within the state—which must observe uniform eligibility and competition rules—rather than against outside opponents. NJSIAA further notes that Phillipsburg voted against the 70% Rule when it was placed before NJSIAA members for adoption, thus indicating an understanding of the rule's broader purpose and how that purpose would work to Phillipsburg's disadvantage vis-à-vis Phillipsburg's custom of playing of large numbers of games against Pennsylvania opponents. (NJSIAA's Brief at 23-24)

Waiver of the 70% Rule

Petitioners argue that they have shown evidence of hardship which is at least as compelling as that which existed in 1983, when NJSIAA granted Phillipsburg a waiver from its nine-game rule in order for the school to continue in its East Penn

affiliation. Specifically, they note: 1) the distances from other schools in the Skyland Conference resulting from Phillipsburg's remote location; 2) already long travel times exacerbated by two decades of real estate development and ensuing traffic congestion; 3) attendant cost increases resulting from greater travel time; 4) gate receipts for football, basketball and wrestling which have "dropped precipitously," leading to a loss of funds in a district that is both needy and subject to heightened State scrutiny owing to its "Abbott" status; and 5) impact on students who must suffer early dismissals from last period classes (a situation made more serious by the district's use of block scheduling), miss after-school academic assistance in order to make game start times ranging from 2:45 to 4:00 (mostly the latter), and experience late arrivals home after games such as junior varsity which are frequently held in the evening, "from time to time" as late as 11 p.m. (Petitioners' Brief at 9-12, quotations at 11-12)

Petitioners point to the survey they conducted of schools characterized by NJSIAA as similarly situated "border schools," contending that, contrary to the unsupported generalization of NJSIAA, Phillipsburg's situation is truly unique because the schools referenced by NJSIAA either have close New Jersey opponents readily available or, to the extent they do not, have no viable options in New York, Pennsylvania or, in some cases, Delaware, that would easily alleviate the hardship caused by travel to remote in-state schools. (Petitioners' Brief at 29-31) According to petitioners, NJSIAA offers only vague, unsupported statements—no evidence as to actual distances, translation into travel time, or impact on students—in contending that Phillipsburg is not experiencing undue hardship. Petitioners acknowledge that Phillipsburg does travel long distances, without complaint, to occasional State contests and other important games, but

urge that these situations are plainly distinguishable from the daily wear-and-tear of regular season travel (*Id.* at 31-32); they also reject NJSIAA's reliance on Phillipsburg's 1987 Mid-State application letter stating that travel necessitated by Mid-State membership would not be of great concern to Phillipsburg, since such reliance takes no account of the fact that Route 78 has evolved over the intervening twenty years from a new super-highway into a congested commuter artery. (*Id.* at 32-33) Petitioners also argue that the requested waiver will give them no advantage over other New Jersey schools, since the Lehigh Valley Conference has gone on record as stating that, should Phillipsburg apply and be admitted to the Conference, the school will be allowed to adhere to all NJSIAA rules and regulations relating to athletic advantage. (*Id.* at 28, citing Record on Appeal, Tab 5(h); Petitioner's Exhibit P-9 [5])

Petitioners additionally contend that a waiver is compelled in Phillipsburg's case by the precedent of Moorestown, which received a waiver notwithstanding that it did not even claim hardship, but only a desire to continue its longstanding cultural ties with other Quaker schools; according to petitioners, if this was an adequate basis for waiver, then surely petitioners' case, based on demonstrated hardship as well as evident historic and cultural ties, cannot be denied. Moreover, petitioners argue, if Moorestown's religious affiliation had any role in NJSIAA's prior decision—as NJSIAA's response to Interrogatory No. 6 explicitly states it did—then petitioners' claim must be honored or NJSIAA will have "unfairly denied petitioners dispensation previously granted to another school because of its religious affiliation," thereby violating the Fourteenth Amendment by according special treatment on the basis

[5] This and all similar references refer to the designations used in the Statement of Items Comprising the Record on Appeal, as provided by NJSIAA under cover letter dated February 15, 2005.

of religion. NJSIAA cannot be permitted to "rewrite the record," petitioners charge, by denying its own sworn statement—likely made in an attempt to avoid setting a precedent—regarding the religious basis for its decision. (Petitioners' Brief at 37-40, 46; quotation at 46)

NJSIAA counters that the Moorestown situation was clearly distinguishable because: 1) Moorestown is a small, independent school, one of a handful in the state not affiliated with a specific league; and 2) although the school was required to play Friends School League opponents, it still played the majority of its games against smaller NJSIAA schools, mostly members of the Olympic Conference and the Burlington County Scholastic League, both of which fully supported the school's application for waiver—in contrast to Phillipsburg, which intends to play most of its contests against Pennsylvania schools and which is a member of a conference that would be significantly impacted by any diminution of Phillipsburg's availability for regular season games. The Moorestown waiver was, therefore, nothing more than "a rational decision to allow a small NJSIAA school to continue to play most of its contests (but not 70%) against NJSIAA member schools who fully supported the waiver without abandoning a 70 year association with an out-of-state conference, which coincidentally happened to be Quaker." (NJSIAA Brief at 26)

NJSIAA notes that it also considered the "fundamental contradiction" of petitioners' position that Phillipsburg should not have to travel for regular season play but is more than happy to do so for tournaments or to gain a higher ranking for its "powerhouse" wrestling team. (NJSIAA Brief at 29-30) The Association further notes its consideration of the contradiction between Phillipsburg's 1987 application to the

Mid-State Conference and its present request, pointing out on appeal to the Commissioner—although conceding that this was not mentioned in the SCLC report—that, in addition to conflicting statements about the ease of such travel, the actual distances given for travel to specific schools presented in 1987, when Phillipsburg *wanted* to join a New Jersey league, were consistently less than the comparable distances presented in the current effort to play more games in Pennsylvania. (*Id.* at 30-32)

NJSIAA further points to what it characterizes as Phillipsburg's lack of regard for: 1) Skyland's willing accommodations to the town's geographic location, including scheduling non-football contests in relative proximity (because size of school is not a dominant factor in such contests) and designing football schedules that allow Phillipsburg to play its traditional opening and closing games against Pennsylvania schools, including the Thanksgiving game against Easton; 2) Phillipsburg's instrumental role in Skyland's creation and subsequent development; and 3) the fact that Phillipsburg's inevitable departure as a conference member if it is granted a waiver from the 70% Rule would require a substantial number of other member schools to schedule—in baseball, softball, basketball, cross country and soccer—at least two regular season contests at great distance, and, in football, to search for large schools outside the region against which to play. (NJSIAA Brief at 33-34)

Procedural Issues

In addition to reiterating their substantive arguments before the NJSIAA, petitioners challenge the Association's determination on procedural grounds. Petitioners stress that the NJSIAA proceeding in this matter was not an ordinary NJSIAA hearing, but a negotiated compromise between the full-blown trial-type OAL hearing sought by

petitioners and the purely appellate review sought by NJSIAA. They contend that, notwithstanding that Skyland representatives were allowed to testify at hearing and that their testimony was taken as fact by both the SCLC and Executive Committee, Skyland never made a formal request to intervene; thus, petitioners had no notice other than through the "rumor mill" that any other district intended to participate in the hearing, and, in the absence of such notice—given the rules established for the proceeding—they had no opportunity for discovery of the evidence Skyland intended to introduce. Skyland, on the other hand—as the result of petitioners' compliance with the directives of NJSIAA counsel that Skyland be copied on petitioners' papers—appeared at the hearing with full foreknowledge of the arguments and evidence upon which petitioners intended to rely. Petitioners object that, in clear contravention of the agreed-upon rules, Skyland officials were "not only allowed to present argument to the Committee but, armed with full disclosure of [petitioners'] evidence, were also permitted to present a detailed factual rebuttal," a situation tantamount to "trial by ambush." Moreover, petitioners state, NJSIAA cannot claim that petitioners knew of Skyland's intentions; to the contrary, they specifically noted in their brief submitted to NJSIAA (and provided to Skyland) a week before hearing that, to petitioners' knowledge, Skyland had not requested to intervene. (Petitioners' Brief at 33-35, quotation at 34)

Petitioners further contend that, even if Skyland's testimony were not disallowed on the aforementioned grounds, NJSIAA erred in crediting it because Skyland witnesses relied on "double- or triple-hearsay, unsupported by any competent data in the record other than [their own] off-the-cuff ruminations." According to petitioners, when a Skyland witness was questioned on cross-examination about his testimony regarding

travel time and frequency, he stated that he "didn't know," "hadn't examined," or "wasn't sure;" yet he "attempted elsewhere in his testimony to insinuate through generalized, undocumented statements" that there were other Skyland Conference members who were forced to travel as much as Phillipsburg, and these statements were in turn (improperly) relied upon by both committees of the NJSIAA. (Petitioners' Brief at 35)

Petitioners similarly object to what they characterize as the committees' conflation of petitioners' request for waiver of the 70% Rule and NJSIAA's criteria for withdrawal from leagues and conferences. They stress that this matter is *not* an application to withdraw from the Skyland Conference—a development which, if it should come to pass, would be the subject of an entirely separate proceeding—and that NJSIAA erred in allowing testimony and applying standards as if it were; indeed, they contend, the Skyland officials' entire presentation should be discounted because they actually stated on record that they were "not there about the 70% Rule," but "to defend about leaving the conference if that were to take place, how it would affect our league" and that they had "no comment" on the 70% Rule issue. (Petitioners' Brief at 35-37) Petitioners insist that the 70% Rule and withdrawal from a conference are two separate and distinct matters, and that considerations of one cannot be permitted to influence decisions about the other. They explain that Phillipsburg is addressing the 70% Rule first because it is "reluctant to pursue [leaving the Skyland Conference to join a Pennsylvania league] further without an assurance that its students' dream of an NJSIAA championship will not be compromised in the process." Granting relief here, petitioners proffer, will be "but the beginning of a lengthy process" before the Skyland Conference and NJSIAA where

"all considerations pertinent" to any withdrawal from the Conference by Phillipsburg will be explored and "all parties' interests adequately protected." (Petitioners' Brief at 26-27)

Finally, petitioners object to the NJSIAA Executive Committee decision because, they allege, the transcript of its underlying deliberations reveals that—despite attempts by NJSIAA counsel to keep the group focused on the record before the SCLC—committee members made no attempt to make a judicial determination, instead reaching a policy-political decision centered on the perceived danger of setting a precedent with any decision in favor of petitioners, treating the record before the SCLC as "nothing more than a starting point for a political discussion." Furthermore, while petitioners and the Skyland representatives were dismissed following their presentations before the Committee, the SCLC representative—along with other Executive Committee members who were also members of the SCLC—were permitted to remain and participate fully in Executive Committee deliberations. (Petitioners' Brief at 41-44, quotation at 44)

In response, NJSIAA counters that while petitioners claim "ambush," the fact is that in November 2003 the Skyland Conference adopted a resolution opposing any departure by Phillipsburg and any "exemption from any NJSIAA regulation." (NJSIAA Brief at 36, citing Record on Appeal, Tab 1, Exhibit G) Moreover, although Skyland did not formally move to intervene, NJSIAA contends, petitioners had been advised well before the hearing that:

> As you are aware, the Skyland Conference has expressed opposition to the application and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that conference wishes to submit any document or brief, it should observe the same schedule [as set forth herein for petitioners]. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well.

(*Ibid.*, citing Record on Appeal, Tab 2)

Additionally, according to NJSIAA, Skyland notified both petitioners and NJSIAA that it would be represented at the hearing, and, once there, its witnesses relied on their own personal experience as athletic directors and seasoned arrangers of conference schedules, and they introduced no documents not previously provided—in contrast to petitioners, who were allowed to introduce previously unprovided documents in rebuttal to the statements of Skyland witnesses and who made questionable claims as previously indicated. NJSIAA urges that Skyland did not act as an intervenor, but

> "simply provided testimony which was critical in the assessment of the impact of a waiver of the 70% Rule or the departure of Phillipsburg from that Conference. Representatives of Skyland were present without counsel and were subject to full cross-examination"; everything to which they testified was "consistent with their pre-hearing submissions. What appears to have occurred is that [Skyland's representatives] presented damaging testimony and after never availing itself of the opportunity to take discovery, Phillipsburg now asserted (*sic*) that they were somehow treated unfairly. Further, Phillipsburg fails to specify what it could have uncovered if it had propounded interrogatories on the Skyland Conference." (NJSIAA Brief at 36-37)

With respect to petitioners' "conflation" argument, NJSIAA argues that petitioners are inappropriately trying to "compartmentalize" issues that are, in fact, inextricably intertwined, thereby placing form over substance; NJSIAA notes that Phillipsburg's own athletic director admitted on record that receiving a waiver of the 70% Rule would result in Phillipsburg playing less than the number of games required of it as a member of the Skyland Conference. It was, therefore, not improper for NJSIAA to consider the impact on Skyland of Phillipsburg's departure, which would seriously damage efforts to arrange for a fair and balanced competition schedule in a less-populated area of the state where more travel time is necessarily required of student-athletes. According to NJSIAA, petitioners want to "have it both ways" in a

"manifestly unfair" proposition that attempts to provide them with "the benefits of tournament competition without any of the obligations of conference membership." (NJSIAA Brief at 27-28)

Finally, NJSIAA protests petitioners' suggestion that the proceedings before the Association in any way denied them due process. To the contrary, NJSIAA urges, petitioners were provided with: complete answers to interrogatories; all documents that would be referred to by Skyland witnesses at hearing; the opportunity to present briefs, full arguments of counsel and sworn testimony, as well as to cross-examine Skyland witnesses; a full stenographic record; and a separate appeal to the Executive Committee, the closed session proceedings of which were recorded by a court stenographer. Under the circumstances, NJSIAA concludes, petitioners cannot claim to have been treated unfairly in any respect. (NJSIAA Brief at 37)

COMMISSIONER'S DETERMINATION

Standard of Review

It is by now settled law that the Commissioner's scope of review in matters involving NJSIAA is appellate in nature. *See N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU) 182, 183. Thus, the Commissioner may not overturn an action by NJSIAA absent a finding that NJSIAA acted in a patently arbitrary, capricious or unreasonable manner, nor may she substitute her judgment for that of NJSIAA, even if she would decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision finally reached. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*,

1987 *S.L.D.* 259 As codified in 2000 to provide notice of this long-held standard to the public and regulated parties:[6]

> 1. If NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his *** judgment for that of NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)[7]

Although petitioners argue that a heightened standard of review should be applied herein, citing to constitutional constraints and the obligation of a quasi-governmental body to uphold the public interest, the Commissioner is unpersuaded that NJSIAA's actions in this matter are not appropriately judged by the established standard.

Participation in interscholastic sports has long been held to be a privilege which may be circumscribed by reasonable rules governing eligibility, not a constitutional right. *Burnside et al. v. NJSIAA et* al., 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985); *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182. To that end, NJSIAA was created as a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education, adopted annually by the member schools, and thereafter deemed school policy enforced in the first instance by the internal procedures of NJSIAA.

---

[6] *See,* 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

[7] Formerly *N.J.A.C.* 6A:3-7.4(a). *See,* 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b).

It is beyond dispute that NJSIAA must fulfill its obligations in a manner that is not arbitrary or unreasonable. The courts have held that:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env.*, *N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

The law is thus clear that, while the party challenging an administrative action bears the burden of proof that such action was deficient, *Kopera v. West Orange Bd. Of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960), the administrative agency must still be found to have acted reasonably based upon the facts at hand in order to prevail on appeal; notwithstanding that the challenger may not agree with the manner in which the agency has exercised its discretionary authority, an action withstanding the "rational basis" test is likely to be inherently consistent with the public interest. Even granting, *arguendo*, that NJSIAA is a quasi-governmental entity as claimed by petitioners, public bodies are frequently required to weigh the legitimate concerns of particular individuals or groups—such as petitioners—against broader-based but equally legitimate considerations such as the need to ensure consistency and fairness statewide. [8] As long as they do so based upon the facts before them and in a rational manner, the public interest is likely to have been adequately served.

---

[8] Although petitioners pose the dilemma facing Phillipsburg student-athletes as a "Catch 22" (remain in New Jersey and suffer "extraordinary" travel burden, or affiliate with a Pennsylvania league and be unable to compete for State championships) and characterize their position as "for the kids" in contrast to NJSIAA's paramount goal of protecting the "interests of the organization," the Commissioner stresses that NJSIAA's concern with the integrity of its league/conference structure—which affects every student-athlete in the state—cannot be automatically dismissed as "narrow self-interest."

Accordingly, the Commissioner's review of this matter will proceed under the established "arbitrary, capricious or unreasonable" standard, so that NJSIAA's determination will be upheld if it is found to have been factually based and reasonably reached, with the appropriate level of due process having been provided to petitioners.

Applicability of the 70% Rule

With the aforementioned standard in mind, the Commissioner first upholds NJSIAA's interpretation of the 70% Rule as applying uniformly to all member districts unless a waiver is specifically granted.

In support of their respective arguments, both parties point in whole or part to the pertinent section of the official minutes of the December 1999 annual meeting of the full membership at which the rule was adopted:

> The purpose of this legislation is to limit out-of-state competition to influence schools to remain in conferences within the state to reduce funding and exposure provided by outside out-of-state tournaments and their sponsors, and lastly it would require all NJSIAA tournament teams to place a priority on scheduling New Jersey teams above a national schedule and a national agenda. (Record on Appeal, Tab 1, Exhibit C at 9-10)

Both also point to the April 21, 1999 discussion of Subcommittee C of NJSIAA Advisory Committee as reflected in the committee minutes:

> Amended Proposal: "NJSIAA tournament entries must compete against a schedule composed of no less than 70% NJ schools. If a team does not meet this criteria (*sic*) they will forfeit their entry into NJSIAA tournaments."
>
> Advisory Committee Vote: Unanimously in Favor
>
> Discussion:
>
> - the number of schools now playing extended out of state competition was not supplied in the proposal and was not available on the day of the meeting
>
> - present regulations permit individual schools to leave a conference for a single sport, to play a national schedule

- this type of schedule enables recruitment because of greater exposure
- proposal refers predominately to small parochial schools competing in basketball
- schools have little accountability when they leave a conference to play a schedule comprising a much larger area
- a full schedule of "powerhouse" teams increases the strength of the team, and therefore provides an unfair advantage in the State Tournament
- all schools pay dues to the Association and should be entitled to enter a tournament on a relatively equal basis as determined by the size of the school
- since the proposal as stated would affect all sports, baseball and softball teams may not be able to play as many spring recess games in other areas of the country
- acceptance of the proposal may deny schools/players exposure when players from other states do not have the same restrictions
- schools allowing one team to travel out of state for most [of] the schedule, frequently do not sponsor a broad program of additional sports
- suggestion to change the percentage from 90% to 70% was proposed and accepted by the submitting school

(Record on Appeal, Tab 1, Exhibit B at 4-5)

These documents and other evidence on record leave no doubt—and, indeed, the parties do not truly dispute—that the sponsor's original impetus for offering a proposal to increase in-state game requirements from 50% to 70% arose out of concern over a specific situation not analogous to that of Phillipsburg. *However*, it is equally clear from the committee and plenary discussions surrounding the rule's official proposal—and from the plain and unambiguous language of the rule as finally adopted by NJSIAA, approved by the Commissioner, and applied in the years since its enactment—that the rule is not, and never has been, intended to be selectively aimed at schools deliberately attempting to obtain national exposure for recruitment and sponsorship

purposes, let alone at the small parochial schools or basketball games referenced in the explicit sponsor statements relied upon by petitioners. Rather, as proffered by NJSIAA, notwithstanding the rule's origin as a response to a specific circumstance, from the outset its overarching purpose has clearly been the maintaining of fairness and uniformity in State championship competition by keeping regular season contests substantially in-state and within officially sanctioned structures.

The Commissioner, therefore, cannot agree with petitioners that NJSIAA's interpretation of its rule is "overbroad" under the circumstances (Petitioners' Brief at 46), nor can she find that NJSIAA has acted in anything other than a reasonable and lawful manner in adopting the rule as written and applying it to Phillipsburg along with all other member schools not specifically exempted by waiver.

Waiver of the 70% Rule

Initially, the Commissioner rejects petitioners' argument that NJSIAA erred in "conflating" the questions of waiver of the 70% Rule and "withdrawal" from the Skyland Conference. While petitioners are correct in asserting that no application for withdrawal has been made—and that if and when it is, there is a process in place to consider it—it is disingenuous in the extreme for petitioners to argue that NJSIAA must be foreclosed, in a waiver proceeding, from considering the impact that will inevitably result from grant of a waiver, in the form of the requesting school's reduced availability for contests within its own conference and New Jersey contests generally. As stated by the Skyland Conference President in his December 16, 2003 letter to the Phillipsburg Director of Secondary Education:

> We realize that Phillipsburg has not announced any intention to leave the conference, but if they are successful in the lawsuit [challenging the 70%

> Rule] it would have an impact on our conference.***By restructuring into three (3) basic divisions, [the conference] addressed the primary concern of travel, as discussed by several schools including Phillipsburg. ***To replace the contests that would need to be filled by the void of Phillipsburg High could create additional travel depending on the location of those contests. (Record on Appeal, Tab 5(j))

The issue was raised again during the SCLC hearing:

> MR. HERBERT: Couldn't there be a waiver of the 70 percent rule and yet allow Phillipsburg to remain a member of the Skyland Conference?
>
> MR. WEIGNER [Skyland Conference President]: It would be pretty difficult based upon our divisional setups.
>
> MR. HERBERT: Why is that?
>
> MR. WEIGNER: You have to look at the numbers that would be in existence here. We play each other twice in some sports. We could give you a ten-game schedule that would be more than the 70 percent that would be required. Other than we have a mandatory, a crossover of three which would be a 13th game that would exceed the 70 percent they're looking to have relief from. (*Ibid.*, Tab 6, Transcript of Hearing at 101-02)

Moreover, in Phillipsburg's case, obtaining a waiver from the 70% Rule is plainly the first step in the school's strategy to position itself for a withdrawal from Skyland; the school clearly wants to assure its right to New Jersey championship play, and its entitlement to play fewer than the number of games required to sustain conference membership, before it submits an application to sever its New Jersey affiliation and join a Pennsylvania league. The following excerpt from the transcript of the SCLC hearing is instructive:

> MR. HERBERT: Well what I'm getting to is that wouldn't you have to – in order to get a waiver of the 70 percent rule, wouldn't that involve playing less than what was required as a member of the Skyland Conference or am I misreading that?
>
> THE WITNESS [Phillipsburg Athletic Director Fisher]: That would be true in all sports, yes.
>
> MR. HERBERT: Isn't the 70 percent rule tied in directly with continued membership in the Skyland Conference? I would think the 70 percent rule is tied into, directly into, membership and NJSIAA as well as the Skyland Conference.

> MR. RUBIN: Maybe you're raising a point that's not in dispute. The reason why we're concerned about the 70 percent rule – and, frankly, about the only effect your decision on the 70 percent rule would have on us is if and when we apply for withdrawal from the Skyland Conference. We don't dispute that. We haven't made the decision yet to apply for withdrawal from the Skyland Conference. That decision may well be affected by your decision in this proceeding. (*Ibid.*, at 76-77)

The school's intentions are likewise signaled by the September 29, 2004 letter to the Phillipsburg Superintendent from the President of the Lehigh Valley Conference, confirming their prior conversation to the effect that, if Phillipsburg joins Lehigh Valley, officials there would work to create schedules that comply with NJSIAA practice and first-contest start dates, and ensure that the school can conclude its Pennsylvania commitments in time to participate fully in New Jersey championship play. (Record on Appeal, Tab 5(h); Petitioner's Exhibit P-9)

Under the circumstances, it was not only appropriate but *necessary* for the NJSIAA to consider, as part of the relative hardship of Phillipsburg as compared to other member schools, the effect of granting the requested waiver on these schools;[9] otherwise, the Association would not be fulfilling its statutory responsibility as the governing agency for interscholastic athletics statewide. While viewing Phillipsburg's waiver request in a vacuum undoubtedly serves the school's purpose,[10] it is also an abrogation of NJSIAA's duty to its other member student-athletes and their schools. Accordingly, the Commissioner holds that broader consideration of the impact of any waiver granted to Phillipsburg was, and is, entirely proper in this matter.

---

[9] The Commissioner contrasts this standard with the far more comprehensive league withdrawal criteria alluded to by petitioners in their allegation of "conflation."

[10] See, for example, the transcript of the SCLC Hearing at 109-13, 135-36.

With respect to the question of whether NJSIAA's grant of a waiver to Moorestown compels a similar grant to Phillipsburg, the Commissioner fully concurs with NJSIAA, for the reasons set forth by the Association above, that the Moorestown matter is factually distinguishable and that the record clearly shows the waiver in that instance to have been granted for lawful reasons having no basis in preferential treatment due to religion.[11] Therefore, petitioners cannot claim that NJSIAA's decision was deficient in this regard.

There is, however, one respect in which petitioners' challenge to NJSIAA's determination has merit. Petitioners are correct in their contention that the "compromise" proceeding directed in this matter was quasi-judicial in nature and envisioned that petitioners would have specific foreknowledge of adverse testimony and evidence to be presented at hearing:

> The standard for intervention will be liberalized to allow other districts, upon request, to present testimony and evidence at the hearing, provided that they are subject to pre-hearing discovery to the same extent as if they were a party. (Record on Appeal, Tab 2, Attachment, January 26, 2004 Letter to Counsel from Director of Controversies and Disputes)

As petitioners correctly note, at no point did Skyland formally request to intervene. Instead, what appears to have occurred is that—based on Phillipsburg's desire for a waiver and Skyland's opposition to it being a matter of common knowledge generally, and of prior discussion between officials of Phillipsburg and Skyland specifically—Skyland's participation in waiver proceedings before NJSIAA was treated

[11] The Commissioner is unpersuaded by petitioners' attempt to force a contrary conclusion. It is apparent from the context of the statements (from NJSIAA's response to Interrogatories) on which petitioners rely, as well as from documentation in the record, that "religious" is nothing more than a description of the particular affiliation Moorestown sought to preserve in requesting a waiver, and that the religious nature of the affiliation—as opposed to the fact that it was long-standing, deep-rooted and central to the school's identity—was not a determinative factor in NJSIAA's decision to grant the school's request.

by NJSIAA as implicitly understood and less formal protocols were observed. In preparation for hearing, counsel for NJSIAA wrote:

> As you are aware, the Skyland Conference has expressed opposition to the application [for waiver of the 70% Rule] and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that Conference wishes to submit any documents or brief, it should observe the same schedule. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well. (*Ibid.*,Tab 2, July 13, 2004 Letter from Counsel for NJSIAA to Counsel for Petitioners, copy to Skyland President)

To which Skyland responded:

> On behalf of the Skyland Conference I would like to submit 15 copies of our 2004-2006 Divisional alignments.
>
> The addition of Ridge and Immaculata high schools necessitated new alignments which aided some concerns of several members of our conference. Travel, strength of program and size of schools were the main criteria used in developing the enclosed document. (*Ibid.*, Tab 3, August 25, 2004 Letter from Skyland Conference President to NJSIAA)

Noting the above-quoted exchange and prior communications between petitioner and Skyland, NJSIAA contends that petitioners were well aware of Skyland's intention to participate in the NJSIAA hearing despite the lack of formal intervention proceedings. NJSIAA urges that technical objections based on strict procedural standards should not be allowed to obscure the fact that petitioners were given extensive due process in this matter, and that notice of Skyland's participation was provided to petitioners in substance if not in precise conformance with the rules of administrative practice; thus, it would be truly unfair if petitioners are allowed to benefit because they chose not to avail themselves of the opportunity to seek discovery.

While the Commissioner understands NJSIAA's position given the history of this matter and the lack of precedent for a "hybrid" proceeding of the type

arranged to accommodate it—and while she recognizes that petitioners might well have chosen to seek clarity about Skyland's actual intentions prior to the hearing rather than standing on ceremony—the fact remains that the "ground rules" established for this proceeding by mutual consent of the parties entitled petitioners to rely on the normal process for effectuating intervention, notwithstanding liberalization of the standard for entitlement to intervene. Therefore, the Commissioner must concur with petitioners that the testimony of Skyland's witnesses cannot serve as a basis for the NJSIAA decision on appeal herein. Similarly, petitioners are correct in their contention regarding the participation of SCLC members in the Executive Committee's quasi-judicial review of the SCLC decision.

Notwithstanding these deficiencies, however, the Commissioner cannot in good conscience conclude that petitioners are entitled at this point to prevail on appeal. Although petitioners have presented skillfully prepared evidence and argument in order to demonstrate their own hardship and rebut the "other districts similarly situated" claim proffered by NJSIAA in its Answers to Interrogatories—and have succeeded on procedural grounds in disposing of substantial testimony and evidence adverse to that presentation[12] and, consequently, to the viability of the NJSIAA decision based upon them—the Commissioner simply cannot decide this matter in petitioners' favor on a record that does not permit her to fully and fairly assess the situation of Phillipsburg relative to other member schools and student-athletes, including those who

[12] Skyland representatives: discussed the history of the conference and its present structure, including the current divisional alignment as supported by Phillipsburg; disputed many of petitioners' travel claims and opined that Phillipsburg is only one of many conference districts that experience longer travel times than typically found elsewhere in the state; contended that the conference tried to be flexible and accommodating in attempting to reduce travel time; and noted that its membership was surveyed and—by a vote of 15-2 (18-member conference, Phillipsburg did not vote)—determined that Phillipsburg should neither leave the conference nor receive a waiver of the 70% Rule.

will be impacted if Phillipsburg is granted the requested waiver. Moreover, the Commissioner notes that, even if the requisite record could be developed before the Commissioner, NJSIAA is the appropriate entity to make such an assessment in the first instance, and that the Association must be given the opportunity to do so based upon a sufficient factual record and without the participation of SCLC members in Executive Committee deliberations.

Accordingly, the Commissioner finds that the appropriate remedy at the present juncture is to remand this matter to NJSIAA for such proceedings as are necessary for the Association to make the requisite decision—after due deliberation based upon a properly developed factual record, with no ambiguity as to appearance(s) by adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by such party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg's situation is, in fact, so extreme relative to other member schools that the hardship imposed on it by the 70% Rule outweighs any hardship that will result to other schools from its reduced availability for in-state play if a waiver of the rule is granted. In so holding, the Commissioner stresses that **it has already been decided herein that**: 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to Moorestown does not compel a similar grant to Phillipsburg; 3) NJSIAA is fully entitled to bring broader policy considerations into its determination in this matter; and 4) any subsequent appeal to the Commissioner of NJSIAA's decision on remand will be reviewed under the established "arbitrary and capricious" standard. Petitioners' federal claims (and NJSIAA's defenses thereto) remain preserved for future litigation, while their claims with respect

to NJSIAA's assessment of legal fees may be pursued—since neither party has fully prevailed herein—in any appeal of NJSIAA's decision on remand that petitioners deem warranted.

IT IS SO ORDERED.[13]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/26/05

Date of Mailing: 9/26/05

[13] This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

364-05

#364-05

J.M.R., o.b.m. T.G. and K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* Residency Appeal challenging the respondent's resolution that disenrolled her children, T.G. and K.G., from the Ewing School District. Petitioner claimed that – during the time frame in question -- she and her children resided in Ewing with petitioner's parents, but visited her fiancé frequently at his Trenton residence. The matter was transmitted to the OAL, and a hearing was scheduled for September 30, 2004. Petitioner failed to appear at the hearing; respondent filed a certification stating that petitioner owes the Ewing School District $10,668.90 in tuition for the 110 days that petitioner's children were illegally enrolled.

The ALJ found that petitioner enrolled her two children in the Ewing School District for 110 school days while the petitioner was not domiciled therein. Accordingly, the ALJ concluded that petitioner owes respondent $10,668.90, and ordered that petitioner reimburse respondent said amount.

Upon careful and independent review of the record in this matter, the Initial Decision, and the petitioner's exception letter, the Commissioner adopts the decision and recommended order of the ALJ. It was proper under the circumstances for the ALJ to enter an initial decision based upon respondent's *ex parte* proofs, and, pursuant to *N.J.A.C.* 1:1-18.4(c), petitioner's exception letter cannot resuscitate her appeal.

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 13, 2005

OAL DKT. NO. EDU 6269-04
AGENCY DKT. NO. 236-7/04

J.M.R., o.b.m. T.G. and K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been carefully and independently reviewed, and the Commissioner is constrained to adopt the decision and order of the Administrative Law Judge (ALJ).

On June 7, 2004, respondent Ewing Township Board of Education passed a resolution disenrolling T.G. and K.G. from the Ewing School District, based upon surveillance evidence, gathered primarily in February 2004, indicating that they lived in Trenton. On July 8, 2004, J.M.R. submitted a petition challenging respondent's action. In it she alleged that she and her children resided in Ewing with her parents, but that she and the children often stayed with her fiancé in Trenton. Attached to her petition were copies of respondent's June 7 resolution and the surveillance reports upon which the resolution had been based.

Other than a notation in one of the surveillance reports that J.M.R.'s car was registered to her parents' address in Ewing, petitioner submitted with her petition no support of her allegation that she and the children resided in Ewing. To the contrary, eleven of the above

mentioned twelve surveillance reports supported the conclusion that petitioner's children were not staying in Ewing. Surveillance on nine of the eighteen days in February 2004 showed the children leaving for school from the Trenton address of petitioner's fiancé.

The matter was transmitted to the OAL on July 23, 2004. On August 9, 2004, the OAL sent a notice to counsel for respondent, and to petitioner at the address of her parents in Ewing. The notice acknowledged receipt of the case, advised that another notice with a hearing date would be sent, and instructed, in pertinent part, that:

> All discovery must be complete 5 days before the hearing unless another date is established by the judge. Therefore, parties must begin immediately to exchange information, to seek access to public documents, to exhaust other informal means of obtaining information and, if necessary, to serve discovery notices and motions.

On August 30, 2004, the OAL notified the parties that the hearing would begin on September 30, 2004. This notice included the following instructions:

> A judge will decide the case based on only what is presented at the hearing. If there are any papers you would like the judge to consider, you must have them at the hearing. Please bring two copies of each paper. If you want any witnesses to testify, you must arrange for their attendance at the hearing. If you are not sure that they will attend the hearing, you should serve them with a subpoena together with the appropriate fee at a reasonable time before the hearing, if possible, three days before the hearing.

The notice also advised that briefs would not be allowed after the hearing without the judge's permission, and that non-attendance at the hearing could result in dismissal of the case.

It is undisputed that petitioner did not attend the hearing on September 30, 2004. A letter dated October 8, 2004 from respondent's counsel to the ALJ indicates that the ALJ agreed to accept a certification by respondent's residency officer to serve as support for respondent's answer and counterclaim, which contended that petitioner's children attended 110 days of school in Ewing while residing in Trenton, and that petitioner consequently owed

respondent tuition. At $47.92 per day for the younger child and $49.07 for the older daughter, the certification calculated $10,668.90 as the total tuition due. The Commissioner notes that this October 8, 2004 correspondence and certification were not copied to petitioner. Nor was a follow-up letter dated May 12, 2005 from respondent to the ALJ.

On July 18, 2005 the ALJ wrote to respondent. In the letter the ALJ referred to the fact that petitioner had not appeared at the hearing, and stated "I was advised that the petitioner had moved and her children were registered in the Trenton school system." The ALJ appeared not to have received respondent's certification concerning tuition, and advised: "I will dismiss petitioner's claim for lack of prosecution and return the file to the Department of Education as a failure to appear if I do not receive the certificate within 10 days." This letter was sent to both parties. The respondent replied to the ALJ's letter on July 26, 2005, forwarding a copy of the October 2004 certification, but did not copy petitioner on this correspondence.

In the initial decision, issued on August 30, 2005 and mailed on September 1, 2005, the ALJ established that on September 30, 2004, respondent's counsel had informed him that petitioner's children had been registered for school in Trenton. Nonetheless, respondent wished to recoup tuition for the year that the children had attended school in Ewing. (Initial Decision at 1)

Based upon his review of respondent's unopposed certification, the ALJ found that petitioner had enrolled her two children in respondent's district for 110 school days while she was not domiciled therein, and that the calculations in respondent's certification showed that petitioner owes respondent $10,668.90. (Initial Decision at 2) Accordingly, he ordered petitioner to pay respondent said amount. *(Ibid.)*

In her "exceptions," dated September 7, 2005, petitioner reiterates the allegations in her petition that she resided in Ewing during the 110 days in question and only visited (frequently) her fiancé in Trenton. (Petitioner's Exceptions at 1-2) As was the case with her petition, petitioner includes no evidentiary support for the allegations. Rather, she states "I will be willing to provide any documentation needed to support my appeal." (*Id.* at 2) Petitioner does not deny that she received notices from the OAL advising that she must prepare all her documentary and testamentary evidence before the hearing that would be scheduled for her case, and submit the evidence at the hearing. Nor does she deny that she received notice that the hearing would be on September 30, 2004, or explain why she did not attend the hearing.

The Commissioner cannot disagree with the ALJ's determination that respondent has prevailed on its counterclaim for tuition. Under the circumstances of this case, it was proper for the ALJ to enter an initial decision on the merits based upon respondent's *ex parte* proofs, provided that in the decision he memorialized petitioner's failure to appear, which he did. *N.J.A.C.* 1:1-14.4(c). I note with disapproval that respondent did not copy petitioner on his correspondence with the ALJ. However, petitioner does not deny that she had two notices from the OAL advising her to prepare her evidence and present it at the hearing, and that she received both a notice and a copy of a letter from the OAL advising her that failure to appear at the hearing could result in the dismissal of her petition for lack of prosecution. That same letter made clear that the ALJ would award respondent tuition upon respondent's submission of a certification.

Petitioner's "exceptions" cannot resuscitate her appeal, because "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be

incorporated or referred to within exceptions." *N.J.A.C.* 1:1-18.4(c). Accordingly, the Initial Decision and recommended Order of the ALJ are hereby adopted.

IT IS SO ORDERED*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6269-04

AGENCY REF. NO. 236-7/04

J.M.R., o/b/o T.G. AND K.G.,

Petitioner,

v.

EWING TOWNSHIP BOARD OF EDUCATION,

Respondent.

No appearance by petitioner

Jeffrey F. Belz, Esq., for respondent

Record closed: July 28, 2005 Decided August 30, 2005

BEFORE **ANTHOHY T. BRUNO,** ALJ:

This matter originated as a *pro se* Residency Appeal filed by J.M.R., mother of T.G. and K.G., of the decision by respondent ("Ewing") that T.G. and K.G. are disenrolled from the Ewing Township School District. J.M.R.'s appeal was transmitted to the Office of Administrative Law, Mercerville, New Jersey. On that date J.M.R. did not appear; counsel for Ewing advised this tribunal that T.G. and K.G. were registered in the City of Trenton School District. Counsel also requested leave to file a certification of the amount due to Ewing for educational services rendered T.G. and K.G. while T.G. and K.G. resided outside of the Ewing School District.

Respondent's Certification (Exhibit R-1) states that petition's 2 children were illegally enrolled in the Ewing School District for 110 days each. K.G. was enrolled as an elementary student and T.G. was enrolled as a middle school student. The per diem tuition as determined by the New Jersey Department of Education for an elementary student as $47.92 and for a middle school student was $49.07. The total tuition owed by petitioner for K.G. is $5271.20 (110 days x $47.92 = $5271.20); and the total tuition owed by petitioner for T.G. is $5397.70 (110 days x $49.07 = $5397.70). For both students petitioner owes $10,668.90.

Having reviewed the calculations in respondent's certification, I Find as a Fact that petitioner enrolled her 2 children in the Ewing School District while petitioner was not domiciled therein for 110 school days. I **CONCLUDE** that petitioner owes Ewing $10,668.90.

ORDER

Accordingly, it is **ORDERED** that petitioner reimburse respondent in the amount of $10,668.90 as tuition due respondent for 110 days of attending school in the Ewing Township School District.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 2005
DATE

ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 30, 2005
DATE

Mailed to Parties:

SEP - 1 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

373-05

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, an approved private school for the disabled, appealed the determination by the respondent Department disallowing certain costs in its final approved tuition rate for the 2002-03 fiscal year; specifically, an expenditure of $1,739 for an event that the petitioner describes as a "field trip" or "group activity" designed to promote social skills and as a reward for successful students under the school's behavior modification program. Petitioner claimed that the activity advances legitimate instructional goals and objectives consistent with each student's Individualized Education Program (IEP), and that the respondent acted arbitrarily, capriciously and unreasonably by failing to include the cost in the approved tuition rate. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: petitioner promoted the field trip in question as an opportunity for students to practice social skills, improve their ability to communicate and learn proper behavior outside the school setting; participation in the event was integral to the token economy plan of behavior modification used by the petitioning school; respondent Department failed to introduce any countervailing evidence to rebut petitioner's showing that the activity is fully consistent with the contents of the students' IEPs. The ALJ concluded that respondent Department misapplied the controlling regulations in disallowing the cost in question, and ordered that the sum of $1,739 be included in setting the tuition rate that petitioner charges to sending public school districts.

The Commissioner concurs with the ALJ's determination that the respondent Department erred in disallowing the cost at issue in this matter, adopts the recommended decision of the OAL, and directs that the sum of $1,739 is appropriately included in setting the tuition rate that the petitioner charges to its sending public school districts.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 14, 2005

OAL DKT. NO. EDU 1807-05
AGENCY DKT. NO. 358-10/04

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent sought and was granted an extension of time within which to file exceptions to the Initial Decision. Petitioner, similarly upon request, was granted an extension to file reply exceptions. These submissions were filed in accordance with the modified timelines, and were fully considered by the Commissioner in reaching her determination herein.

Respondent's exceptions present suggested interpretative analysis of *N.J.S.A.* 18A:36-21 to 23, *N.J.A.C.* 6A:23-4.5(a)(30), *N.J.A.C.* 6A:23-4.2(a)(1), *N.J.A.C.* 6A:23-4.2(a)(1)(ii) and *N.J.A.C.* 6A:23-4.2(a)(1)(iv), which it avers leads to the conclusion that the Administrative Law Judge (ALJ) erred in his determination that the Department misapplied these provisions in excluding the $1,739 field trip cost from the tuition rate charged to sending public school districts. It urges that the Commissioner subscribe to this interpretation in order "to avoid any implication arising from the decision in this matter that private schools for the disabled may simply incur a charge for any type of student activity – whether a field trip, social activity, or other event deviating from regular day-to-day

instruction – and then pass this cost along to its sending districts by justifying the activity as 'educational' in retrospect." (Respondent's Exceptions at 15)

Upon careful and independent review of the record, the Commissioner, finding respondent's exceptions unpersuasive under the particular circumstances existing in this case, concurs with the Administrative Law Judge's (ALJ) determination, for the reasons clearly presented in his Initial Decision, that the Department erred in disallowing the cost at issue in this matter. The certification offered by petitioner establishes that the field trip advanced the goal of implementing petitioner's behavior modification program and afforded a learning experience for the students. As noted by the ALJ, respondent offered no countervailing affidavit or certification.

Accordingly, the recommended decision of the OAL is adopted. It is hereby directed that the sum of $1,739 is appropriately included in setting the tuition rate that the Bergen Center for Child Development, Inc. charges to its sending public school districts.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/05

Date of Mailing: 10/17/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1807-05

AGENCY DKT. NO. 358-10/04

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,

Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Melanie M. Brooks, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: July 12, 2005 Decided: August 31, 2005

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal brought by the Bergen Center for Child Development, Inc. ("BCCD"), an approved private school for the disabled, from the disallowance of certain

costs in its final approved tuition rate for the 2002-03 fiscal year ("FY 2003"). Pursuant to *N.J.S.A.* 18A:46-14-21, private schools for the disabled receiving students from public school districts may not charge a tuition rate that exceeds the actual cost per student as determined under rules prescribed by the Commissioner of Education ("Commissioner") and approved by the State Board of Education.

Auditors from the New Jersey Department of Education ("Department") excluded the amount of $1,739 incurred for an event involving 109 luncheon guests at the Colonial Inn. In their written findings, the auditors disallowed the cost on three separate grounds: first, that it constitutes "an ordinary living expense for a student that is not normally assumed by the parents of a student" and, therefore, non-allowable under *N.J.A.C.* 6A:23-4.5(a)(30);[1] second, that BCCD has failed to show that the cost is "consistent with the individualized education programs (IEP) of a disabled student," as required by *N.J.A.C.* 6A:23-4.2(a)(1);[2] and, third, that the cost is unreasonable within the meaning of *N.J.A.C.* 6A:23-4.2(a)(1), which limits allowable expenses to those that are "ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in administration of public funds."[3]

BCCD describes the event as a "field trip" or "group activity" designed to promote social skills and as a reward for successful students under the school's behavior modification program. Originally, BCCD had characterized the event as a school "prom," but now contends that such label is a misnomer. Despite its misleading name, BCCD explains that the activity is not an after-school dance. Since the activity allegedly advances legitimate instructional goals and objectives, BCCD maintains that the Department acted arbitrarily, capriciously and unreasonably by failing to include the cost in the approved tuition rate.

---

[1] OCI erroneously cited this regulation as *N.J.A.C.* 6A:23-4.4(a)(3). The correct citation for the pertinent regulation during FY 2003 was *N.J.A.C.* 6A:23-4.5(a)(30) (1996). Effective August 16, 2004, this regulatory section was amended and recodified. 36 *N.J.R.* 1313(a), 36 *N.J.R.* 3895(a). Identical language is still found at *N.J.A.C.* 6A:23-4.5(a)(30) (2004).

[2] This section is recodified in the current regulations as *N.J.A.C.* 6A:23-4.2(a)(ii) (2004).

[3] This section is recodified as *N.J.A.C.* 6:23-4.2(a)(iv) (2004).

Procedural History

By letter, dated March 10, 2004, the Department notified BCCD that it had completed a fiscal monitoring of petitioner's budget for FY 2003 and had approved all but $1,739 of its $2.2 million request.[4] On or about May 13, 2004, BCCD filed an appeal with the Department's Office of Compliance Investigation setting forth in detail the reasons for its disagreement with the disallowance. Thereafter, on June 24, 2004, the Office of Compliance Investigation reviewed BCCD's submissions and upheld its earlier determination. On or about July 7, 2004, BCCD filed a second-level appeal to the Department's Chief of Staff. A week later, on July 14, 2004, the Chief of Staff issued a letter of denial. Consequently, on October 8, 2005, BCCD filed an appeal to the Commissioner of Education ("Commissioner"). The Department filed an answer on November 4, 2005.

On November 5, 2005, the Commissioner requested that the parties submit cross-motions for summary decision. The Department filed a motion for summary decision, together with supporting brief and exhibits, on December 10, 2004. BCCD filed a motion for summary decision, together with supporting brief and certification, on December 13, 2004. On December 30, 2004, the Department filed a reply brief. Subsequently, on February 16, 2005, the Commissioner transmitted the matter to the Office of Administrative Law for ruling on the motions. The OAL heard oral argument by telephone conference on July 12, 2005.

Findings of Fact

All of the material facts are derived from financial and other official records maintained by BCCD and subject to inspection by the Department during its fiscal monitoring. **I FIND** the following facts to be undisputed:

[4] The auditors also recommended that BCCD exclude similar items for the following fiscal year should the same type of costs be incurred.

Bergen Center for Child Development, Inc. is a nonprofit private school for the disabled organized under the laws of New Jersey and located in Haworth, New Jersey. BCCD has been approved by the Department to provide special education programs to public school children.[5] Most of BCCD's students come from low income households. Ninety percent of its student population qualifies for the free or reduced lunch program. Because of their economic hardship, BCCD infers that the majority of its students cannot afford to participate "in many outside community experiences that are crucial to developing appropriate social behaviors and community awareness."

More than 100 participants attended the school-sponsored event held at the Colonial Inn on May 23, 2003. BCCD expended $16.50 per person for use of the facility and a multi-course meal. Unlike the typical school prom, the event was not held at night, the students did not bring dates, and participation was not limited to a single grade or class. Staff-to-student ratio at the event was one staff member to every two students, consistent with a regular day of instruction at BCC. School administration had directed staff members in attendance "to carry out each student's instructional goals" and "to discharge their regular instructional duties and responsibilities." The record does not reflect whether any formal academic instruction occurred and, if so, what subjects were taught to such a large group comprised of students of different ages and abilities.

Instead, BCCD promoted the activity as an opportunity for students to practice social skills, improve their ability to communicate and learn proper behavior outside of the school setting. Students had to demonstrate appropriate behavior at school in order to earn enough tokens to attend the event.[6] As such, the event was said to be "an integral part of the token economy plan of behavior modification in effect at BCCD."

---

[5] The Department's website lists BCCD as a private school approved for classified children with behavioral disabilities, moderate cognitive impairment or multiple disabilities. http://www.nj.gov/njded/specialed/instate/

[6] Those students who did not qualify for the reward were assigned to "an alternative in-school education day."

In support of its contention that the event is consistent with each student's IEP, BCCD relies on the social and life skill goals incorporated "in every student's Annual Instruction Guide (AIG)."[7] Among other desirable outcomes, these goals include: helping children recognize the importance of applying what they learn in school to real life situations, understanding stressful situations and ways to cope with stress, becoming aware of the difference between appropriate and inappropriate behaviors, and demonstrating the importance of good manners for the development of positive relationships with others. Furthermore, BCCD refers to various skill sets taught as part of its regular curriculum, such as etiquette and table manners, proper grooming and hygiene, social interaction, public speaking and learning how to dance. Significantly, the Department has failed to introduce any countervailing evidence to rebut BCCD's showing that the activity is fully consistent with the contents of the students' IEPs.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Department misapplied the controlling regulations in disallowing the cost in question.

The Legislature has expressed concern for the quality of education for handicapped pupils as well as its overall cost to the public. *Council of Private Schools for Children With Special Needs, Inc. v. Cooperman*, 205 *N.J. Super.* 544 (App. Div. 1985). A private school receiving pupils from a local public school district may not charge the local board tuition that exceeds "the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." *N.J.S.A.* 18A:46-21. *Council of Private Schools, supra.* Pursuant to this statutory grant of rule-making power, the Commissioner, with the approval of the State Board, has promulgated regulations governing the maximum tuition rates that may be

[7] An individualized education program means written plan developed jointly by the parents and school staff "which sets forth present level of performance, measurable annual goals and short-term objectives or benchmarks and describes an integrated sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives." *N.J.A.C.* 6A:14-1.3.

charged by private schools for the handicapped. *N.J.A.C.* 6A:23-1.1 to -4.6.

N.J.A.C. 6A:23-4.5(a)(30) (1996) prohibits a private school from passing along to the sending public districts "an ordinary living expense for a student that is normally assumed by the parent of a student attending a public day school." Uncontradicted proofs establish, however, that the event was not a school "prom" in any traditional sense, but more in the nature of a "field trip" outside the school. The event held by BCCD satisfies the literal definition of a "field trip" as "a journey by a group of pupils, away from the school premises, under the supervision of a teacher." *N.J.S.A.* 18A:36-22. Educators recognize that field trips "are a regular part of a District's program and are designed to help familiarize the students with their community and foster their independence." *Clifton Bd. of Educ. v. D.C.*, OAL Dkt. No. EDS 19771-97, *1998 N.J. AGEN LEXIS 345* (May 1998). Teachers may be assigned to supervise educational trips which are properly part of the curriculum. *Parrish v. Moss,* 200 *Misc.* 375, 106 *N.Y.S.*2d 577 (Sup. Ct. 1951), *aff'd without opinion*, 270 *App. Div.* 608, 107 *N.Y.S.*2d 580 (App. Div. 1951).

Although public boards of education are legally authorized to impose all or part of the costs of a field trip on the pupils' parents or legal guardians, an express exception exists for "pupils in special education classes and pupils with financial hardship." *N.J.S.A.* 18A:36-21. In determining financial hardship, the criteria shall be the same as the statewide eligibility standards for free and reduced price meals under the state school lunch program. *Id.*[8] Consequently, the cost of this field trip would not be normally assumed by the parent of a student who attends public day school. All of the students at BCCD are in special education and, therefore, exempt on that basis alone. Ninety percent of the students at BCDD receive free or reduced price school lunches and are entitled to attend field trips free of charge.

[8] Regardless of whether or not a student can meet these criteria for financial hardship, "no student shall be prohibited from attending a field trip due to inability to pay the fee." *N.J.S.A.* 18A:36-23.

Next, consideration must be given to whether the cost is "consistent with the students' individualized education program" as mandated by *N.J.A.C.* 6A:23-4.2(a)(1) BCCD's director has represented in his sworn certification that the field trip is "consistent with the objectives of the IEP that address the need for social and life skills as well as personal growth and development." Documents attached to the certification, including annual instructional goals and various curricular materials, substantiate that the teaching of appropriate behavior in social situations is an essential element of each child's program in this specialized school for children with behavioral disabilities. For its part, the Department has not offered any evidence suggesting otherwise. Absent the production of opposing evidence that creates a genuine issue of material fact, summary decision must be entered in favor of BCCD on this issue. *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995); *Contini v. Board of Educ.*, 286 *N.J. Super.* 106 (App. Div. 1995).

Finally, the question arises whether the cost is "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds" as provided by *N.J.A.C.* 6A:23-4.2(a)(1) (1996). This particular requirement is more subjective than the others, due to the difficulty of articulating a bright line test for separating reasonable from unreasonable expenses. Few would seriously argue that a sending public district must pay for a trip to Madrid by the Spanish class or front row seats at a top Broadway show for a theater class, although certainly such costs could be justified as serving a legitimate educational purpose. Nonetheless, the Department concedes that the cost of $16.50 per person for a field trip is not inherently excessive and makes no showing that it is unusual or extraordinary. In its reply brief, "the Department does not take issue with whether the amount of money is reasonable, but with whether the event itself was a reasonable expenditure of funds toward special education." Framed in this way, the inquiry becomes whether the field trip advanced the goal of implementing BCCD's behavior modification program and afforded a learning experience for the students. Since the undisputed facts clearly establish the educational value of the field trip, the sending districts must bear their fair share of its cost.

Order

It is **ORDERED** that the sum of $1,739 be included in setting the tuition rate that BCCD charges to sending public school districts.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/31/05
DATE

Mailed to Parties: Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 1 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

374-05

D.L. and Z.Y. on behalf of minor children T.L. and K.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners originally filed a *pro se* Residency Appeal in 2001 challenging the respondent's determination that their children, T.L. and K.L., had lived in West Windsor from January 2000 until April 2001, and therefore owed tuition to Princeton Regional Schools for the period of their ineligible attendance. Petitioners ultimately appealed to the Superior Court, Appellate Division, where it was determined that, despite owning property in both Princeton and West Windsor for a period of time, petitioners' intent during the period at issue was to sell the West Windsor property and establish a permanent home in Princeton. The Appellate Division remanded the matter for the purpose of determining the amount of tuition owed, if any, to the Princeton Regional School District for the period during which the petitioners' children were enrolled between January 3 and February 29, 2000, the date on which petitioners' closed on the purchase of a home in Princeton. A remand hearing was scheduled for August 4, 2005, and notice was mailed to a former address of petitioners. Petitioners failed to appear at the hearing, and aver that they were not properly notified.

At the scheduled hearing, respondent presented *ex parte* proofs to establish a *per diem* tuition cost of $56.59 for the 1999-2000 school year; the number of days that school was in session during the period in question was estimated at 37. Based on this information, and the fact that there was no opposition to the certification, the ALJ concluded that petitioners owe respondent $4,187.66 as prorated tuition for T.L. and K.L. for the period from January 3 to February 29, 2000 when they were attending school in Princeton Regional School District while not domiciled there.

Upon review of the record and the initial decision of the ALJ, the Commissioner remands the matter to the OAL for a hearing to determine whether petitioners owe respondent tuition and, if so, how much is due. In so deciding, the Commissioner finds that although petitioners had properly advised the OAL of their change of address, the OAL sent the hearing notice to an address that was a year out of date, preventing petitioners from their right to appear and be heard. The Commissioner further notes that a hearing is necessary in light of the existence of School Policy #5118 (Admission of Non-Resident Students), which allows the waiver of tuition charges for up to sixty days where families intend to move into the district but are temporarily prevented from doing so due to reasons beyond their control.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 17, 2005

OAL DKT NO. EDU 6015-04
AGENCY DKT. NO. 335-8/01

D.L. and Z.Y. on behalf of minor children T.L. and K.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been independently reviewed. Upon such review the Commissioner is constrained to remand the matter to the OAL.

Petitioners lived in Princeton from March 1995 to June 1998, during which time their children attended Princeton district schools. They moved to West Windsor in 1998 and the two children consequently attended West Windsor schools during the 1998-1999 school year. In November 1999, petitioners listed their West Windsor house for sale and in December 1999, they contracted to purchase a condominium in Princeton. They returned the children to Princeton Schools on January 3, 2000, and closed on the Princeton condominium on February 29, 2000. Because the West Windsor home was on the market for a long time, the family spent time in both homes for the next year and a half, until the West Windsor house was sold.

In March of 2001, upon the report of a guidance counselor, a Princeton attendance officer conducted a residence investigation and observed the children and mother

leaving the West Windsor house a few times in the mornings to drive to school in Princeton. Petitioners conceded that they spent time in both homes. They believed that a lived-in home (i.e., the one in West Windsor) would sell faster, and they were, further, redecorating to attract buyers. In addition, petitioners explained that their parents had been visiting from China and staying in the West Windsor home. Nonetheless, on April 4, 2001, respondent notified petitioners that their children were not legal residents of Princeton and would have to be removed from the district schools by April 9, 2001. The notice further advised that tuition would be due for past "illegal" attendance.

On July 24, 2001, petitioners closed on another house in Princeton, at B. Lane, and on August 10, 2001 they moved in. Respondent sent petitioners a letter on August 1, 2001 that the Princeton Board of Education determined after a hearing that petitioners' children had lived in West Windsor from January 2000 through April 6, 2001, and owed tuition. Petitioners appealed to the Commissioner of Education on August 22, 2001.

Petitioners pursued their administrative remedies and ultimately appealed to Superior Court, Appellate Division. The Appellate Division determined that the evidence supported petitioners' position that, although they owned property in both Princeton and West Windsor for a period of time, their intent during the period at issue was always to sell the West Windsor property and establish a permanent home in Princeton. Accordingly, the Appellate Division remanded the matter for the specific purpose of determining "the amount of tuition owed, *if any*, to the Princeton Regional School District for the period of time the children were enrolled in the district from January 2000 until February 29, 2000, when petitioners closed on the purchase of the Princeton [condominium] home" (emphasis added).

The case was remanded back down the chain to the OAL. A notice for an August 5, 2004 pre-hearing conference was sent out on July 26, 2004. Petitioners wrote to the administrative law judge (ALJ) on July 30, 2004 requesting an adjournment because of a business trip, notifying him that petitioners' address had changed, and asking that all future communications be sent to the new address: H. Drive, Princeton, NJ 08540. Nonetheless, the OAL's notice for the remand hearing, which was set for August 4, 2005, was sent out on July 18, 2000, to B. Lane, where petitioners apparently had not resided for over a year.

Not surprisingly, petitioner did not attend the August 4, 2005, hearing. Respondent presented *ex parte* proofs to establish a *per diem* tuition fee to be multiplied by 37 days for two students. The ALJ found that petitioners owed respondent $4187.66, and ordered petitioners to pay.

In their exceptions, petitioners argue: 1) that they were not properly notified about the August 4, 2005, hearing; and 2) that charging them tuition for January 3 through February 29, 2000 would be contrary to respondent's School Policy # 5118, Admission of Nonresident Students, which allows the waiver of tuition charges for up to sixty days where families intend to move into the district but are temporarily prevented from doing so due to reasons beyond their control. As to petitioner's first argument, respondent contends in its reply exceptions that because petitioners received a conference notice a year before the hearing, and were able to acquire a copy of the ALJ's September 2, 2005, Initial Decision on Remand, the Commissioner should assume that petitioners received notice of the August 4, 2005 hearing. As to petitioners' second argument, respondent maintains: 1) that petitioners are precluded from making the argument now because they did not make it at the hearing or at any other time during the proceedings in this matter; 2) that School Policy #5118 is permissive, and does not mandate a

waiver for petitioners; and 3) that petitioners did not follow the procedure for requesting a tuition waiver.

The Commissioner need not reach to the merits of the issues raised about Princeton School Policy #5118, because she finds that petitioners did not receive proper notice of the August 4, 2005 hearing. Petitioners properly advised the OAL of their change of address, but the OAL sent the hearing notice to an address that was a year out of date, preventing petitioners from their right to appear and be heard.

Further, the Appellate Division remanded for a finding as to the amount of tuition, if any, that petitioners might owe to respondent. An examination of School Policy #5118, the history of its application, and any facts about the petitioners' circumstances that might be pertinent to the policy, are clearly relevant to an ultimate determination about whether and/or how much tuition is due.

Accordingly, the Commissioner finds that petitioners are entitled to a hearing to determine whether they owe respondent tuition and, if so, how much is due. The Commissioner hereby remands the matter to the OAL for that purpose.

IT IS SO ORDERED*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/05

Date of Mailing: 10/18/05

---

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6015-04

AGENCY REF. NO. 335-8/01

D.L. and Z.Y., o/b/o K.L.,

Petitioners,

v.

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT,

Respondent.

No appearance by D.L. or Z.Y.

Steven M. Fleischer, Esq., appeared for respondent (Sills, Cummins, Epstein & Gross, P.C., attorneys)

Record Closed: August 4, 2005 Decided: September 2, 2005

BEFORE **ANTHONY T. BRUNO,** ALJ:

This matter originated as a *pro se* Residency Appeal filed by D.L. and Z.Y., parents of T.L. and K.L., of the decision by respondent ("Princeton") that D.L. and Z.Y. owned Princeton $27,292.38 for tuition for the period when T.L. and K.L. attended school in the Princeton School District but were not domiciled within the said district. The decision by the State Board of Education affirming the decision of the Commissioner of Education affirming the action of Princeton was appealed to the Appellate Division of Superior Court of New Jersey. The

Appellate Division reversed the determination of the State Board of Education and remanded the matter "for a determination of the amount of tuition owed, if any, to the Princeton Regional High School District for the period of time the children were enrolled in the district from January 2000 until February 29, 2000, when petitioners closed on the purchase of the Princeton home."

The matter was eventually transmitted back to the Office of Administrative law for further consideration consistent with the decision of the State Board of Education to conduct such proceedings as may be required to fulfill the terms of the Appellate Division decision. A prehearing conference was scheduled for August 5, 2004 but was adjourned at petitioners' request because they would be on a business trip. The hearing was scheduled for August 4, 2005 at 2 p.m. at the Office of Administrative Law, Mercerville, New Jersey. On that date, time and place counsel for respondent appeared, but neither respondent appeared, nor did anyone telephone or otherwise communicate with the Office of Administrative Law to explain petitioners' non-appearance. Counsel for respondent was granted leave to present *ex parte* proofs, as permitted at *N.J.A.C.* 1:1-14,4 (c), to establish the per diem tuition for Princeton schools in January and February 2000.

The Certification of Judy A. Wilson, Superintendent of Schools for the Princeton Regional School District, (Exhibit R-1) affirms that the tuition rate for the 1999-2000 school year was $56.59 per day. Wilson further estimated that school was in session for 37 days during the 8 week period between January 3, 2000 and February 29, 2000, and concludes that the tuition calculated by multiplying $56.59 x 37 days x 2 children was $4187.66. Note should be taken that the information concerning tuition was developed during the March 21, 2002 hearing and was not contested by the petitioners.

There being no opposition to the certification, and the calculations being accurate, I Find as a Fact that the tuition rate of Princeton School District for the 1999-2000 school year was $56.59 per day and there were 37 school days between January 3 and February 29, 2000. I therefore **CONCLUDE** that petitioners owe respondent $2093.83 for each of their 2 children enrolled in the Princeton school between January 2 and February 29, 2000.

ORDER

Accordingly, it is **ORDERED** that petitioners reimburse respondent in the amount of $4187.66 as the prorated tuition due between January 3, 2000 and February 29, 2000 for T.L. and K.L. attending school in Princeton Regional High School District while not domiciled therein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 2005
DATE

ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 2, 2005
DATE

Mailed to Parties:

SEP - 7 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

378-05

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Newton Board of Education appealed Department's determination that the Board was responsible for the 1998-99 and 1999-2000 educational costs of a State-placed student pursuant to *N.J.S.A.* 18A:7B-12. The State had become the student's legal guardian in January 1996.

The ALJ addressed the matter in two separate decisions, one an Order dealing with the 1998-99 school year and the other an Initial Decision incorporating the Order by reference and dealing with the 1999-2000 school year. For 1998-99, the ALJ found that, on the determinative date for fixing the parents' residency for purposes of local district fiscal responsibility, the parents actually resided in Frankford Township. For 1999-2000, the ALJ found that a newly promulgated rule pertaining to students for whom the State was legal guardian—adopted by the State Board of Education in July 2004—applied retroactively, so that, pursuant to this rule, the State as legal guardian was responsible for the student's 1999-2000 educational costs.

The Commissioner adopted the ALJ's determination that Newton was not responsible for the student's educational costs in either of the years at issue, but modified the ALJ's analysis to hold that the State was responsible for both years in light of the deference to be accorded to the State Board's now-established interpretation of a previously ambiguous aspect of *N.J.S.A.* 18A:7B-12 and its implementing rules.

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 21, 2005

OAL DKT. NO. EDU 7399-00
AGENCY DKT. NO. 221-6/00

RECORD SEALED

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), incorporating a Partial Summary Decision issued on July 28, 2004, but not submitted for final agency decision at that time, have been reviewed. The Department of Education (Department) filed exceptions addressing both decisions, and the Newton Board of Education (Newton) duly replied.

In its exceptions, the Department objects, without elaboration, to the Administrative Law Judge's (ALJ) "seemingly inconsistent use of the applicable regulations, i.e., the former *N.J.A.C.* 6A:23-5.2 and the current *N.J.A.C.* 6A:23-5.2, to reach irreconcilable conclusions." (Respondent's Exceptions at 2)

In reply, Newton references its prior submissions and contends that the ALJ's two decisions—one addressing 1998-99 and the other 1999-2000—together provide a "cohesive resolution" to the underlying appeal. In response to the Department's claim of inconsistency, the district counters that the two decisions are entirely consistent, and it additionally points to the ALJ's statement that the outcome of

the second decision—made subsequent to amendment of *N.J.A.C.* 6A:23-5.2—would have been the same regardless of which version of the rule was applied. Accordingly, Newton urges, the Commissioner should adopt the ALJ's decisions and issue an order directing the Department to restore all funds withheld for B.S.'s tuition for the 1998-99 and 1999-2000 school years, together with interest, costs and fees. (Petitioner's Reply Exceptions at 2-4, quotation at 2)

Upon review, the Commissioner adopts the ALJ's ultimate determination that Newton is not responsible for B.S.'s educational costs for the years at issue, but modifies the ALJ's reasoning as follows.

Initially, the Commissioner notes that during proceedings at the OAL, this matter was argued largely as a dispute concerning the point at which the residency of B.S.'s parent or guardian should be fixed for purposes of identifying the school district responsible for B.S.'s educational costs. Simply stated, under this framing of the issue, if the determinate date were the point immediately prior to B.S.'s first admission to Devereux-Deerhaven[1] as a resident student (October 21, 1995), as contended by Newton, then the district where B.S.'s parents then resided (Frankford Township) should be responsible for costs; alternatively, if it were the point prior to B.S.'s first placement of any kind by the Division of Youth and Family Services (DYFS), as contended by the Department, then Newton would be the responsible district.

However, as became apparent by the time the OAL proceedings were reaching closure, the parties' dispute more accurately turns on the question of how

[1] Although the school's name is given at various places in the record and Initial Decision as "Devere*a*ux-Deerhaven," the Commissioner uses the spelling found in DYFS records, e.g. Exhibit H, Petitioner's December 18, 2003 Motion for Summary Judgment (DYFS Placement Report).

N.J.S.A. 18A:7B-12 is to be applied in instances where the State has become the legal guardian of a covered student, as it did for B.S. in January 1996.

N.J.S.A. 18A:7B-12 provides in pertinent part, as substantially unchanged from the law's enactment in 1979 (P.L. 1979, c. 207):[2]

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. The district of residence for children in resource family homes shall be the district in which the resource family parents reside. If a child in a resource family home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such resource family placement had occurred.
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
> ***
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.***

During all times at issue herein, *N.J.A.C. 6A:23-5.2,* the rule promulgated to implement this statute, read in pertinent part as follows:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> 1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
>
> 2. The "present district of residence" of a child placed by a State

[2] P.L. 2004, c.130, s.39, changed the term "foster" to "resource family" throughout *N.J.S.A.* 18A:7B-12.

> agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.
>
> (b) The "present district of residence" or "district of residence" referred to in *N.J.S.A.* 18A:7B-12b shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Human Services or the Juvenile Justice Commission on forms prepared by the Department of Education.

B.S. was placed in Devereux-Deerhaven as a residential student on October 21, 1995; she remained in this placement until November 6, 1998. At that point, she was consecutively placed in two foster homes, but neither placement proved successful. On January 26, 1999, B.S. was once again placed as a resident student in Devereux-Deerhaven, where she remained for the balance of the period at issue herein.

Thus, under the statutory-regulatory scheme set forth above, responsibility for B.S.'s educational costs would have been fixed on dates when the State was undisputedly the student's legal guardian: For 1998-99, the determinative date would have been the last school day prior to October 16, 1998, since 1998-99 was a "subsequent school year" in the same educational placement, pursuant to the second sentence of *N.J.A.C.* 6A:23-5.2(a)2. For 1999-2000, it would have been October 16, 1999, since B.S. was at Devereux-Deerhaven at all times subsequent to October 21, 1995—other than the period between November 6, 1998 and January 26, 1999, when she was in foster homes—and *N.J.S.A.* 18A:7B-12a provides that residency determinations for placements

made *subsequent* to placement in a foster home shall be made as if the foster placement(s) had not occurred.

The Department, in applying the above-quoted law to B.S., interpreted her status as a ward of the State to mean that her guardian's "district of residence" could not be determined pursuant to the first paragraph of *N.J.S.A.* 18A:7B-12b; thus, in the Department's reading, the second paragraph of that section would apply instead, so that the district where B.S. resided with her parents immediately prior to her initial placement by DYFS (Newton) would be responsible for her educational costs.

Given the ambiguity of the then-existing legal framework with respect to the effect of State legal guardianship on determining the district of residence pursuant to *N.J.S.A.* 18A:7B-12, the Commissioner finds the Department's approach—seeking to the greatest extent possible to assign fiscal responsibility for a State-placed student to a local school district based upon the residence of the student's parent or guardian—to have been a reasonable and lawful attempt to fulfill the statute's intent of consistency with the general principles of New Jersey school funding.[3] Indeed, had this matter come to the agency for final decision prior to July 2004, the Commissioner might well have sustained the Department's conclusion that Newton was the district responsible for the years in question.

However, the fact remains that the State Board of Education has now enacted a specific regulation interpreting *N.J.S.A.* 18A:7B-12 with respect to the central question in this matter. On July 7, 2004, the State Board adopted amendments to the above-referenced rule "to clarify and ensure the determination of financial responsibility

[3] See legislative history, P.L. 1979, c. 207.

based on district of residency," [4] so that, as amended effective August 16, 2004, *N.J.A.C.* 6A:23-5.2 now reads in pertinent part as follows (changes in italics *thus*):

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> 1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
>
> 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided *[with his or her parent or guardian]* immediately prior to his or her *[initial]* *most recent* admission to a State facility or most recent placement by a State agency.
>
> *3. If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State will assume financial responsibility for the child's educational costs in subsequent school years.*
>
> (b) The "present district of residence" or "district of residence" referred to in *N.J.S.A.* 18A:7B-12b shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Human Services or the Juvenile Justice Commission on forms prepared by the Department of Education.

Rules and regulations promulgated by the State Board of Education—as head of the Department of Education pursuant to *N.J.S.A.* 18A:4-1 and the body empowered to implement the school laws of the State, *N.J.S.A.* 18A:4-15—are to be accorded great deference in interpreting statutes under the agency's jurisdiction.

[4] See 36 N.J.R. 1313(a), 1316; adopted 36 N.J.R. 3895(a).

St. Peter's Univ. Hosp. v. Lacy, 185 *N.J.* 1; *Nelson v. Board of Educ.*, 148 *N.J.* 358, 364 (N.J. 1997); *GE Solid State, Inc. v. Director, Div. of Taxation*, 132 *N.J.* 298, 306, 625 A.2d 468 (1993); *Merin v. Maglaki,* 126 *N.J.* 430, 436-37, 599 A.2d 1256 (1992) Given that the State Board of Education has—by adopting a clarifying rule precisely on point—now acted to interpret *N.J.S.A.* 18A:7B-12 clearly and unequivocally with respect to the effect of State guardianship[5] on district of residency determinations, the Commissioner is guided by the State Board's reading of the statute. Consequently, the Commissioner finds that, because the State undisputedly became B.S.'s legal guardian by virtue of the January 17, 1996 court order[6] issued pursuant to *N.J.S.A.* 30:4C-15 *et seq.* (Exhibit B, Petitioner's January 2005 Motion for Partial Summary Decision on Remaining Issues), responsibility for her 1998-99 and 1999-2000 educational costs pursuant to *N.J.S.A.* 18A:7B-12 are properly found to lie with the State.

Accordingly, the Initial Decision of the OAL, as expanded and modified herein, is adopted as the final decision in this matter. Newton's motion for summary decision is granted with respect to both years at issue, and the Department is directed to restore all funds withheld from the district as payment for B.S.'s tuition for the 1998-99 and 1999-2000 school years. However, the Commissioner rejects Newton's request for prejudgment interest as without support in the record, *N.J.A.C.* 6A:3-1.17, and its request for costs and attorney fees as contrary to the well-established principle that the Commissioner may not direct such compensation in the absence of express statutory

---

[5] The Commissioner stresses that the referenced rule addresses State *legal guardianship* of a student, as distinct from State *custody*. (See *N.J.A.C.* 6A:23-5.3)

[6] At various places in the record and Initial Decision, the date of State assumption of B.S.'s guardianship is given as January 16, 1996 and January 17, 1995; the date of the actual court order is January 17, 1996. The Commissioner also notes that this order is erroneously referenced, in the ALJ's Order at 2 and Initial Decision at 3, as the instrument of effectuating B.S.'s placement into DYFS custody in 1992.

authority. *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 441 (1990). Finally, in the interest of protecting the confidentiality of the numerous DYFS records contained in the file, the Commissioner directs that the record of this matter be sealed.

IT IS SO ORDERED.[7]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05
Date of Mailing: 10/21/05

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION AND CROSS MOTION
FOR SUMMARY DECISION
OAL DKT. NO. EDU 7399-00
AGENCY DKT. NO. 221-6/00

BOARD OF EDUCATION TOWN OF NEWTON, SUSSEX COUNTY,
Petitioner,
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

Heidi M. G. Handley, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Patricia M. O'Neil, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General, attorneys)

Record Closed: April 22, 2005 Decided: June 7, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

On June 5, 2000, the petitioner, Newton Board of Education ("Newton" or "Board") filed a verified petition with the Commissioner of Education seeking an Order reversing the determination of the respondent, New Jersey Department of Education,

Newton School District is the district of residence for B.S., and therefore, responsible for B.S.' tuition costs. Additionally, petitioner sought costs, attorney's fees and such other relief that the Commissioner deemed equitable.

On June 22, 2000, the NJDOE filed an Answer wherein it sought, *inter alia*, dismissal of the petition.

On August 10, 2000, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. After a prehearing conference, the matter was scheduled for hearing on December 11, 2001. The matter was adjourned and rescheduled on several occasions. On October 23, 2002, an Order was issued by the undersigned providing for a disclosure of certain Division of Youth and Family Service records of B.S. A June 17, 2003, an Order issued that denied Emergency Interim Relief and or a Stay which, if granted, would have enjoined the respondent from withholding $55,000 in state aid to the Newton School District.

Thereafter the parties moved for summary judgment. On July 28, 2004, Partial Summary Decision was entered in favor of the petitioner, Newton BOE. Specifically, it was found that for the September to November portion of the 1989-1999 school year, B.S. did not reside in the district but resided in Frankford Township, the place of residence of her parents. However, Summary Decision was denied for the period beginning January 26, 1999, since no evidence was submitted concerning the parents' residence at that time.

Thereafter, the parties exchanged further discovery and motions were filed on the subsequent time period. This decision addresses that subsequent time frame, commencing on January 26, 1999.

FACTS

Based on the record, I **FIND** the following **FACTS**:

On or about August 26, 1992, the Division of Youth and Family Services ("Division") notified the Newton Public School Child Study Team, that B.S., a 10-year-old District student, was placed in the care and custody of the Division on or about August 14, 1992. The placement was pursuant to an Order of the Superior Court on January 17, 1995.

The Division placed B.S. and a sibling in a foster home in Branchville, Sussex County, outside of the Newton School District. While in the Sussex-Wantage Regional School District, B.S. was assessed by their child study team. She was classified as emotionally disturbed (ED) and was placed at the Durand Academy. In October 1995, B.S. was placed at Devereaux Deerhaven (Devereaux) Chester, N.J. Devereaux is a residential facility that treats emotionally disturbed and sexually abused adolescents. B.S.' parents continued to reside in Newton, N.J. On November 10, 1992, the NJDOE determined B.S.'s district of residence to be Newton, N.J. where B.S.'s parents resided. B.S. attended Devereaux from October 21, 1995 until November 6, 1998. Thereafter, B.S. was placed in two separate foster homes. On January 26, 1999, B.S. was again placed in Devereaux.[1] DYFS was awarded guardianship of B.S. on January 17, 1996[2]

On November 1, 1996, the NJDOE sent a letter to the Frankford Township Board of Education notifying it that it was the responsible school district for B.S., as her parents' residence "lies within the boundaries of the Frankford Township School District." Therefore, a determination was made that the responsible district for B.S.'s tuition costs was Frankford Township.

On March 18, 1999, the NJDOE again determined that B.S.'s district of residence as the Newton School District pursuant to *N.J.S.A.* 18A:7B-12(b). The letter from the NJDOE provided:

---

[1] Newton is only seeking reimbursement of budgetary funds withheld through the 1999-2000 school year.

[2] The NJDOE letter to the Frankford Township Board of Education states that the parents' residence is in "Frankford Township School District. However, the street address is listed as Newton, in portions of the record. The actual school district was the Frankford School District. It is argued that Newton is listed as the street address because that is the post office location for residents of the Frankford School District.

> The Department of Human Services has asked my office to determine the district of residence for [B.S.], a child who was placed by DYFS with Devereaux-Deerhaven . . . on January 27, 1999.
>
> The specific facts in this case are as follows:
>
> 1. The child has been a ward of the state since January 17, 1996, but the state was not legal guardian at the time of initial placement by DYFS with the Teaching Family Home of [redacted][3] Therefore, we must refer to the second criteria in our determination, which is the address of parent or guardian as of the date of initial placement. . .
>
> 2. Parent(s) [were residents at [redacted information] as of the date of initial placement on August 19, 1994.[4] (Exhibit K)

LEGAL ARGUMENT

The NJDOE argues that this initial placement in 1993 is the date that should be utilized when determining the responsible district of residence and at that time the parents' address was in Newton, New Jersey. Petitioner contends that on October 21, 1995, the initial date of admission to Devereaux-Deerhaven, B.S.'s parents' residency was in Frankford Township, and that is the date that should be used for determination of the responsible district of residence.

FINDINGS, DISCUSSION AND CONCLUSIONS

Under the New Jersey Uniform Procedure Rules, a party may move for summary decision upon all or any of the substantive issues in a case. *N.J.A.C.* 1:1-12.5(b). When considering this motion, the Administrative Law Judge may make a ruling in favor

[3] The information is redacted because it is confidential pursuant to *N.J.S.A.* 9:6-8.10(a).

of the motion when the papers filed along with any supporting affidavits show that no genuine issue as to any material fact exists and that the moving party is entitled to a decision as a matter of law. *Ibid.*

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment 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 judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [*R.* 4:46-2(c).]

The Supreme Court in *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995), provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529. I **FIND** that the instant matter is appropriate, in part, for summary disposition.

As noted, I have previously determined that the Frankford School District was the responsible party for B.S.' tuition costs for October 21, 1995 to November 6, 1998. One month after my decision, the controlling regulation, *N.J.A.C.* 6A:23-5.2 was amended. It provides in its pertinent part that:

> If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State

[4] The actual date of initial placement was August 19, 1993, not 1994, since 1993 is the year used by the NJDOE in its brief and in Newton's reply letter, dated August 4, 1999 (Exhibit L) and is the date listed in Exhibit H, which is a DYFS placement report.

> will assume financial responsibility for the child's educational costs in subsequent school years.
>
> [*N.J.A.C.* 6A:23-5.2(a)(3).]

Consequently, petitioner argues that, pursuant to the "time of decision" rule, the regulation as amended, should apply herein. The respondent opposes this contention and argues that the "time of decision" rule is inapplicable because this matter was not "pending" at the time the current regulation became effective. Respondent argues that this case is on appeal since June 2000, when the petitioner filed an appeal from the NJDOE's determination that it was the district of residence. Thus, it must be decided whether the previous regulation applies pursuant to the presumption against retroactivity or whether the current regulations apply pursuant to the "time of decision" rule.[5]

Courts have found current law generally applicable for administrative decision-making, when the law changes while a case is pending. *Ziffrin, Inc. v. United States*, 318 *U.S.* 73, 78 (1942); see also *Commissioner v. Peter A. Ladas*, 2004 *WL* 3743375 (N.J. Adm). An administrative agency must apply the law at the time of its decision, "[o]therwise the administrative body would issue orders contrary to the existing legislation." *Ziffrin, supra*, 318 *U.S.* at 78. An exception to the "time of decision" rule is that a current law may not be applied if it will divest a vested right a party obtained under the prior law. *Riggs v. Long Beach Tp.*, 101 *N.J.* 515, 521 (1986).

In Landgraf v. USI Film Products, 511 *U.S.* 244 (1994), the United States Supreme Court examined the distinction between the presumption against retroactivity and the "time of decision" rule. The Court found the general presumption against retroactive legislation "deeply rooted in our jurisprudence." *Id.* at 265. The Court reasoned "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Ibid.* Indeed, it has been recognized that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and

[5] Administrative regulations are subject to the same rules of construction and constitutional standards as a statute. *State, Dept. of Health v. Tegnazian*, 205 *N.J. Super.* 160, 174 (1985).

universal appeal." *Ibid.* The Court found, however, the "time of decision" rule applies when the statute either affects the propriety of prospective relief, or clearly states it is to be applied retroactively. *Id.* at 273.

The New Jersey Supreme Court described the "time of decision" rule as "a well-established principle that an appellate court on direct review will apply the statute in effect at the time of its decision, at least when the legislature intended that its modification be retroactive to pending cases." *Kruvant v. Mayor & Council of Cedar Grove,* 82 *N.J.* 435, 440 (1980); *S&L Assocs., Inc. v. Washington Twp.,* 35 *N.J.* 224, 227 (1961); *Borough of Little Ferry v. Bergen County Sewer Auth.,* 9 *N.J.* 536 (1952). The purpose underlying the principle is to effectuate the current policy declared by the legislative body. *Kruvant, supra* 82 *N.J.* at 440.

Current statutes and regulations "may be retroactively applied where 'the Legislature has expressed its intent, either explicitly or implicitly,' that they should be so applied, 'when the reasonable expectations of those affected by the regulations warrant such application,' or when the regulation is ameliorative or curative." *Seashore Ambulatory Surgery Ctr., Inc. v. State Dep't of Health*, 288 *N.J. Super.* 87 (App. Div. 1996) (citing *Twiss v. State, Dep't of Treasury*, 124 *N.J.* 461 (1991). Pursuant to the ameliorative or "curative exception to prospective application, a new law is given retroactive effect 'if it is designed merely to carry out or explain the intent of the original statute.'" *Serrano v. Gibson*, 304 *N.J. Super*, 314, 319 (App. Div. 1977). Stated another way, the new law's purpose is merely to remedy a perceived imperfection in or misapplication of a statute." *Ibid.*

In the instant matter, the New Jersey Register provides that *N.J.A.C.* 6A:23-5.2 was amended '"to clarify and ensure the determination of financial responsibility based on district of residency." CF: 36 *N.J.R.* 1313(a), 1316 (emphasis added). Section (a)(3) was added to *N.J.A.C.* 6A:23-5.2 to clarify and ensure the results set forth in *N.J.S.A.* 18A:7B-12. Therefore, I **FIND** that "time of decision" rule applies because section (a)(3) falls under the ameliorative or curative exception to prospective application because it is designed merely to carry out or explain the intent of the original

statute, *N.J.S.A.* 18A:7B-12. The agency intended *N.J.S.A.* 18A:7B-12 to obtain the exact same results whether applying the previous or current version of *N.J.A.C.* 6A:23-5.2.

The next issue is the determination of B.S.'s residing during the period in issue.

Determining a child's district of residence is governed by *N.J.S.A.* 18A-7B-12 which states in relevant part:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> . . .
>
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.
>
> [*N.J.S.A.* 18A:7B-12.]

The criteria for determining a school child's district of residence is provided in *N.J.A.C.* 6A:23-5.2:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.

2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-state facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided immediately prior to his or her most recent admission to a State facility or most recent placement by a State agency.

3. If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State will assume financial responsibility for the child's educational costs in subsequent school years.

[*N.J.A.C.* 6A:23-5.2.]

The facts in this case are clearly governed by *N.J.A.C.* 6A:23-5.2(a)(3). I **FIND** that the State became B.S.'s legal guardian on January 16, 1996, which is after the date of B.S.'s initial placement by DYFS in Devereaux-Deerhaven in 1995. Further, the State remained B.S.'s legal guardian when she was enrolled for subsequent school years and after she left Devereaux-Deerhaven from November 6, 1998 through her re-enrollment on January 26, 1999. Therefore, pursuant to *N.J.A.C.* 6A:23-5.2(a)(3), I **CONCLUDE** the State is financially responsible for B.S.'s educational costs for the period of January 26, 1999 through June 27, 2000.

I further **FIND** that this holding still prevails even under the previous version of *N.J.A.C.* 6A:23-5.2. I **FIND** that under the prior version, B.S. most recent placement was the January 26, 1999 placement at Devereaux-Deerhaven. Her prior placement (October 21, 1995) ended when she was discharged from the facility on November 6, 1998. Pursuant to *N.J.S.A.* 18A:7B-12(b), the district of residence for B.S. "shall be the present district of residence of the parent or guardian with whom the child lived prior to his . . . most recent placement by a State agency." Guardianship of B.S. was awarded to the State on January 17, 1996. Therefore, the State, and neither of B.S.'s parents, was B.S.'s guardian prior to her most recent placement on January 26, 1999. *C.F. Prospect Park Bd. Of Educ. V. State of New Jersey, Dept. of Education*, 97 *N.J.A.R.2d* (EDU) 134, *affirmed in part and remanded in part, Comm.r at 140.*

CONCLUSION

Thus, for the foregoing reasons, summary decision is hereby **GRANTED** in favor of the petitioner Newton Board of Education for the placement of B.S. from January 26, 1999 to June 27, 2000 and respondent's cross motion is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/7/05
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/7/05
DATE

Mailed to Parties:

JUN 0 8 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATOR
OFFICE OF ADMINISTRATIVE LAW

sej

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 7399-00

AGENCY DKT. NO. 221-6/00

BOARD OF EDUCATION TOWN OF NEWTON, SUSSEX COUNTY,

Petitioner,

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Allan P. Dzwilewski, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Kimberley Lake Franklin, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General, attorneys)

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

On June 5, 2000, the petitioner, Newton Board of Education ("Newton" or "Board") filed a verified petition with the Commissioner of Education seeking an Order reversing the determination of the respondent, New Jersey Department of Education, Division of Finance, Office of School Finance ("NJDOE" or "Respondent") that the

Newton School District is the district of residence for B.S., and therefore, responsible for B.S.' tuition costs. Additionally, petitioner sought costs, attorney's fees and such other relief that the Commissioner deemed equitable.

On June 22, 2000, the NJDOE filed an Answer wherein it sought, *inter alia*, dismissal of the petition.

On August 10, 2000, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. After a prehearing conference, the matter was scheduled for hearing on December 11, 2001. The matter was adjourned and rescheduled on several occasions. On October 23, 2002, an Order was issued by the undersigned providing for a disclosure of certain Division of Youth and Family Service records of B.S. A June 17, 2003, an Order issued that denied Emergency Interim Relief and or a Stay which, if granted, would have enjoined the respondent from withholding $55,000 in state aid to the Newton School District.

FACTS

The salient facts that give rise to the instant controversy are as follows:

On or about August 26, 1992, the Division of Youth and Family Services ("Division") notified the Newton Public School Child Study Team, that B.S., a 10-year-old District student, was placed in the care and custody of the Division on or about August 14, 1992. The placement was pursuant to an Order of the Superior Court on January 17, 1995.

The Division placed B.S. and a sibling in a foster home in Branchville, Sussex County, outside of the Newton School District. While in the Sussex-Wantage Regional School District, B.S. was assessed by their child study team. She was classified as emotionally disturbed (ED) and was placed at the Durand Academy. In October 1995, B.S. was placed at Devereaux Deerhaven (Devereaux) Chester, N.J. Devereaux is a residential facility that treats emotionally disturbed and sexually abused adolescents.

B.S.' parents continued to reside in Newton, N.J. On November 10, 1992, the NJDOE determined B.S.'s district of residence to be Newton, N.J. where B.S.'s parents resided. B.S. attended Devereaux from October 21, 1995 until November 6, 1998. Thereafter, B.S. was placed in two separate foster homes. On January 26, 1999, B.S. was again placed in Devereaux.[1] DYFS was awarded guardianship of B.S. on January 17, 1996[2]

On November 1, 1996, the NJDOE sent a letter to the Frankford Township Board of Education notifying it that it was the responsible school district for B.S., as her parents' residence "lies within the boundaries of the Frankford Township School District." Therefore, a determination was made that the responsible district for B.S.'s tuition costs was Frankford Township.

On March 18, 1999, the NJDOE again determined that B.S.'s district of residence as the Newton School District pursuant to *N.J.S.A.* 18A:7B-12(b). The letter from the NJDOE provided:

> The Department of Human Services has asked my office to determine the district of residence for [B.S.], a child who was placed by DYFS with Devereaux, Deerhaven. . . on January 27, 1999.
>
> The specific facts in this case are as follows:
>
> 1. The child has been a ward of the state since January 17, 1996, but the state was not legal guardian at the time of initial placement by DYFS with the Teaching Family Home of [redacted][3] Therefore, we must refer to the second criteria in our determination, which is the address of parent or guardian as of the date of initial placement. . .
> 2. Parent(s) [were residents at [redacted information] as of the date of initial

[1] Newton is only seeking reimbursement of budgetary funds withheld through the 1999-2000 school year.

[2] The NJDOE letter to the Frankford Township Board of Education states that the parents' residence is in "Frankford Township School District. However, the street address is listed as Newton, in portions of the record. The actual school district was the Frankford School District. It is argued that Newton is listed as the street address because that is the post office location for residents of the Frankford School District.

[3] The information is redacted because it is confidential pursuant to *N.J.S.A.* 9:6-8.10(a).

placement on August 19, 1994.[4] (Exhibit K)

LEGAL ARGUMENT

The NJDOE argues that this initial placement in 1993 is the date that should be utilized when determining the responsible district of residence and at that time the parents' address was in Newton, New Jersey. Petitioner contends that on October 21, 1995, the initial date of admission to Devereaux-Deerhaven, B.S.'s parents' residency was in Frankford Township, and that is the date that should be used for determination of the responsible district of residence.

FINDINGS, DISCUSSION AND CONCLUSIONS

Under the New Jersey Uniform Procedure Rules, a party may move for summary decision upon all or any of the substantive issues in a case. *N.J.A.C.* 1:1-12.5(b). When considering this motion, the Administrative Law Judge may make a ruling in favor of the motion when the papers filed along with any supporting affidavits show that no genuine issue as to any material fact exists and that the moving party is entitled to a decision as a matter of law. *Ibid.*

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment 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 judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving

[4] The actual date of initial placement was August 19, 1993, not 1994, since 1993 is the year used by the NJDOE in its brief and in Newton's reply letter, dated August 4, 1999 (Exhibit L) and is the date listed in Exhibit H, which is a DYFS placement report.

> party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

The Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995), provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529. I **FIND** that the instant matter is appropriate, in part, for summary disposition.

There are two determinations required in the instant matter. The first is to determine the district of residence of B.S.' parents on October 21, 1995, as that is the pertinent date for the first portion of the 1998-1999 school year (through November 6, 1998). The second determination required is B.S.'s parents' address as of January 26, 1999, as that is the pertinent date for the second portion of the 1998-1999 and the full 1999-2000 school years.

The district of residence determination is governed by *N.J.S.A.* 18A:7B-12, which states in relevant part that:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement has occurred.
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior

> to his most recent admission to a State facility or most recent placement by a State agency.
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> ******
>
> c. If the district of residence cannot be determined according to the criteria contained herein, ... the State shall assume fiscal responsibility for the tuition of the child. ...
>
> [*N.J.S.A.* 18A:7B-12.]

The implementing regulations defines district of residence as:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> 1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
>
> 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b <u>means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency</u>. ... The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

[*N.J.A.C.* 6A:23-5.2 (emphasis added).][5]

Prospect Park Board of Education v. State of New Jersey, Department of Education, Bureau of School Finance, et. al, 97 *N.J.A.R.*2d(EDU) 134, *affirmed in part and remanded in part*, Comm'r at 140. The School District contested the NJDOE's finding that it was the responsible district, pursuant to *N.J.S.A.* 18A:7B-12. There, the child was placed in foster care on November 2, 1990 and remained in a foster home until November 26, 1990, at which time she was admitted to Bergen Pines County Hospital. In December of 1990, it appears that she was admitted to the Holley Center for the first time until her discharge on August 29, 1991.[6] After her discharge from the Holley Center, she was consecutively placed in two different foster homes. Thereafter, she then stayed in a shelter for two weeks prior to returning to the Holley Center on June 15, 1992. It was determined that L.L.'s mother's residence during her second stay at the Holley Center was Prospect Park. It was held that:

> Viewed in its correct context, the term "initial placement" in the regulation must mean the latest or most recent time when the child was placed in a state facility or private school and not an earlier placement that occurred years ago and has been superseded by intervening events. ... Any contrary interpretation would run directly counter to the express statutory language and thereby exceed the agency's proper rule-making authority. Administrative regulations cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute.
>
> [*Prospect Park BOE, supra* 97 *N.J.A.R.*2d (EDU) at 137. (citations omitted)]

The Commissioner agreed with findings and conclusions that Prospect Park was the responsible school district within the meaning of *N.J.S.A.* 18A:7B-12. The Commissioner remanded the case for further findings concerning the unilateral placement of the student by DYFS.

---

[5] The regulation in effect on January 26, 1999, was codified as N.J.A.C. 6:20-5.3. The current regulation is essentially the same after the recodification to 6A, with only minor administrative changes that do not affect the current matter.

[6] The dates of the Bergen Pines and Holley Center placements are not clear, but the date of discharge from L.L's first stay at the Holley Center is certain.

I **FIND** and **CONCLUDE** that the *Prospect Park BOE* is controlling herein. The respondent is attempting to refer back to DYFS' initial placement of B.S. and not the current placement. During the placement of B.S. in Devereaux from October 21, 1995 to November 6, 1998, her parents lived within the Frankford School District, as was acknowledged by the NJDOE in its November 1, 1996, letter to the Frankford Township Board of Education. Therefore, pursuant to *N.J.S.A.* 18A:7B-12, *N.J.A.C.* 6A:23-5.2, and *Prospect Park BOE, supra*, Frankford Township Board of Education is the responsible district for B.S.'s tuition costs for the first portion of the 1998-1999 school year.

However, I **FIND** that because B.S. was discharged from Devereaux on or about November 6, 1998, but readmitted on January 26, 1999, more information is needed to determine the residence of her parents on January 26, 1999 that a determination of the responsible school district as of January 26, 1999 can be made.

CONCLUSION

Consequently, partial summary decision is hereby **GRANTED** in favor of the petitioner Newton Board of Education for the September to November 6th portion of the 1998-1999 school year since the parents resided in Frankford Township. Summary Decision is hereby **DENIED** for the period beginning January 26, 1999, the date of the most recent placement, because there is no evidence submitted concerning the residence of B.S.'s parents at that time. This matter is set down for plenary hearing on October 18, 2005.

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.

7/28/04
DATE

IRENE JONES, ALJ

sej

379-05

OAL DKT. NO. EDU 4733-01
AGENCY DKT. NO. 169-6/01

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BOARD OF EDUCATION OF THE BOROUGH OF STRATFORD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05

Date of Mailing: 10/21/05

RICHARD J. CODEY
Acting 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 08625-0112

PETER C. HARVEY
Attorney General

2005 OCT -4 P 4:26
OFFICE OF ADMIN. LAW

October 4, 2005

Sent via facsimile and regular mail
Honorable John Tassini, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: Monroe Township Board of Education v. New Jersey Department of Education and Board of Education of the Borough of Stratford, Camden County
OAL Dkt. No. EDU-~~0473~~-01
4733-01

Dear Judge Tassini:

Enclosed please find a signed stipulation of settlement which fully resolves the issues between the parties in this matter. Unless the parties hear to the contrary, it will be assumed that the 1:30 p.m. settlement conference scheduled tomorrow, October 5, 2005, is adjourned.

If you have any questions, or need any additional information, please do not hesitate to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Allison Colsey Eck
Deputy Attorney General

enc.
c. John J. Armano, Jr., Esq.
Peter J. Bonfiglio, III, Esq.

HUGHES JUSTICE COMPLEX • TELEPHONE: (609) 984-8464 • FAX: (609) 777-4036
New Jersey Is An Equal Opportunity Employer • Printed on Recycled Paper and Recyclable

Oct 4 2005 16:21 P.02
Fax:6097774036
DIV OF LAW

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General

2005 OCT -4 P 4:26

OFFICE OF ADMIN LAW

MONROE TOWNSHIP BOARD OF EDUCATION, Petitioner, v. STATE OF NEW JERSEY DEPARTMENT OF EDUCATION and BOARD OF EDUCATION OF BOROUGH OF STRATFORD, CAMDEN COUNTY, Respondents.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW 4733 OAL Docket No. EDU-~~0473~~-01 STIPULATION OF SETTLEMENT

WHEREAS, petitioner, Monroe Township Board of Education ("Monroe") and respondents, New Jersey Department of Education ("Department") and Board of Education of the Borough of Stratford, Camden County ("Stratford"), have mutually agreed to settle the above-captioned matter, with Trimble & Associates (John J. Armano, Jr., Esq., appearing) on behalf of Monroe, Peter C. Harvey, Attorney General of New Jersey (Allison Colsey Eck, Deputy Attorney General appearing) on behalf of the Department, and ~~Wade, Long, Wood & Kennedy, LLC~~ Peter J. Bonfiglio, III Peter J. Bonfiglio, et al (~~John D. Wade~~, Esq., appearing) on behalf of Stratford; and

WHEREAS, this matter arose from Monroe's challenge to its fiscal responsibility for Shane Usilton's public education for the 2000-01 school year; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Monroe is responsible for the cost of public education for Shane Usilton for the 2000-01 school year.

2. Monroe shall pay Somerset Hills School the sum of $48,598.20 for tuition for Shane Usilton for the 2000-01 school year

3. Since Shane Usilton's mother died on March 1, 2001, the State will assume financial responsibility for the public education of Shane Usilton for the 2001-02 school year and in subsequent years thereafter until such time as Shane Usilton may be adopted.

4. Upon the execution of this Stipulation of Settlement, Monroe will withdraw its petition currently before the Office of Administrative Law.

8. The parties agree that this stipulation of settlement fully resolves all issues between them arising from

Monroe's challenge to its fiscal responsibility for the educational costs of Shane Usilton for the 2000-01 school year.

Date____

_____

Attorney for Petitioner,
Monroe Township Board of Education
John J. Armano, Jr., Esq.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: 10/4/05

By: /s/ Allison Colsey Eck
Allison Colsey Eck
Deputy Attorney General

Date: 9/29/05

/s/ Peter J. Boyle
Attorney for defendant,
Board of Education of
Stratford, Camden County

Monroe's challenge to its fiscal responsibility for the educational costs of Shane Usilton for the 2000-01 school year.

Date 10/3/05

Attorney for Petitioner,
Monroe Township Board of Education
John J. Armano, Jr., Esq.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date:_____ By: _____
Allison Colsey Eck
Deputy Attorney General

Date:_____ _____
Attorney for defendant,
Board of Education of
Stratford, Camden County

380-05

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner Monmouth-Ocean Educational Services Commission (ESC) filed a Petition of Appeal alleging that the NJDOE, through the Office of the County Superintendent, has improperly denied reimbursement for administrative costs under *N.J.S.A.* 18A:46-19.1 to 9 (Chapter 193), which provides remedial services for handicapped students in both public and private schools. NJDOE asserts that petitioner could not charge for administrative expenses under Chapter 193 funding. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: petitioner ESC is contracted to provide educational services on behalf of several school districts in Monmouth and Ocean counties; petitioner included general administrative expenses in their budget between 1979 and 2004; in April 2004, subsequent to periodic monitoring of one of the districts to which the ESC is contracted for services, respondent issued – for the first time – a non-compliance order regarding petitioner's charge of administrative expenses to Chapter 193 funding; the legislative intent was that administrative expenses could be charged from Chapter 193 funding, but with some limitation; in the absence of any specific legislative limitation on administrative funding, the 6% standard found in *N.J.S.A.* 18A:46A-8 shall apply to Chapter 193 expenses; and the respondent's rejection of the administrative expenses after twenty-five years represents a new policy or rule that was not properly promulgated according to the New Jersey Administrative Procedure Act. (APA) The ALJ ordered that the respondent's decision to deny reimbursement or administrative expenses for Chapter 193 services be reversed, and recommended that the respondent formulate new regulations to clarify the limitation and reimbursement issues as to Chapter 193 administrative expenses.

The Commissioner concurs with the findings and conclusions of the ALJ in this matter, emphasizing that – when read in conjunction with the statutory and regulatory provisions found at *N.J.S.A.* 18A:46-19.8 and *N.J.A.C.* 6A:14-6.3(a), which relate directly to Chapter 193 funds – the ALJ's analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; moreover, the Commissioner concurs that the respondent's denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the APA. Accordingly, the Initial Decision of the OAL is adopted 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.

October 21, 2005

OAL DKT. NO. EDU 8786-04
AGENCY DKT. NO. 286-8/04

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The exceptions filed by the Department of Education (Department) were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching her determination herein.

In its exceptions, the Department takes issue with the Administrative Law Judge's (ALJ) reliance on *N.J.S.A.* 18A:6-51(e) and (j), claiming that it formed the basis for the ALJ's holding that Chapter 193 funds can be used for administrative costs. (Department's Exceptions at 2-3) The Department avers that *N.J.S.A.* 18A:6-51(e) and (j) expressly allow Educational Service Commissions (ESCs) to charge their client districts for administrative expenses, but that the issue is not whether ESCs may charge their client districts for administrative costs; instead, the issue is whether the specific State aid provided to districts under Chapter 193 may be used in this manner. (*Id.* at 3) Thus, the Department avers, whether administrative costs may be charged

against Chapter 193 funding should be limited to a consideration of the services required by Chapter 193 itself and should not include a discussion of the laws governing the creation and administration of ESC's generally. (*Id.* at 4)

The Department also excepts to the ALJ's reliance on *Airwork, supra*, arguing that, in that matter, the Supreme Court rejected plaintiff's claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that set forth the administrative agency's policy regarding the statute at issue. (*Id.* at 5) Moreover, the Department contends, unlike the situation in *Airwork*, there is no previously enacted policy or statutory interpretation at issue in the present matter. (*Ibid.*) The Department thus urges that the Legislature's failure to prevent petitioner's practice of using Chapter 193 funds for payment of administrative costs for the last twenty-five years does not constitute Legislative approval of any pre-existing administrative policy. (*Ibid.*) Moreover, the Department claims that it simply had not recognized the need to either develop monitoring procedures or create regulations with respect to the use of Chapter 193 funds for administrative costs until the instant litigation. (*Id.* at 5-6)

Additionally, the Department disagrees that its noncompliance determination underlying this issue satisfies each of the six criteria for an administrative rule as set forth in *Metromedia, supra*, and thus constitutes a new administrative rule made in violation of the Administrative Procedure Act. (*Id.* at 6) In this regard, the Department takes exception to the ALJ's determination that its noncompliance determination meets the third *Metromedia* criterion for constituting an administrative rule, *i.e.*, that it was "designed to operate prospectively." (*Id.* at 7) Although the Department admits that its finding against petitioner is intended to prevent Chapter 193 funds from being used for administrative costs in the future, it also argues

that its noncompliance finding was not intended "to create a new rule 'designed to operate only in future cases,'" but "was meant only as an application of the Chapter 193 laws as written, in the best judgment of the Department at that time." (*Ibid.*) Additionally, the Department asserts that its noncompliance determination does not meet the fifth *Metromedia* criterion because its "publication of the Chapter 193 laws in this case was not 'contrary to twenty-five years of existing policy' of the Department, but only contrary to petitioner's own practice" because the Department has not articulated a policy regarding administrative costs under Chapter 193. (*Id.* at 7-8) Finally, the Department states that it welcomes the opportunity to promulgate State Board regulations regarding the use of Chapter 193 funds as urged by the ALJ. (*Id.* at 8)

Upon a careful and independent review of the record, the Initial Decision, and the exception arguments filed in this matter, the Commissioner determines to adopt the ALJ's findings and conclusions as set forth in the Initial Decision. Notwithstanding the Department's contention that *N.J.S.A.* 18A:6-51(e) and (j) should not be utilized to form the basis for finding that Chapter 193 funds can be used for administrative costs, the Commissioner disagrees. *N.J.S.A.* 18A:6-51(e) and (j) simply set forth the definitions of "Commission expenses" and "program or service expenses," respectively, and, thus, are instructive to the assessment of the operation of ESCs. However, the conclusion that Chapter 193 administrative funds are recoverable does not turn on these definitions, but, instead, turns on the conclusion that the statutes governing commissions and the interpretative case law provide for collection of all costs with respect to the provision of remedial and auxiliary services to school districts.

Although Chapter 193 itself is silent on administrative costs, as fully explained by the ALJ, statutes should be read in *pari materia* when the statutes in question were enacted during the same session, went into effect at the same time and/or when the sections are part of

the same act, as in this case. The ALJ reached the conclusion that Chapter 193 funds can be used for administrative costs only after a thorough analysis of *all* the statutes that are inextricably a part of the provision of remedial and auxiliary services to local school districts, *i.e.*: *N.J.S.A.* 18A:6-51 to -70, specifically *N.J.S.A.* 18A:6-51(e) and (j), *N.J.S.A.* 18A:6-52(a) and *N.J.S.A.* 18A:6-63; *N.J.S.A.* 18A:46A-8; *N.J.S.A.* 18A:46-19.1; and a review of interpretative case law.

In this regard, the Commissioner determines that the ALJ correctly analyzed the statutory provisions related to funding sources for ESCs to arrive at the conclusion that the legislative scheme contemplates that the ESC will recover all its costs. The following statutory and regulatory provisions, which relate directly to Chapter 193 funds, further support the ALJ's conclusion:

> ***In preparing its annual budget, each board of education shall include as a revenue State aid in an amount equal to the estimated costs of providing services to nonpublic school children, pursuant to *P.L.*1977, *c.*193 (C.18A:46-9.1 et al.) *N.J.S.A.* 18A:46-19.8.
>
> Each board of education of the district in which the nonpublic school is located shall provide programs and services under this subchapter at a cost not to exceed the amount of State aid funds. *N.J.A.C.* 6A:14-6.3(a).

When read in conjunction with the above-quoted statutory and regulatory provisions, the ALJ's analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; public schools and educational services entities may not subsidize the costs of nonpublic programs by diverting funds for or from other public educational programs.

Moreover, the Commissioner rejects the Department's argument that the ALJ's reliance on *Airwork, supra*, is misplaced. While the court in *Airwork* rejected the plaintiff's

claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that described the administrative agency's policy regarding the statute at issue in that matter, the court in *Airwork* also clarified the circumstances when Legislative intent could or could not be inferred from administrative construction, stating:

> We note that courts have acknowledged that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts. (citations omitted) Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. (citations omitted) *Airwork, supra*, at 296.

In the instant matter, there is no clear legislative intent regarding the issue of the payment of administrative costs from Chapter 193 funds. To conclude that the omission of specific language in Chapter 193 prevents the ESCs from calculating administrative expenses in determining the costs of providing remedial services would result in a departure from the legislative scheme as set forth in similar statutes governing the provision of remedial and auxiliary services. Moreover, notwithstanding the Department's contention to the contrary, the Department permitted, whether consciously or by inaction, the payment of administrative expenses out of Chapter 193 funds for approximately twenty-five years. Thus, in the absence of a clear legislative intent within the statute itself and the Department's practice of permitting the use of Chapter 193 funds for administrative expenses without legislative interference over a twenty-five year period, the Commissioner agrees that such inaction can be construed as evidence of conformity with legislative intent pursuant to the parameters established in *Airwork, supra.*

The Commissioner also rejects the Department's claim that its denial of reimbursement for administrative expenses from Chapter 193 funds does not satisfy the third and fifth criteria of *Metromedia* so as to constitute an administrative rule. Whether the Department's noncompliance finding was intended to create a new rule designed to operate only in future cases, or, as argued, was meant only as an application of the Chapter 193 law as written, it was "designed to operate only in future cases" and, thus, satisfies the third criterion. See *Metromedia, supra,* at *331.* Likewise, with respect to the fifth criterion of *Metromedia*, the Department's determination to deny reimbursement for administrative expenses from Chapter 193 funds is, in effect, an "administrative policy," whether articulated or not, that was "not previously expressed in any official and explicit agency determination, adjudication or rule or constitutes a material and significant change from a clear, agency position on the identical subject matter." (*Ibid.*) The Commissioner, therefore, concurs that the Department's denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the Administrative Procedures Act.

Accordingly, as explicated above, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05

Date of Mailing: 10/24/05

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8786-04

AGENCY DKT. NO. 286-8/04

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,

Respondent.

J. Peter Sokol, Esq., for petitioner (McOmber and McOmber, attorneys)

Melanie M. Brookes, Deputy Attorney General, for respondent (Peter J. Harvey, Attorney General of New Jersey, attorney)

Record Closed: July 15, 2005 Decided: July 20, 2005

BEFORE **DONALD J. STEIN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 18, 2004, the Monmouth-Ocean Educational Services Commission (Petitioner) filed a petition of appeal with the Commissioner of Education alleging that

the Department of Education through the office of County Superintendent (respondent) has improperly denied reimbursement for administrative costs under *N.J.S.A.* 18A:46-19.1 to -19.9 (Chapter 193), which provides remedial services for handicapped students in both public and private schools. On October 4, 2004, respondent filed an answer to the appeal, asserting that petitioner could not charge for administration expenses under Chapter 193 funding. The matter was transmitted to the OAL on October 22, 2004.

On June 15, 2005, the petitioner moved for summary decision. On June 17, 2005, respondent filed a cross-motion for summary decision. On July 15, 2005, oral argument was scheduled and heard, and the record closed.

STATEMENT OF FACTS

The facts in this matter are not in dispute.

1. Petitioner is an education services commission established pursuant to *N.J.S.A.* 18A:6-51 to –70, and is currently contracted to provide educational services on behalf of several school districts in Monmouth and Ocean counties. Since its founding in 1979, the petitioner has included general administrative expenses in their budget. In April 2004, the respondent, for the first time, issued a non-compliance order because the petitioner had charged administrative expenses to Chapter 193 funding.

2. Respondent maintains a list of organizations that provide educational services under *N.J.S.A.* 18:46A-1 to -17 (Chapter 192), which provides auxiliary services to all pupils in the State, in both public and nonpublic schools, and *N.J.S.A.* 18A:46-19.1 to –19.9 (Chapter 193), all of which are subject to periodic compliance monitoring by Respondent pursuant to *N.J.A.C.* 6A:14-9.1.

3. Petitioner is currently under contract to provide Chapter 192 and Chapter 193 services to nonpublic school students in Belmar, Borough of Freehold, Highlands, and Eatontown. Petitioner provides these services to several other districts including, but not limited to, Asbury Park, Atlantic Highlands, Freehold Regional, Hazlet, Henry

Hudson Regional, Holmdel, Howell, Jackson, Manasquan, Keyport, Little Silver, Long Branch, Manalapan-Englishtown Regional, Marlboro, Matawan-Aberdeen Regional, Middletown, Monmouth Regional, Neptune, Ocean, Point Pleasant Beach, Red Bank Borough, Red Bank Regional, Shore Regional, Shrewsbury, Spring Lake, Toms River Regional, Wall, and West Long Branch.

4. On January 13, 2004, respondent conducted its periodic monitoring of the Chapter 192 and Chapter 193 programs provided in Belmar.

5. The Belmar monitoring resulted in a noncompliance finding because petitioner was charging administration expenses under Chapter 193 funding.

6. On May 5, 2004, petitioner contested the findings that Chapter 193 does not authorize a charge for administration.

7. Petitioner charges certain costs for administering Chapter 193 services toward support services for general program administration, as defined in *The Uniform Minimum Chart of Accounts for New Jersey Public Schools* and classified under function code 230.

8. In 2003-2004, Petitioner classified approximately 6.48% ($163,400) of its total Chapter 193 expenditures of $2,504,871 as code 230 expenses. This amount included $29,200 for Supplementary Instruction, $61,600 for Examination and Classification, and $71,600 for Corrective Speech.

9. Petitioner expended $590,060 worth of Supplementary Instruction services throughout all of its contracted districts in 2003-2004, of which about 4.94% ($29,200) was charged as administration.

10. Petitioner expended $1,111,017 worth of Examination and Classification services throughout all of its contracted districts in 2003-2004, of which about 5.54% ($1,600) was charged for administration.

11. Petitioner expended $803,794 worth of Corrective Speech services throughout all of its contracted districts in 2003-2004, of which about 8.9% ($71,600) was charged as administration.

12. For the 2003-2004 school year, Belmar received $113,280 from respondent for the provision of Chapter 193 services, $87,457.50 of which was expended by Petitioner.

13. In 2003-2004, petitioner classified approximately 5.82% ($82,192.92) of its total Chapter 192 expenditures as code 230 expenses. This amount included $64,182.92 for Compensatory Education, $3,750 for English as a Second Language, $1,500 for Home Instruction, and $12,800 for Transportation.

14. Petitioner expended $1,052,374 worth of Compensatory Education services throughout all of its contracted districts in 2003-2004, of which about 6.09% ($64,142.92) was charged as administration.

15. Petitioner expended $68,668 worth of English as a Second Language services throughout all of its contracted districts in 2003-2004, of which about 5.46% ($3,750) was charged as administration.

16. Petitioner expended $65,926.56 worth of Home Instruction services throughout all of its contracted districts in 2003-2004, of which about 2.27% ($1,500) was charged as administration.

17. For the 2003-2004 school year, Belmar received $96,516 from respondent for the provision of Chapter 192 services, all of which was expended by petitioner.

18. At the time of the January 13, 2004, monitoring of Belmar, respondent's monitoring procedures did not require service providers to submit detailed information regarding their Chapter 192 and Chapter 193 expenses.

19. For the 2003-2004 school year, the Belmar, Borough of Freehold, Highlands, and Eatontown school districts were monitored and issued monitoring reports indicating petitioner was noncompliant with Chapter 193 for charging administration fees.

20. Respondent's January 13, 2004, monitoring of Belmar was the first instance in which petitioner was found noncompliant with Chapter 193 due to charging administration fees.

21. On September 12, 1998, Petitioner and Belmar entered a 10-year Instructional Services Agreement for Chapters 192/193 (Agreement).

22. The Agreement, with regard to Chapter 193 services, indicates the petitioner will provide all services required pursuant to *N.J.S.A.* 18:46A-19.1 –19.9 and the rules and regulations governing these services to nonpublic schools.

The preceding information is **FOUND** as fact.

CONCLUSION OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of* America, 142 *N.J.* 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for Summary Decision.

Local school districts must furnish Chapters 192/193 services to nonpublic schools located within their boundaries, either by performing such services themselves or

by contracting with public or private agencies to do so. *Essex County Educ. Services Comm'n v. NJDOE*, 93 *N.J.A.R.*2d (EDU) 522, 523. Chapter 192 specifies that no more than 6% of the aid received by any district pursuant to this act shall be used by such district for administration of the act, and no more than 18% of such aid shall be used to rent facilities needed to implement the provisions of this act. *N.J.S.A.* 18A:46A-8. Chapter 193 does not contain a corresponding subsection regarding the use of funds for administration costs.

The sole issue to be determined in this matter is whether administrative expenses can be charged for Chapter 193 (remedial services) funding. The petitioner asserts that it was not the intent of the legislature to require the public school districts or its agents to subsidize these services by not permitting petitioner to draw down reasonable administrative costs. In the present case, petitioner charged approximately 6.5% under Chapter 193 for administrative costs. Respondent argues that since (Chapter 193) does not authorize a charge for administration, the petitioner must adjust the contract and submit an amended copy to the district and county office for approval.

N.J.S.A. 18A:6-51 to –70 provides for the establishment and operation of educational services commissions. Educational Services Commission is defined as:

> An agency established or to be established in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education. *N.J.S.A.* 18A:6-51(a).

The amended provisions distinguish between program or service expenses and commission expenses, but allow funds generated by programs and services to be used interchangeably to pay either of these expense categories. *N.J.S.A.*18A:6-51(e) and (j) respectively define commission expenses and program or service expenses as follows:

> (e) "Commission expenses" means those funds devoted to or required for the regular or ordinary operating expenses of the commission, <u>including</u>

> administrative, maintenance and salary expenses, and purchase or rental of real and personal property necessary for the operation of the commission, but excluding program or service expenses.
>
> (j) "Program or service expenses" means those funds devoted to or required for the provision of a program or service by the commission, including but not limited to the administrative, maintenance and salary expenses and the purchase or rental of real or personal property necessary for the provision of the program or service.

Although these expenses are distinguished, they both allow for funds devoted to or required for administrative expenses.

N.J.S.A. 18A:6-52(a) describes the petition process necessary to establish a commission. A report shall be attached to such petition setting forth the kind or kinds of educational and administrative services and programs which are deemed to be needed and proposed to be provided, an estimate of the cost of providing such services and programs, a method of financing the expenditures of such commission, including a detailed budget which projects anticipated costs and identifies anticipated sources of revenue until such can be financed under its first regularly adopted budget, and any other data or information deemed pertinent. Thereafter, the State Board shall determine whether there is a need for such a commission and whether its operation is feasible.

N.J.S.A. 18A:6-63 authorizes an educational services commission to decide what services it will offer and then determine the costs of providing such services as follows:

> a. The representative assembly shall from time to time determine what services and programs shall be provided by the commission, subject to approval of and pursuant to rules of the State Board of Education. It shall determine the fee to be charged for providing each service and program, and enter into contracts with school districts, whether member districts of the commission or not, to provide any or all such services and programs.
>
> b. Commissions may enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools. These

> contractual arrangements shall conform to rules and regulations of the State Board of Education and be approved by the county superintendent or superintendents, as the case may be.

As part of the petitioning process, a report must be prepared setting forth the kind of educational and administrative services and programs needed, and the cost of providing those services and programs. The State Board not only determines the need for programs, but also reviews the proposed administrative services to be rendered. Furthermore, the law requires the inclusion of a detailed budget that must indicate anticipated costs and sources of revenue until the commission can be financed under its first regularly adopted budget. Therefore, the language of the statute clearly acknowledges administrative costs are part of a properly prepared budget for commissions. Finally, under the statutory scheme, the State Board of Education must approve all fees the representative assembly proposes for both the programs and administrative services.

A close reading of the Statute and Code provisions governing educational services commissions and Chapters 192/193 services allow administrative costs to be recoverable expenses. Statutes should be read in pari materia when the statutes in question were enacted during the same session or went into effect at the same time; all the more so when the sections are part of the same act. *Wuethrich v. Delia*, 134 *N.J. Super.* 400, 411 (Law Div. 1975), aff'd., 155 *N.J. Super.* 324 (*App. Div.* 1978), cert. denied, 77 *N.J.* 486 (1978); *Ceva v. Twp. of River Vale*, 119 *N.J. Super.* 593, 604 (*App. Div.* 1972), aff'd., 62 *N.J.* 245 (1973). Where statutes in some apparent conflict relate to the same subject matter, it is the duty of the court to construe them together as a unitary and harmonious whole insofar as that may be possible in order that each may be fully effective. *Boyle v. Riti*, 175 *N.J. Super.* 158, 165 (*App. Div.* 1980). Finally, in construing a statute, courts must consider "not only the particular statute in question, but also the entire legislative scheme of which it is a part." *New Jersey Transit Corp. v. Borough of Somerville*, 139 *N.J.* 582, 590 (1995).

A statute should be interpreted in a way that gives effect to all its provisions and does not render any language inoperative, superfluous, void, or insignificant. *G.S. v.*

Dept. of Human Services, DYFS, 157 *N.J.* 161, 172 (1999). Reviewing courts should give considerable weight to an agency's interpretation of a statute the agency is charged with enforcing, but Courts are not bound by an agency interpretation of a strictly legal issue, when that interpretation is inaccurate or contrary to legislative objectives. *Mayflower Securities Co., Inc. v. Bureau of Securities in Division of Community Affairs of Dept. of Law and Public Safety*, 64 *N.J.* 85, 93 (1973). *See New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562-63 (1978). Therefore, interpretation of the statute herein should harmonize any conflicting provision and assure no language is rendered inoperative, superfluous, void, or insignificant.

Shortly after the enactment of Chapter 192/193 legislation, the Attorney General issued an opinion letter to the Commissioner of Education regarding whether an Educational Services Commission could, by separate contract, relinquish its responsibilities for provision of these educational services to a private profit-making organization. *Attorney General Formal Opinion No. 1* (1981). That opinion indicates that "to properly determine the matter, it was necessary to consider two provisions of the school law: the first governing educational services commissions and the second structuring the provision of certain remedial and auxiliary educational services to pupils in both public and non-public schools." The Attorney General also stated that nothing in the statute authorizing creation of commissions indicated that the commissions could contract with private agencies for performance of instructional services. *Attorney General Formal Opinion No. 1, supra,* 6 (1981). Therefore, a departure from a legislative scheme is not to be inferred from mere silence

Essex County Educ. Services Comm'n, 93 *N.J.A.R.* 2d (EDU) 522, 525, found the commission had to return unused Chapter 192/193 funds just as any school board must, and that all costs expended are recoverable. Moreover, both the formal opinion of the Attorney General and *Essex County Educ. Services Comm'n*, indicate these provisions must not be read in isolation, but together to properly determine what the legislature intended. Construing the provisions of both governing statutes, administrative costs are expenses for which the commission is entitled to collect. They are inextricably a part of

providing these remedial and auxiliary services to local school districts. Although Chapter 193 is silent on administrative costs, the statutes governing commissions and interpretative case law provide for collection of "all costs."

Airwork Service Div., Div. of Pacific Airmotive Corp. v. Director, Div. of Taxation, 97 *N.J.* 290, 296 (N.J. 1984) addressed a similar situation in which the legislative intent was not clear from the statute. The New Jersey Supreme Court ruled that:

> We note that courts have acknowledged that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts." *Automatic Merchandising Council v. Glaser, 127 N.J. Super.* 413, 420 (App. Div.1974) (interpreting Sales and Use Tax Act); see *Malone v. Fender*, 80 *N.J.* 129 (1979). Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. See *Fedders Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376 (1984) (language, purpose, and policy of "indebtedness" clause in New Jersey Corporation Business Tax Act evidenced legislative intent to exclude bona fide debt owed to affiliated corporation, notwithstanding contrary administrative interpretation that was itself confirmed by administrative rule and longstanding, uniform agency practice); *Mobay Corp. v. Director, Div. of Taxation*, 96 *N.J.* 407 (1984) (same). *Airwork Service Div., Div. of Pacific Airmotive Corp. v. Director, Div. of Taxation*, 97 *N.J.* 290, 296 (1984)

Therefore, in the absence of clear legislative intent regarding this issue, the fact that these expenses were paid over an approximate twenty-five year period without legislative interference is evidence of conformity with legislative intent.

To conclude that the omission of specific language in Chapter 193 would prevent the commissions from calculating administrative costs to determine the costs of providing remedial services would result in a departure from the legislative scheme. This would

result in the commissions absorbing administrative costs, requiring them to expend monies in excess of state aid that the Attorney General expressly stated districts are not required to pay. Just as silence in the legislative scheme could not infer commissions could contract with private profit making organizations to provide services, silence in Chapter 193 cannot infer the commissions cannot include administrative costs in calculating the cost of providing remedial services. Thus, the petitioner properly included administrative costs in calculating the costs of providing these services.

Although Chapter 193 was enacted more than 25 years ago, this is a case of first impression. The Department of Education (DOE) has never challenged the commission's practice of including administrative costs in its estimates of costs when providing remedial educational services, since the commission was founded in 1979. Despite the respondent's statements that it did not know the commission included administrative expenses, the statutes require approval by the State Board of Education of submitted plans from the commissions. To avoid an appearance of engaging in rule-making, the time to question whether administrative costs were included in these plans would have been when the plans were submitted or within a reasonable time after enactment of the statutes in question.

The question raised is whether the denial of Chapter 193 benefits constitutes an example of impermissible rulemaking. The New Jersey Administrative Procedure Act (APA) defines an administrative rule as an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." *N.J.S.A.* 52:14B-2(e). In determining whether an agency's action constitutes an administrative rule, certain factors must be assessed. These factors, enunciated by the State Supreme Court in *Metromedia, Inc. v. Director of the Div. of Taxation*, 97 *N.J.* 313, 331-32 (1984), are whether the action:

> (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.
>
> These factors can, either singly or in combination, determine whether the agency action must be executed through rulemaking. *Metromedia*, *supra*, 97 *N.J.* at 332; see *Woodland Private Study Group v. Department of Envtl. Protection*, 109 *N.J.* 62 (1987).

I **FIND** that the respondent's denial of reimbursement for administrative expenses for Chapter 193 services satisfies each of the *Metromedia* criteria to constitute an administrative rule. (1) It is intended to cover all school districts in the state that render these services; (2) it is intended to be applied generally and uniformly to all similarly situated persons; (3) it was designed to operate prospectively; (4) it prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statute, which is silent on the subject; (5) it reflects an administrative policy not previously expressed in any official or explicit agency determination, adjudication or rule, and is contrary to twenty-five years of existing policy; (6) and it reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. I therefore **CONCLUDE** that the respondent's denial of reimbursement for Chapter 193 services constitute an administrative rule pursuant to the New Jersey Administrative Procedure Act (APA), specifically *N.J.S.A.* 52:14B-2(e), and should have been promulgated as an administrative rule.

Although administrative agencies have wide discretion in choosing the procedures best suited to their regulatory aims, this discretion is not unbounded. *Crema v. Department of Envtl. Protection*, 94 *N.J.* 286, 299 (1983); *St. Barnabas*

v. Hospital Rate Setting Comm'n, 250 *N.J. Super.* 132, 142 (*App. Div.* 1991); see *N.J.S.A.* 52:14B-2(b), (c), (e). "When the agency is concerned with 'broad policy issues' that affect the public-at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is intended to have wide application and prospective effect, rulemaking becomes the suitable mode of proceeding." [*11] *Crema, supra*, 94 *N.J.* at 299; *St. Barnabas, supra*, 250 *N.J. Super.* at 142-43. Hence, even when an agency is given statutory discretion, the manner in which this discretion is exercised may be controlled by the requirements of the APA.

Moreover, the impact of this decision will impact not only the petitioner herein, but every other district and Educational Service Commission providing remedial services throughout the state.

CONCLUSION

Since *N.J.S.A.*18A:6-51(e) and (j), expressly allows for administrative expenses for commissions, and Chapter 192 specifically allows limits administrative expenses for auxiliary services, as well as the fact that administrative expenses were paid over an approximate twenty-five year period without legislative interference is evidence of conformity with legislative intent, I **FIND** that the legislature intended that administrative expenses can be charged for Chapter 193 (remedial services) funding.

I further **CONCLUDE** that the legislature intended to have some limitation on the amount of administrative expenses to be charged. However, the record is scant as to what limitation should be imposed. The only standard provided to this tribunal is reflected in *N.J.S.A.* 18A:46A-8, which states that, "No more than 6% of the aid received by any district pursuant to this act shall be used by such district for administration of the act." In the absence of any other alternatives, I **FIND** that the 6% limitation be applied to Chapter 193 expenses.

I also **FIND** that the respondent's rejection of the administrative expenses after twenty-five years represents a new policy or rule that was not properly promulgated according to the APA. I further recommend that the respondent formulate new regulations to clarify the limitation and reimbursement issue as to Chapter 193 administrative expenses.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the respondent's decision to deny reimbursement or administrative expenses for Chapter 193 services is **REVERSED.** It is also recommended that the respondent formulate new regulations to clarify the limitation and reimbursement issues as to Chapter 193 administrative expenses.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7-20-05
DATE

DONALD J. STEIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-21-05
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 25 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

381-05

I.B., on behalf of minor child, M.A., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her nephew, M.A. is not eligible for a free education in the Belleville School District. A family court order granted petitioner joint custody, along with M.A.'s mother, in July 2004; the order gave petitioner residential custody. Subsequent to the custody order, M.A. was enrolled at Belleville High School in September 2004. Respondent Board contended that it had determined that M.A. was not entitled to attend Belleville schools pursuant to *N.J.S.A.* 18A:38-1, and sought tuition for the period of M.A.'s ineligible attendance.

The ALJ found, *inter alia*, that: M.A. was lawfully residing in Belleville by virtue of a joint custody order of the Superior Court, but was residing with I.B. solely because of his difficulties in the Newark School District; and I.B.'s actions in enrolling M.A. in Belleville Schools "were in violation of *N.J.S.A.* 18A:38-1." The ALJ concluded that M.A. was not domiciled in Belleville; was not an affidavit student; was not entitled to a free education in Belleville Schools; and ordered the petitioner to pay respondent $8,464.27 in tuition costs for the period of M.A.'s ineligible attendance.

The Commissioner rejects the recommended decision of the ALJ, finding that the petitioner's claim should have been analyzed under *N.J.S.A.* 18A:38-2, which provides that any nonresident person over five and under twenty who is placed in the home of a resident in the school district by court order is entitled to a free education in the district. Inasmuch as it is not in the purview of the Commissioner to disturb an Order of the Superior Court, any challenge to the Order must be directed to that Court. The Commissioner orders respondent to continue to admit M.A. to its schools as long as there is no change in the Superior Court Order that would alter his entitlement.

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 24, 2005

OAL DKT. NO. EDU 1447-05
AGENCY DKT. NO. 437-12/04

I.B., on behalf of minor child, M.A., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

Upon careful and independent review of the record in this matter, for the reasons detailed below, the Commissioner rejects the recommended decision of the Administrative Law Judge (ALJ).

Initially, the Commissioner finds that the ALJ applied the incorrect statute to arrive at her conclusion that petitioner did not meet her burden of proving that M.A. was entitled to a free education in the district. The Petition of Appeal in this matter, filed on December 17, 2004, clearly evidences that petitioner's *sole* claim of M.A.'s entitlement to attend the District's schools is predicated on a July 15, 2004 Order of the Honorable Hector E. Desoto, J.S.C.,

[1] On September 20, 2005, Charles P. Cohen, Esq. filed exceptions to the Initial Decision on behalf of petitioner, I.B. In that at all times during the course of these proceedings petitioner was *pro se*, Mr. Cohen was advised that he was required to file a letter entering his representation of I.B. before his exception submission could be considered. Such representation letter was received on September 22, 2005.

Superior Court of New Jersey, Chancery Division, Family Part, Essex Vicinage, granting her residential custody of M.A. Indeed, there is nothing in the petition or accompanying documents to suggest that petitioner's allegation before the Commissioner was that either the "domicile" or "affidavit student" portions of *N.J.S.A.* 18A:38-1 were satisfied. As such, the Commissioner finds and determines that petitioner's claim should have been analyzed under *N.J.S.A.* 18A:38-2, and its implementing regulation, *N.J.A.C.* 6A:22-3.2(e), rather than *N.J.S.A.* 18A:38-1 as was done by the ALJ in her decision. In this regard, it is noted that *N.J.S.A.* 18A:38-2 specifically provides that:

> Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state***.

It is unambiguously apparent, pursuant to this provision, that M.A., who was placed in the home of I.B., an undisputed domiciliary of Belleville, by Order of Superior Court is entitled to a free public education in that District. Inasmuch as it is not within the jurisdictional purview of the Commissioner of Education "to vacate, modify or otherwise disturb an Order of the Court", any challenge to this Order by the Board or attestation of petitioner's noncompliance therewith must be directed to Superior Court. (*See D.W., on behalf of minor child, V.D.V. v. Board of Education of the Township of Bass River, Burlington County and Larry A. Mathis, Superintendent* and *D.D.V. v. Board of Education of the Township of Bass River, Burlington County and Larry A. Mathis, Superintendent,* decided by the Commissioner January 29, 2003, #35-03L)

Accordingly, the Commissioner directs that M.A. is entitled to a free public education in the Belleville school district pursuant to *N.J.S.A.* 18A:38-2. The Board is, therefore,

ordered to continue to admit him to its schools as long as there is no change in the Superior Court Order that would alter his entitlement.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/24/05

Date of Mailing: 10/24/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1447-05
AGENCY DKT. NO. 437-12/04

I. B. O/B/O M.A., III,
Petitioner,
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

I. B., petitioner, *pro se*

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: April 30, 2005 Decided: September 6, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, I. B., (I.B. or Boyce) challenges the action of the respondent, Belleville Board of Education (respondent or District) that denied residency status to her nephew, M.A. As a result of the December 14, 2004 denial, M.A. was found ineligible to attend the District High School on tuition free basis. On December 17, 2004, petitioner filed a petition of appeal and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on January 31, 2005. A hearing was held on April 5, 2005

surveillance notes are set forth in R-1. He was assisted by Investigator Rodriguez who testified herein. Their the notes provide that over various school day mornings, Morgan observed the Boyce household at 59 B___ Street and the N. 9th Street address, A.M.'s address.

On October 27, 2004, Morgan observed a vehicle, License plate number PYF-63F with two females leave the Boyce household. M.A. was not in the vehicle but did report to school that day on time. The next day, he observed a vehicle, New Jersey plate number JKL-56F leave ____ N. 9th Street at 6:45 a.m. The vehicle was occupied by an adult female and one male student. On November 10, Morgan saw M.A. leave his mother's address, N. 9th Street, in a vehicle with plate number JKL-56F. Morgan followed the car to the high school parking lot, gym entrance.

On November 18th, he observed vehicle bearing N.J. plates PYF-63F leave B___ Street with one adult female and one young female at 7:05 hours. M.A. was not in the car but was present at school on that day. The next day he went to ___ N. 9th Street at 6:45 a.m. where he saw an adult and M.A. leave the residence at 7:07. M.A. was dropped off at the high school.

On November 22 and 23, Investigator Rodriguez observed 59 B___ Street at 6:40 a.m. Morgan observed the mother's address, N. 9th Street where he saw M.A. leave at 7:09 a.m. Rodriguez saw a vehicle leave Beech Street with two females. The next day, Morgan was at ___ N. 9th. Street and Investigator Rodriguez was at the59 B___ Street address. M.A. left the N. 9th Street address.

On January 6 and 7, 2005, M.A. was absent from school. Morgan checked the 59 B___ Street address and was told by Boyce's husband that M.A. was not there.

On February 3, 2005, Morgan monitored 59 B____ Street from 3:45 p.m. to 5:15., M.A. did not return to residence from school. At 5:28 p.m. Morgan called the Newark address and M.A. answered the phone. (R-1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1447-05
AGENCY DKT. NO. 437-12/04

I. B. O/B/O M.A., III,
Petitioner,
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

I. B., petitioner, *pro se*

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: April 30, 2005 Decided: September 6, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, I. B., (I.B. or Boyce) challenges the action of the respondent, Belleville Board of Education (respondent or District) that denied residency status to her nephew, M.A. As a result of the December 14, 2004 denial, M.A. was found ineligible to attend the District High School on tuition free basis. On December 17, 2004, petitioner filed a petition of appeal and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on January 31, 2005. A hearing was held on April 5, 2005

and posthearing summations were submitted on April 28, 2005. Due to the voluminous caseload of the undersigned, Orders of Extensions were granted which extended the time for the issuance of the instant decision until September 12, 2005.

FACTS

Based on the record, I **FIND** the following **FACTS**:

M.A., is the son of A.M. and the nephew of I.B. On July 15, 2004, I.B. and A.M. appeared before the Honorable Hector De Soto, J.S.C. where they secured a joint custody order for M.A. The Order gave I.B. residential custody. At that time, M.A. was seventeen years old and enrolled at Barringer High School in Newark, N.J. I.B. resided in Belleville with her spouse and their two children.

The Township of Belleville employs Bruce Morgan (Morgan) and Iris Rodriguez (Rodriguez) as investigators who, among other things, investigate the domicile of returning Belleville students and newly enrolled students. In the summer of 2004, Morgan recalls receiving a phone call from Boyce. Boyce did not identify herself, however the telephone caller I.D. provided her name. Boyce inquired as to whether she could pay tuition. Morgan told her no. She wanted to know how her out-of-district nephew could attend the District School. Boyce then explained that her nephew was not doing well in the Newark school district and that she didn't want him at Barringer High School. Morgan told her that she needs to have custody of her nephew, however, he cautioned that "custody" cases were closely monitored by the District as 95% of the "custody" cases proved to be illegal students.

On September 8, 2004, Boyce and A.M. enrolled M.A. in Belleville High School. Morgan told them that they would be monitored. Boyce then produced the custody court order. (R-6).

Investigator Morgan monitored the Boyce household on some thirty three (33) occasions, commencing on October 27, 2004 and ending on March 3, 2005. His

surveillance notes are set forth in R-1. He was assisted by Investigator Rodriguez who testified herein. Their the notes provide that over various school day mornings, Morgan observed the Boyce household at 59 B___ Street and the N. 9th Street address, A.M.'s address.

On October 27, 2004, Morgan observed a vehicle, License plate number PYF-63F with two females leave the Boyce household. M.A. was not in the vehicle but did report to school that day on time. The next day, he observed a vehicle, New Jersey plate number JKL-56F leave ____ N. 9th Street at 6:45 a.m. The vehicle was occupied by an adult female and one male student. On November 10, Morgan saw M.A. leave his mother's address, N. 9th Street, in a vehicle with plate number JKL-56F. Morgan followed the car to the high school parking lot, gym entrance.

On November 18th, he observed vehicle bearing N.J. plates PYF-63F leave B___ Street with one adult female and one young female at 7:05 hours. M.A. was not in the car but was present at school on that day. The next day he went to ___ N. 9th Street at 6:45 a.m. where he saw an adult and M.A. leave the residence at 7:07. M.A. was dropped off at the high school.

On November 22 and 23, Investigator Rodriguez observed 59 B___ Street at 6:40 a.m. Morgan observed the mother's address, N. 9th Street where he saw M.A. leave at 7:09 a.m. Rodriguez saw a vehicle leave Beech Street with two females. The next day, Morgan was at ___ N. 9th. Street and Investigator Rodriguez was at the59 B___ Street address. M.A. left the N. 9th Street address.

On January 6 and 7, 2005, M.A. was absent from school. Morgan checked the 59 B___ Street address and was told by Boyce's husband that M.A. was not there.

On February 3, 2005, Morgan monitored 59 B____ Street from 3:45 p.m. to 5:15., M.A. did not return to residence from school. At 5:28 p.m. Morgan called the Newark address and M.A. answered the phone. (R-1).

Currently, Joseph Kramer is the District's Curriculum Director. He was formerly the Acting Superintendent from September 2004 to February 2005. Kramer recalls that he spoke to Boyce and A.M. on December 8, 2004 about M.A. attending school in the District. He told them that M.A. was ineligible to attend the District High School. Boyce explained that she had joint custody and produced the Custody Order from the family court. He concludes that the sole reason why M.A. was living with his aunt was due to his difficulties in the Newark School District. Kramer told Boyce and A.M. that if M.A. were to leave the District at that time, no tuition costs would be assessed.

R-5 set forth the District's tuition as of March 21, 2005. It provides that the tuition fee is $46.51 per day and as of March 21, 2005, M.A. had attended school for 121 days for a total of $5,627.71. (R-5).

I. Boyce testified that she received residential custody of M.A. in July 2004. M.A.'s father was present as well as his mother. She registered M.A. in the District School in September. She obtained custody because M.A.'s mother worked long hours and M.A. was failing in school. He needed help with his school work which she was prepared to do. She observed Investigator Morgan in the front of her home. She questioned him and he told her he was attempting to establish residency.

Boyce concedes that M.A. stays with his mother on weekends and holidays. She admits that R-4 indicates that M.A. left his mother's house on days other than Mondays and Fridays. She supplies with room and board and his mother provides him with his necessities.

Boyce questions why the investigators did not come at night. M.A. eats dinner in her household. Further, he mostly eats breakfast, there, too.

FINDINGS AND CONCLUSION

Pursuant to *N.J.S.A.* 18A:38-1, public schools shall be free to persons over five and under 20 years of age who are domiciled within the school district. An exception to this requirement is set forth in subsection (b) 1 of the statute which provides:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

A child's domicile is normally that of his or her parents. See *Mississippi Band of Choctaw Indians v. Holyfield,* 490 *U.S.* 30, 48, 109 *S.Ct.* 1597, 1608, 104 *L.Ed.2d*, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.* 283 *N.J. Super* 505, 521-22, 662 *A.2d* 976 (App. Div. 1995), *certif. denied*, 143 *N.J.* 325, 670 *A.2d* 1066 (1996); 25 *Am.Jur2d Domicile* § 42 (1996); *Restatement (Second) Conflict of Laws* §22 (1971). After a divorce or judicial separation, the domicile of the child is that of the parent with whom the child lives. *Roxbury* 283 *N.J. Super* at 521-23, 662 *A.2d* 976; 25 *Am.Jur Domicile* § 42. It is well established that one may have many residences but one can only have one domicile.

In the instant matter, the petitioner contends that M.A. was lawfully residing in Bloomfield by virtue of a Joint Custody Order of the Superior Court. While this is true that M.A. could lawfully reside in Bloomfield, I **FIND** that he was not domiciled in

Bloomfield. It is the domicile that entitles M.A. to a free education in Bloomfield, not his residency. The Legislature understood the distinction and clearly intended that domicile and not residence will be the controlling factor for determining whether a student is entitled to a free education in a local school District.

As noted above, under subsection b.(1), a child may reside with another if that person is supporting him *gratis* and sets forth in an affidavit that the child is residing with him or her due to a family or an economic hardship . The fact that a child is not doing well in a particular district, does not constitute a hardship. Further, it must be clearly established that a child is not residing with another for the sole purpose of receiving a free public education within that District. There was no proof presented in the record that Boyce was caring for M.A. *gratis*. Rather, the proofs and testimony, clearly establish that M.A. was residing with Boyce because of his difficulties in the Newark School District.

I have considered the reference letters submitted by Boyce. Most of the letters are neighbors of Boyce and they attest to her fine character. Further, they assert that M.A. has in fact resided with her since September 2004. (P-1 to P-3). Boyce's character is not in dispute. Indeed, her intentions were good. Nevertheless, her actions were in violation of *N.J.S.A.* 18A:38-1.

I therefore, **CONCLUDE** that M.A. was not domiciled in Belleville or an affidavit student, thus he was not entitled to a free education in the District.

Pursuant to *N.J.S.A.* 18A:38-1, tuition shall be assessed for the time of student's ineligible attendance in the District. Here, the proofs indicate that the per diem tuition during the 2004-2005 school year was $46.51. As of April 30, 2005, tuition costs were $6,650.39. Presumably, M.A. attended school until the end of the school term, an additional 39 days or $1,813.88. It is therefore **ORDERED** that the appellant shall pay to the respondent $8,464.27.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/6/05
DATE

IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

SEP 8 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

382 05

582-05

OAL DKT. NO. EDU 6862-04
AGENCY DKT NO. 261-7/04

NEW JERSEY EDUCATION ASSOCIATION, ON BEHALF OF ITS AFFILIATES AND MEMBERS, INCLUDING MELISSA ECHSTEIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record and settlement of this matter transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present matter, the settlement, pursuant to *N.J.A.C.* 1:1-19.1 (c) and (d), is deemed to be the final decision in the case, and it is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General

RECEIVED
2005 OCT -5 A 10:35

NEW JERSEY EDUCATION ASSOCIATION on behalf of its Affiliates and the Members they represent, including MELISSA ECKSTEIN, MICHAEL RYAN and WENDY OSBBORNE,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Docket No. EDUOT 06862
v.	:	STIPULATION OF SETTLEMENT
NEW JERSEY DEPARTMENT OF EDUCATION,	:	
Respondent.	:	

WHEREAS, petitioner, New Jersey Education Association ("NJEA") on behalf of its Affiliates and the Members they represent, including Melissa Eckstein, Michael Ryan and Wendy Osborne, and respondent, New Jersey Department of Education ("Department"), have mutually agreed to settle the above-captioned matter, with Selikoff and Cohen, P.A., (Keith Waldman, Esq., appearing) on behalf of NJEA, and with Peter C. Harvey, Attorney General of New Jersey, (Allison Colsey Eck, Deputy Attorney General appearing) on behalf of the Department; and

WHEREAS, this matter arose from NJEA's challenge to the Department's revised regulations which were adopted on December 18,

T/W 9/27/5

2003, and effective on January 20, 2004. 36 N.J.R. 469 (Jan. 20, 2004); and

WHEREAS, NJEA specifically challenged the regulatory provisions governing educational services certifications including N.J.A.C. 6A:9-13.1(e), N.J.A.C. 6A:9-13.3(d), N.J.A.C. 6A:9-13.5(e), N.J.A.C. 6A:9-13.6(f), N.J.A.C. 6A:9-13.7(d), N.J.A.C. 6A:9-13.8(e), N.J.A.C. 6A:9-13.9(i), N.J.A.C. 6A:9-13.10(e), N.J.A.C. 6A:9-13.13(d), N.J.A.C. 6A:9-13.14(e) and N.J.A.C. 6A:9-13.15(e), claiming that the Department did not provide the same notice regarding the regulatory change to applicants attending colleges out-of-state that it provided to applicants attending in-state colleges; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. The following individuals, who were enrolled in, and matriculated in, a graduate program of study to receive a student personnel services endorsement at the time the Department's regulations governing the school personnel services endorsement were changed on December 18, 2003, effective on January 20, 2004, shall be permitted to submit their application and credentials for

1/N 9/27/15

a student personnel services endorsement to the Department for review pursuant to the regulations existing on January 19, 2004 as set forth in former N.J.A.C. 6:11:

a. Lily Basantis
b. Ronda Brown
c. Tina Dietrich
d. Michael Ryan
e. Graham Hall
f. Betsy Kirkbride
g. Jeremiah Bodner
h. Sherrie Davis
i. Melissa Eckstein
j. Lauren Small
k. Michael Egan
l. Bonnie Sprigman
m. Mollie Huntsinger

2. The applicants listed in paragraph 1 who have not met the requirements for the award of a student personnel services endorsement, but have submitted their credentials for a review and evaluation pursuant to the terms of this settlement agreement, shall receive a written evaluation from the Department and will have until January 20, 2009 to complete the requirements set forth in the written evaluation.

3. The applicants listed in paragraph 1 must submit their application, including all required documentation and fees for their student personnel services endorsement, and/or their credentials for review and evaluation to the Department no later than October 31, 2005. Applications received after October 31, 2005, will not be subject to the terms of this agreement and will be subject to review pursuant to the Department's current licensing regulations at 6A:9.

TW 9/23/15

4. Upon receipt of the information from the applicants listed in paragraph 1, above, on or before October 31, 2005, the Department shall issue student personnel services endorsements pursuant to the regulations existing on January 19, 2004, and/or issue written evaluations to applicants no later than November 30, 2005.

5. Upon execution of this stipulation of settlement, NJEA will withdraw its appeal of the provisions of N.J.A.C. 6A:9-13.1(e), N.J.A.C. 6A:9-13.3(d), N.J.A.C. 6A:9-13.5(e), N.J.A.C. 6A:9-13.6(f), N.J.A.C. 6A:9-13.7(d), N.J.A.C. 6A:9-13.8(e), N.J.A.C. 6A:9-13.9(i), N.J.A.C. 6A:9-13.10(e), N.J.A.C. 6A:9-13.13(d), N.J.A.C. 6A:9-13.14(e) and N.J.A.C. 6A:9-13.15(e), captioned as New Jersey Education Association on behalf of its Affiliates and the Members they represent, including Melissa Eckstein, Michael Ryan and Wendy Osborne, OAL Dkt. NO. EDUOT 06862, as well as its challenge to the notice the Department provided to out-of-state colleges and universities as compared to the notice provided to in-state colleges and universities concerning the changes to the professional licensure and standards adopted on December 18, 2003, effective January 20, 2004.

6. NJEA will not challenge the sufficiency of the notice of the regulatory changes provided by the Department for any regulatory provision adopted by the State Board on December 18, 2003, effective January 20, 2004.

7. NJEA does not concede that the allegations in the petition in this matter were not justified, nor does the Department admit or concede the truth of the allegations contained in the petition filed in this matter and both parties have entered into this agreement for the purposes of settlement only.

8. The parties agree that this stipulation of settlement fully resolves all issues between them arising from the Department's adoption on December 18, 2003 of its revised professional licensure and standards regulations set forth in N.J.A.C. 6A:9, which were effective on January 20, 2004, that are the subject of this appeal.

Date 9/27/5

Keith Waldman, Esq.
Attorney for Petitioner,
New Jersey Education
Association

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: 9/30/05

By:
Allison Colsey Eck
Deputy Attorney General

383-05

OAL DKT. NO. EDU 10041-04
AGENCY DKT. NO. 361-10/04

MARY EDWARDS-ANDREWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Dismissal with Prejudice, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner notes the absence of the terms of the parties' settlement so as to permit her review, pursuant to *N.J.A.C.* 1:1-19.1. The Commissioner has, therefore, determined to consider the parties' Stipulation of Dismissal with Prejudice as the parties' withdrawal of the asserted claims and counterclaims in this matter, pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Commissioner approves the parties' withdrawal of their claims in the instant matter. Given this conclusion, this matter is no longer deemed to be a contested case before the Commissioner and the within matter is, therefore, dismissed, with prejudice.

IT IS SO ORDERED.

Lucille Edwards

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 10041-04

AGENCY DKT. NO. 361-10/04

MARY EDWARDS-ANDREWS,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

Geoffrey B. Gompers, Esq., for petitioner (Geoffrey B. Gompers & Associates, P.C., attorneys)

Peter J. Cammarano, III, Esq., on behalf of respondent (Genova, Burns & Vernoia, attorneys)

Record Closed: September 26, 2005 Decided: September 26, 2005

BEFORE **ISRAEL D. DUBIN,** ALJ:

This matter arises out of petitioner's demand that the decision of respondent Camden City Board of Education transferring her from the position of Principal of the Woodrow Wilson High School to that of Principal of the South Camden Alternative School be reversed and that she be reappointed to her former position. Petitioner has asserted that the Board's action was based on an unlawful and discriminatory plan and resulted in a reduction of her base salary.

Petitioner filed her appeal with the Commissioner on August 13, 2004, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on November 10, 2004. *N.J.S.A.* 52:14F-1 to –13. The matter was subsequently scheduled to be heard on October 6, 7, 11 & 12, 2005. However, by Stipulation of Dismissal dated September 14, 2005, the parties stipulated that the matter should be "dismissed with prejudice."

Based on the foregoing, I find that the parties have amicably resolved their differences and that petitioner no longer wishes to proceed. I therefore conclude that the matter should be and is hereby **DISMISSED.** It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2005
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

9-29-05
DATE

DEPARTMENT OF EDUCATION

SEP 30 2005

Mailed to Parties:

DIRECTOR AND ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

GEOFFREY B. GOMPERS & ASSOCIATES, PC
By: Geoffrey B. Gompers, Esquire
778 Riverton Road
Moorestown, NJ 08057
(856) 663-2566
Attorney for Petitioner

DR. MARY EDWARDS-ANDREWS,	: OAL Docket No.: EDUOA 10041-2004S
	: Agency Ref. No.: 361-10/04
Petitioner,	:
	: Transmitting Agency:
v.	: Department of Education
	:
CAMDEN CITY BOARD OF EDUCATION,	: **STIPULATION OF DISMISSAL**
	:
Respondent.	:
	:

It is hereby stipulated that the dispute between the parties in the above matter is dismissed with prejudice.

GENOVA BURNS & VERNOIA

By: P J Cammarano III
Peter J. Cammarano, Esquire
Attorney for Camden County
Board of Education

GEOFFREY B. GOMPERS & ASSOC., PC

By: _____
Geoffrey B. Gompers, Esquire
Attorney for Dr. Mary Edwards-Andrews

Date: September 14, 2005

FILED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2005 SEP 22 A 10: 14

384-05

OAL DKT. NO. EDU 07386-05
AGENCY DKT. NO. 129-5/05

IN THE MATTER OF THE TENURE	:	
HEARING OF GARRY HOWARD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF ROSELLE, UNION COUNTY.	:	

The record of this matter, the parties' proposed Consent Order of Withdrawal, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs that, under the circumstances of this matter, the Board may properly be permitted to withdraw the tenure charges certified against respondent so that they may, should the Board deem it appropriate, subsequently be re-filed in accordance with applicable procedural law. In so holding, the Commissioner stresses that she construes the parties' representatives' consent to the "Form of Order" as consent to its substantive content as well; should either party deem it otherwise, the Commissioner's acceptance of the proposed withdrawal will become null and void.

Accordingly, subject to the proviso set forth above, the Initial Decision of the OAL approving the Consent Order of Withdrawal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05
Date of Mailing: 10/25/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND
ORDER OF WITHDRAWAL
OAL DKT. NO. EDU 07386-05
AGENCY DKT. NO.129-5/05

BOROUGH OF ROSELLE, UNION COUNTY
Petitioner,
v.
GARY HOWARD,
Respondent.

Allan C. Roth, Esq., for petitioner
(Law offices of Allan C. Roth, attorneys)

Louis P. Bucceri, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: September 1, 2005 Decided: September 13 , 2005

BEFORE, **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in June 2005 as a result of the

certification of tenure charges by the School District of Roselle, Union County, against the respondent, Gary Howard, a tenured custodian. Hearings were scheduled to begin in the latter part of September 2005. However, in advance of the scheduled hearing dates and at the request of both counsel, the dates were adjourned.

Thereafter, an agreement was reached whereby the School District of Roselle would withdraw the tenure charges without prejudice to its opportunity to refile the same. In turn, respondent was to be reinstated to his position with full salary, retroactive to the date of his suspension without pay.

Attached hereto is a "Consent Order of Withdrawal" which contains the background circumstances and refers to procedural defects which precipitated the withdrawal and the interests of judicial economy and preservation of public funds which it will serve.

I have reviewed the proposed Withdrawal Order and I am satisfied that it is consistent with law; in particular, the reservation by the School District of the right to refile the tenure charges which may include some or all of the allegations contained in the original petition.

Accordingly, the Consent Order of Withdrawal hereby is approved and will be attached to this Initial Decision and Order of Withdrawal.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 13, 2005
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9-14-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 15 2005
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102

AUG 26 2005

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	OAL Docket No. EDUTH-07386-2005N
In the Matter of the Tenure Hearing of Garry Howard, School District of the Borough of Roselle, Union County	Agency Ref. No. 129-5/05
	CONSENT ORDER OF WITHDRAWAL

THIS MATTER having been opened to the Office of Administrative Law, before the Hon. Stephen G. Weiss, ALJ, by the Petitioner, Borough of Roselle Board of Education, by its attorney Allan C. Roth, Esq., appearing, and Respondent, Garry Howard, appearing by his attorney Louis P. Bucceri, Esq., on Petitioner's application to have this matter withdrawn without prejudice pursuant to N.J.A.C. 6A:3-5.6, and

WHEREAS, this matter arises out of tenure charges alleging unbecoming conduct, inefficiency and other just cause against a tenured custodial employee of Petitioner, and

WHEREAS, Respondent has denied these charges, and

WHEREAS, Respondent has filed a motion to dismiss the charges due to procedural defects, and

WHEREAS, established case law requires that any dismissal based on Respondent's procedural motion would be without prejudice to the re-filing of the charges by Petitioner, and

WHEREAS, the Administrative Law Judge is satisfied that, due to procedural defects which may be fatal to the Petitioner's charges in their current form and in the interest of judicial economy and preservation of public funds, the Petitioner should be permitted to withdraw its charges without prejudice pursuant to N.J.A.C. 6A:3-5.6, with leave to re-file the Petition pursuant to the requirements of N.J.A.C. 6A:3-5.1, et seq., and

WHEREAS Respondent consents to the entry of this order since it provides him the same relief that he would receive if his motion was successful, it is

On this 13th day of September, 2005;

ORDERED that due to the claims of procedural defects which may be fatal to the Tenure Charge Petition in its current form and in the interest of judicial economy and preservation of public funds, the Petitioner is permitted to withdraw its Petition without prejudice pursuant to N.J.A.C. 6A:3-5.6, with the right to re-file tenure charges against Respondent pursuant to the requirements of N.J.A.C. 6A:3-5.1, et seq., including charges which arise out of some or all of the allegations contained in the current Petition, and

IT IS FURTHER ORDERED that Petitioner shall reinstate Respondent to full salaried status, retroactive to the date of his suspension without pay pursuant to N.J.S.A. 18A:6-14. All monies due shall be paid to Respondent forthwith;

IT IS FURTHER ORDERED that this initial decision and Order is filed with the Commissioner of Education for consideration. This recommended initial decision and Order 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 (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.

Stephen G. Weiss, A.L.J.

Form of Order consented to by:

Petitioner
Roselle Board of Education

By: _____
Allan C. Roth, Esq.

Respondent
Garry Howard

By: _____
Gregory T. Syrek, Esq.

385-05

OAL DKT. NO. EDU 2864-05
AGENCY DKT. NO. 27-1/05

TERRANE JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the Assistant Superintendent for Business/B.S. signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Assistant Superintendent for Business/B.S. to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille Edwards

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05
Date of Mailing: 10/25/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2864-05

AGENCY DKT. NO. 27-1/05

TERRANE JOHNSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

John Jay Perrone, Esq., for petitioner

Martin M. Barger, Esq. for respondent (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, attorneys)

Record Closed: September 28, 2005 Decided: September 29, 2005

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 11, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 29, 2005
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

10-4-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 6 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

J-1

MONMOUTH REGIONAL HIGH SCHOOL
ONE NORMAN J FIELD WAY
TINTON FALLS, NJ 07724
(732) 542-1170 FAX(732) 542-5815

JAMES W. CLEARY,
ASSISTANT SUPERINTENDENT FOR BUSINESS
BOARD SECRETARY

September 28, 2005

AGREEMENT BETWEEN MONMOUTH REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND MS. TERRAINE JOHNSON

The Monmouth Regional High School Board of Education will agree to pay Ms. Terraine Johnson loss wages equal to $10,066.00 and will take out the necessary federal, state, social security and unemployment tax; along with pension obligations for this total dollar amount. The Board will further agree to credit Ms. Johnson for the sick days earned during this period of absence.

If Ms. Johnson wants to buy back pension time, she will be responsible for any additional cost beyond the four (4) percent that we will withdraw from the $10,066.00. The Board of Education will adjust Ms. Johnson's salary for the 2005/2006 school year to the rate of $12.50/hr.; retro back to September 01st, 2005, with a one (1) dollar additional hourly rate when she is riding the school bus as an aide.

Any attorney fees incurred by Ms. Johnson in this matter will be her responsibility.

This should put closure to the pending legal matters between Monmouth Regional High School Board of Education and Ms. Johnson.

Agreed: Terraine Johnson
Ms. Terraine Johnson

James W. Cleary
James W. Cleary
Assistant Superintendent for Business/B.S

Dated: 9-28-05

9/28/05

RECEIVED
OFFICE OF ADMIN LAW
2005 SEP 29 A 10:56

MONMOUTH REGIONAL HIGH SCHOOL
ONE NORMAN J FIELD WAY
TINTON FALLS, NJ 07724
(732) 542-1170 FAX(732) 542-5815

JAMES W. CLEARY,
ASSISTANT SUPERINTENDENT FOR BUSINESS
BOARD SECRETARY

OFFICE OF ADMIN LAW
2005 SEP 29 A 10:4

September 28, 2005

AGREEMENT BETWEEN MONMOUTH REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND MS. TERRAINE JOHNSON

The Monmouth Regional High School Board of Education will agree to pay Ms. Terraine Johnson loss wages equal to $10,066.00 and will take out the necessary federal, state, social security and unemployment tax; along with pension obligations for this total dollar amount. The Board will further agree to credit Ms. Johnson for the sick days earned during this period of absence.

If Ms. Johnson wants to buy back pension time, she will be responsible for any additional cost beyond the four (4) percent that we will withdraw from the $10,066.00. The Board of Education will adjust Ms. Johnson's salary for the 2005/2006 school year to the rate of $12.50/hr.; retro back to September 01st, 2005, with a one (1) dollar additional hourly rate when she is riding the school bus as an aide.

Any attorney fees incurred by Ms. Johnson in this matter will be her responsibility.

This should put closure to the pending legal matters between Monmouth Regional High School Board of Education and Ms. Johnson.

Agreed: Terraine Johnson
Ms. Terraine Johnson

James W. Cleary
James W. Cleary
Assistant Superintendent for Business/B.S

Dated: 9-28-05

9/28/05

REUSSILLE, MAUSNER, CAROTENUTO, BARGER, KENNY & STEEL, L.L.C.
(FOUNDED IN 1861 BY JOHN S. APPLEGATE)
COUNSELLORS - AT - LAW
P. O. BOX 580
RED BANK, NEW JERSEY 07701

MARTIN M. BARGER (N.J. & N.Y.)
PETER W. KENNY (N.J. & N.Y.)
DONALD B. STEEL
RONALD T. CATELLI (N.J. & TN.)
MILTON A. MAUSNER
SAMUEL CAROTENUTO
WHITNEY CROWELL
OF COUNSEL
LEON REUSSILLE, JR. (1917-1980)

RED BANK, NJ 07701
365 BROAD STREET
(732) 741-1800
FAX: (732) 758-9724

LAKEWOOD, NJ 08701
718-A BUCKINGHAM DRIVE
(732) 364-4900
FAX: (732) 363-3798

WHITING, NJ 08759
15-A WHITING SHOPPING CENTER
P.O. BOX 137
(732) 350-3200
FAX: (732) 350-3731

September 28, 2005

via fax 1-609-588-3730 & first class
Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road – P.O.Box 049
Mercerville, New Jersey 08625-0049

2005 SEP 29 A 10:19
OFFICE OF ADMIN. LAW

RE: Terrane Johnson v. Monmouth Regional High School District, Monmouth County
OAL Docket No. EDUOA 02864-2005S
Agency Ref. No. 27/1/05

Dear Judge Stein and Mr. Perrone:

Enclosed herewith find fully executed Agreement between Monmouth Regional High School Board of Education and Terrane Johnson.

Please confirm that the prehearing conference scheduled for Friday, September 30th at 3:00 p.m. is cancelled.

Respectfully,

MARTIN M. BARGER

MMB:le:5
Enclosure
cc: John Jay Perrone, Esquire – via fax 732-389-4719 & first class

REUSSILLE, MAUSNER, CAROTENUTO, BARGER, KENNY & STEEL, L.L.C.
(FOUNDED IN 1861 BY JOHN S. APPLEGATE)
COUNSELLORS - AT - LAW
P. O. BOX 580
RED BANK, NEW JERSEY 07701

MARTIN M. BARGER (N.J. & N.Y.)
PETER W. KENNY (N.J. & N.Y.)
DONALD B. STEEL
RONALD T. CATELLI (N.J. & TN.)

MILTON A. MAUSNER
SAMUEL CAROTENUTO
WHITNEY CROWELL
OF COUNSEL

LEON REUSSILLE, JR. (1917-1980)

RED BANK, NJ 07701
365 BROAD STREET
(732) 741-1800
FAX: (732) 758-9724

LAKEWOOD, NJ 08701
718-A BUCKINGHAM DRIVE
(732) 364-4900
FAX: (732) 363-3798

WHITING, NJ 08759
15-A WHITING SHOPPING CENTER
P.O. BOX 137
(732) 350-3200
FAX: (732) 350-3731

September 28, 2005

via fax 1-609-588-3730 & first class
Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road – P.O.Box 049
Mercerville, New Jersey 08625-0049

RE: Terrane Johnson v. Monmouth Regional High School District, Monmouth County
OAL Docket No. EDUOA 02864-2005S
Agency Ref. No. 27/1/05

Dear Judge Stein and Mr. Perrone:

Enclosed herewith find fully executed Agreement between Monmouth Regional High School Board of Education and Terrane Johnson.

Please confirm that the prehearing conference scheduled for Friday, September 30th at 3:00 p.m. is cancelled.

Respectfully,

MARTIN M. BARGER

2005 SEP 29 A 10:56
OFFICE OF ADMIN. LAW

MMB:le:5
Enclosure
cc: John Jay Perrone, Esquire – via fax 732-389-4719 & first class

Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, LLC

(founded in 1861 by john s. applegate)

Counsellors - at - Law

Leon Reussille, Jr. (1917-1980)

Milton A. Mausner
Samuel Carotenuto
Whitney Crowell
OF COUNSEL

Martin M. Barger (N.J. & N.Y.)
Donald B. Steel
Peter W. Kenny (N.J. & N.Y.)
Ronald T. Catelli (N.J. & TN.)

P. O. BOX 580
RED BANK, NEW JERSEY 07701

(732) 741-1800

FAX NUMBER
(732) 758-9724

Red Bank Office
365 Broad Street
(732) 741-1800
fax: (732) 758-9724

Lakewood Office
718-A Buckingham Drive
(732) 364-4900
fax: (732) 363-3798

Whiting Office
38B Whiting Shopping Center
(732) 350-3200
fax: (732) 350-3731

FAX TRANSMITTAL PAGE

PLEASE DELIVER THE FOLLOWING PAGE(S) TO:

NAME: Beth

FIRM: Hon. Donald J. Stein, A.L.J.

FAX NUMBER DIALED: 1-609-588-6574

FROM: MARTIN M. BARGER, ESQ.

2005 SEP 29 A 10:56
OFFICE OF ADMIN LAW

Total number of pages faxed including this page: 3 DATE: 09/29/05 TIME 10:56 AM

IF YOU DO NOT RECEIVE ALL OF THE PAGES, OR IF YOU HAVE DIFFICULTY WITH THE TRANSMISSION, PLEASE CALL LINDA AT (732) 741-1800 EXT. 223 or FAX (732) 758-9724.

CONFIDENTIALITY NOTE:
The documents accompanying this telecopy transmission contain information from MARTIN M. BARGER, ESQ., which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named in this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited, and that the documents should not be reproduced and should be returned to this attorney immediately. In this regard, if you received this telecopy in error, please notify me by telephone immediately so that we can arrange for the return of the faxed documents to us at no cost to you.

COMMENTS: **Beth: Pursuant to our telephone conversation of this date, enclosed find copy of the letter I mentioned to you concerning the Terraine Johnson v. Monmouth Regional matter. Linda**

387-05

OAL DKT. NO. EDU 8078-05
AGENCY DKT. NO. 259-10/05

J.D., on behalf of her minor child, L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY, DR. HAROLD MELLEBY, SUPERINTENDENT, AND RONALD W. SAHLI, SOLICITOR.	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on October 14, 2005, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner'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. *Crowe* at 132-34.

The Commissioner has, therefore, determined to adopt the recommended Order of the ALJ and deny petitioner's request for emergent relief. Moreover, after reviewing the audiocassette tape of the hearing, the Commissioner is compelled to comment on the apparent

misunderstanding of the parties that the law requires Eastern Camden County Regional School District (District) to enroll L.S. pending a decision in this case. This is not a residency dispute under *N.J.S.A.* 18A:38-1 *et seq.* Accordingly, there is no basis to conclude that L.S. is entitled to attend school in the District during the pendency of this matter.[1]

In conclusion, the Commissioner has determined to adopt the recommended Order of the ALJ for the reasons expressed therein and petitioner's request for emergent relief is, therefore, denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

[1] It appears that L.S. has been attending school in the District since October 12, 2005. Thus, L.S. *may* have been included in the October 15 student count submitted to the Department of Education by the District in support of its State-aid request.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 8078-05

AGENCY DKT. NO. 259-10/05

J.D. o/b/o Minor Child L.S.,
Petitioners,

v.

BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY, DR. HAROLD MELLEBY, SUPERINTENDENT, AND RONALD W. SAHLI, SOLICITOR,
Respondents.

J.D. on behalf of L.S., petitioners, *pro se*

Ronald W. Sahli, Esq., for respondents

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 3, 2005, petitioners filed an application for emergent relief with the New Jersey Department of Education, Division of Controversies and Disputes. The application requested that L.S. be permitted to attend school in respondent's district free of charge, as a non-

resident student under the Student Privilege provision of the district's by-laws, pursuant to an oral agreement. The respondent (District) denies any oral agreement exists, and further denies that the petitioner is eligible to attend school in the District.

On October 4, 2005, these matters were transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On October 14, 2005, the emergent relief was heard in the OAL, Trenton (Hamilton Township). At the conclusion of the hearing, the petitioner was explained the legal issues involved, and he requested one additional day to research the issue. On October 18, 2005, petitioner submitted a detailed brief with exhibits. On October 21, 2005, respondents' brief, as well as a response from the petitioner, was filed.

STATEMENT OF FACTS

Some of the facts are undisputed. Petitioner was a resident of the district during the times L.S. attended Eastern High School. On July 8, 2005, petitioners called the district and discussed this matter with a secretary. The contents of this conversation are in dispute and will be discussed below. On July 9, 2005, petitioners signed a lease to move into Haddonfield. On July 10, 2005, petitioners sent the district a letter requesting permission for their daughter L.S. to complete her senior year at Eastern High School. The letter further stated:

> Please let me know if it is possible for [L.S] to finish her final year of High School at Eastern and, if possible, what steps we need to take in order to facilitate the process (R-1).

The same letter further stated that "Our living situation has forced us to move out of the school district effective July 31, 2005."

Shortly thereafter, the district denied petitioners' request, because the school's by-laws require that the student be a resident of the district and attend school as of October 15, 2005 (P-2). On August 17, 2005, petitioners appealed to the Eastern Regional School District, and the appeal was denied.

The preceding information is undisputed and is thus **FOUND AS FACT**.

At issue is what was said during the July 8, 2005, telephone conference between the petitioner and a secretary for the district. Petitioner wrote in his initial petition:

> Once the petitioner signed a lease to move out of the district, the petitioner would then notify the senior high school principal of their move and make a written request for Senior Privilege (P-1).

Petitioner further testified during the hearing that he was told to send a letter to the district. After a lengthy discussion as to this issue, petitioner later testified that he was told that L.S. would be allowed to attend Eastern High School. Petitioner wrote in his brief that the promise made to him was:

> If you enter into a lease on July 9, 2005 to move into a home located out of Eastern High School district on August 1, 2005, you will be meet [*sic*] all eligibility requirements to have tuition waived for a non-resident Senior. (P-2)

Petitioner then alleges that he relied upon this promise and signed a new lease.

This issue is significant because the crux of the petitioner's argument is that he was made a promise by the district that L.S. could attend the district and, in reliance thereof, the petitioner and his family moved out of the district.

Based on the fact that his initial pleadings and testimony merely state that a written request must be made for Senior Privilege, and that petitioner's letter sent the day after this phone call confirms that a process must be followed and completed, I **FIND** that no express promise was made to the petitioner.

CONCLUSIONS OF LAW

A party seeking emergent relief must satisfy the standards in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), which requires the movant to establish:

1. The petitioner will suffer irreparable harm if the relief is not granted;

2. The petitioner has a substantial likelihood of prevailing on the merits of the underlying claim; and

3. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all three prongs of the *Crowe* test.

IRREPARABLE HARM

Although petitioner may face a difficult transition to attend another school away from her friends, and not be able to take the specialized classes offered in her prior school, she will be attending high school in a well established school district. It should further be noted that the petitioner is seeking to attend an out-of-district school through the policy of "senior privilege." A privilege may be withheld in the interest of maintaining an orderly and efficient school system. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, State Board of Education* decision dated April 17, 1996, citing *Camden City Board of Education v. NJSIAA*, Docket #A-2802-91T2 (App. Div. 1992); *Burnside et al. v. NJSIAA*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985). The determination of whether or not a student may attend is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. The denial of a public high school of her choosing, as opposed to attending a high school in the district in which she resides, creates no irreparable harm.

SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. *Thomas v. Bd. of Ed. of Morris Tp.,* 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Ed.,* 60 *N.J. Super.* 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Ed., supra,* 60 *N.J. Super.* at 294. Obviously, the district has a clear and distinct policy to require tuition payment for out-of-district students to attend their high school.

The petitioners have also argued that the doctrine of promissory estoppel bars the respondent from denying them attendance at their high school. There are four elements to the doctrine of promissory estoppel: 1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment. *Malaker Corp. Stockholders Protective Committee v. First Jersey Nat'l Bank*, 163 *N.J. Super.* 463, 479, 395 A.2*d* 222 (App. Div. 1978), *Lobiondo v. O'Callaghan,* 357 *N.J. Super.* 488, 499 (N.J. Super. Ct. 2003). I have already determined that no clear and definite promise was ever made to the petitioners. It should further be noted that the petitioner admits that he was notified the week of July 11, 2005, of the October 15, 2005, requirement to be living in the district. Since petitioners had signed the lease only few days before becoming aware of the denial, the petitioners may have been able to cancel the lease. It does not appear as though there was any detrimental reliance, since the petitioner stated that his living conditions required him to move. Thus, the doctrine of promissory estoppel is not applicable in this case.

Therefore, I **FIND** it unlikely that the petitioners would have prevailed on the merits.

WILL PETITIONER SUFFER GREATER HARM THAN THE RESPONDENT IF THE REQUESTED RELIEF IS NOT GRANTED?

This appears to be a more difficult question. The petitioners have alleged that their daughter will face a difficult transition to another school, be away from her friends, and not be able to take specialized classes offered in her prior school. The district alleges that they are not required to provide a free and appropriate education to the petitioner, since they no longer reside in the district. I am unable at this time to determine if the petitioners would prevail on this argument.

In conclusion, I **FIND** that since *N.J.A.C.* 6A:14-2.7(m) 1 and *N.J.A.C.* 1:6A-12.1 is written in the conjunctive and the petitioners have failed to satisfy all three requirements, I **CONCLUDE** that the petitioners have failed to establish grounds for the granting of emergency relief.

DECISION AND ORDER

Based on the foregoing, petitioner's motion for emergent relief is **DENIED**. The matter will be scheduled for a plenary hearing on an expedited basis, should the parties wish to so proceed.

This order on the application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

10-24-2005
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

/bdt

LIST OF EXHIBITS

For petitioner:

P-1 Petition

P-2 Nonresident Senior Policy of the District

For respondent:

R-1 Petitioner's letter dated July 8, 2005

388-05

JAMES F. TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner — a former principal terminated through a reduction in force (RIF) in 1996 — contends that the terms of respondent's 2004 offer of reemployment were deliberately unacceptable so as to circumvent petitioner's tenure and seniority rights; he seeks reinstatement to the position of principal or appointment to the position of assistant superintendent, retroactive to July 1, 2004, with annual salary and emoluments consistent with the statewide salary ranges for those positions. Respondent filed a motion for summary decision, alleging that the petition was barred by the 90-day limitation of *N.J.A.C.* 6A:3-1.3(d).

The ALJ found, *inter alia,* that: the matter was ripe for summary decision as there are no genuine issues of material fact; the letter dated July 15, 2004 provided adequate notice to petitioner that the Board did not intend to alter the terms of the reemployment contract; the 90-day period therefore began on July 15, 2004, and ended on October 13, 2004, making the petitioner's October 20, 2004 filing untimely; petitioner's claims to tenure and seniority rights for two other positions – assistant superintendent for curriculum and instruction, and supervisor of curriculum and instruction – are also time barred; and there are no compelling or exceptional circumstances to warrant relaxation or waiver of the 90-day rule. The Initial Decision of the OAL granted the respondent's motion for summary decision, and dismissed the petition.

The Commissioner adopts the ALJ's decision, and dismisses the petition. In so determining, the Commissioner notes her concurrence with the ALJ's reasoning except for the ALJ's reliance on *Drapczuk v. Board of Education of the Township of Winfield, Union County*, as the Commissioner rejected the Initial Decision in that matter, holding that the underlying issue was not whether a letter constituted "sufficient notice" in accord with *Kaprow, supra,* but whether the Board did, in fact, make a lawful determination of nonrenewal as required by *N.J.S.A.* 18A:17-20.1.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 27, 2005

OAL DKT. NO. EDU 1049-05
AGENCY DKT. NO. 366-10/04

JAMES F. TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the administrative law judge's (ALJ's) determination to grant the Hardyston Township Board of Education's (Board's) motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C.* 1:1-12.5(b) and *Contini, supra.* In this regard, with respect to petitioner's claim to the principal's position at Hardyston Middle School, the Commissioner agrees with the ALJ's conclusion that the Board's letter of July 15, 2004 provided final and adequate notice to petitioner that the Board did not intend to alter the terms of the re-employment contract offered to him so as to trigger the 90-day rule for filing an appeal to the Commissioner set forth at *N.J.A.C.* 6A:3-1.3(d). Since the within petition was filed on October 20, 2004, after the 90-day deadline, the Commissioner concurs that petitioner's appeal petition was untimely filed.

In so determining, however, the Commissioner notes that the ALJ in this matter relied, in part, on the ALJ's conclusion in the matter of *Drapczuk v. Board of Education of the*

In that petitioner did not file his appeal within 90 days from the Board's July 15, 2004 notification, the Commissioner finds that his appeal is time-barred.

Likewise, the Commissioner concurs that petitioner had actual knowledge of a possible claim to the position of Assistant Superintendent for Curriculum and Instruction no later than January 5, 2004, and to the position of Supervisor of Curriculum and Instruction — by his own admission — "no earlier than May 2004." In that the petition in this matter was not filed until October 20, 2004, petitioner clearly filed his claims for these positions after the 90-day period set forth at *N.J.A.C.* 6A:3-1.3(d).

Moreover, the Commissioner does not find that the factual circumstances set forth in petitioner's pleadings constitute grounds for relaxation of the 90-day rule. No constitutional issues are involved in petitioner's claims, nor does the petition present issues of significant public interest beyond the parties. On the contrary, the Commissioner herein determines — as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood,* 1990 *S.L.D.* 663, 673 — that the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioner's appeal as untimely.

Accordingly, with the exception of the reliance on the *Drapczuk* decision noted above, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

Township of Winfield, Union County, decided by the Commissioner May 20, 2005, in which the ALJ concluded that Drapczuk's petition was untimely because he did not file his appeal within 90 days of receipt of a letter from the president and vice-president informing him that the board did not intend to renew his contract. However, the Commissioner in *Drapczuk* rejected the ALJ's conclusion, finding, instead, that petitioner's appeal *was* timely filed. The Commissioner reasoned that, notwithstanding petitioner's receipt of an April 24, 2001 letter from the president and vice-president of the board informing him that the board did not intend to renew his contract, the earliest date that petitioner could have asserted a viable claim that his chief school administrator's contract was renewed by operation of *N.J.S.A.* 18A:17-20.1 was July 1, 2001 because the board could have acted at any time prior to and including June 30, 2001 to correct any alleged deficiencies in its notification or determination of nonrenewal. (The Commissioner emphasized in that matter that the underlying issue was not whether the April 24 letter constituted "sufficient notice" in accord with *Kaprow, supra*, but whether the board did, in fact, make a lawful determination of nonrenewal as required by *N.J.S.A.* 18A:17-20.1.) *Drapczuk,* slip op. at 2-3. The State Board affirmed the Commissioner's decision in *Drapczuk* on October 19, 2005.

Notwithstanding the Commissioner's rejection of the ALJ's misplaced reliance on *Drapczuk* in this matter, the Commissioner agrees with the ALJ's analysis and ultimate conclusion that petitioner in this instance received adequate and final notice of the Board's determination that it did not intend to alter terms of the reemployment contract it was offering to him in its letter dated July 15, 2004, and that such notice was consistent with the Supreme Court's determination in *Kaprow, supra*, which established that the 90-day period begins when a petitioner learns of facts that would enable him to file a timely claim. *Kaprow, supra,* at 588-89.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 1049-05
AGENCY DKT. NO. 366-10/04

JAMES F. TAYLOR,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,
Respondent.

Jason P. Gratt, Esq., for petitioner (Courter, Kobert & Cohen, attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 5, 2005 Decided: September 13, 2005

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

On October 20, 2004, petitioner, James F. Taylor, filed a Verified Petition with the Commissioner of Education alleging that he should be granted reinstatement to the position of principal of the Hardyston Elementary School or, in the alternative, appointment to the position of assistant superintendent, retroactive to July 1, 2004. He sought an annual salary and emoluments consistent with the statewide salary ranges for those positions. On November 12, 2004, respondent filed its answer, denying certain of the allegations and asserting among other affirmative defenses that petitioner's action was barred for failure to file within applicable time limitations. On January 5, 2005, 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.

The case was assigned to the undersigned on January 24, 2005, and a telephone prehearing conference was scheduled for March 14, 2005. The conference was adjourned to April 8, 2005, to allow petitioner the opportunity to retain other counsel due to a conflict of interest. During the prehearing conference the issues were isolated and respondent discussed filing a motion for summary decision on the issue of whether petitioner's claim was time barred. The hearing was scheduled for November 14 and 15, 2005, at the Office of Administrative Law. By letter dated April 22, 2005, petitioner clarified that he sought reinstatement to the vacant principal position or appointment to any one of various other positions that he was wrongfully denied pursuant to his tenure and seniority rights.

On June 6, 2005, respondent moved for summary decision, alleging that the petition was barred by the 90-day limitation of *N.J.A.C.* 6A:3-1.3(d). On June 20, 2005, petitioner filed a response, and on June 27, 2005, respondent filed its reply. Thereafter, in a conference call on July 20, 2005, I advised counsel to clarify whether there was also a dispute as to two other positions, assistant superintendent for curriculum and instruction and supervisor of curriculum and instruction, and, if so, when petitioner became aware of them. Counsel submitted additional memoranda on those

issues. The following constitutes my determination on respondent's motion for summary decision.

Issue

At issue is whether petitioner is barred from pursuing this appeal pursuant to *N.J.A.C.* 6A:3-1.3(i) (the 90-day rule),[1] and whether the 90-day limitation period should be relaxed pursuant to *N.J.A.C.* 6A:3-1.16.

Facts

It is clear from a review of the certification of counsel for respondent and the attachments thereto, as well as the petition, that the facts necessary for determination of the motion are essentially undisputed. They may be summarized as follows:

1. James Taylor began employment with the Hardyston Board of Education in August 1989 and received tenure as principal in August 1992. In November 1995 the Board voted to abolish the position of principal as part of a reduction in force, effective in June 1996.

2. On January 14, 2003, the Board voted to establish the position of assistant superintendent for curriculum and instruction. The Board employed an individual in this position from July 1, 2003, through May 2004.

3. On May 3, 2004, the Board notified petitioner that the principal position that he had held previously had been reestablished, offered him the position and requested a response by May 14, 2004. On May 10, 2004, petitioner notified the Board of his interest in the position and requested a

[1] Effective April 4, 2005, *N.J.A.C.* 6A:3-1.3 was amended and rewritten. *See* 36 *N.J.R.* 5032(a), 37 *N.J.R.* 105(b). *N.J.A.C.* 6A:3-1.3(d) was recodified as *N.J.A.C.* 6A:3-1.3(i).

copy of the contract for the position. The parties then entered into negotiations relating to petitioner's return to the position.

4. The Board memorialized its offer in a letter dated June 16, 2004, and requested a response by June 23, 2004. The Board then forwarded a proposed contract to petitioner's attorney for review.

5. On July 9, 2004, petitioner's attorney requested revisions to the terms of the contract. Specifically, petitioner believed the salary was unacceptably low. On July 15, 2004, however, the Board faxed a letter to petitioner's former attorney, stating, "The Board is unwilling to consider any changes to the proposed [contract]." The letter further requested petitioner's answer to these terms by July 16, 2004.

6. It was conceded that a fax of the letter was received at counsel's office on July 15, 2004, but not reviewed by him until the following day. In fact, by letter of July 16, 2004, petitioner's prior counsel acknowledged receipt of the letter and indicated that he believed the Board's position was "arbitrary, capricious and might be considered an attempt to avoid Mr. Taylor's tenure rights."

7. The Board did not receive an answer from petitioner by July 16, 2004, as requested. (In fact, the Board heard nothing further from petitioner until his Verified Petition filed in this matter.) As a result, on July 26, 2004, the Board sent a letter to petitioner's attorney stating that since it had not received any answer from petitioner regarding the position, "The Board will construe this as a rejection of the offer." On October 20, 2004, the Board was served with a copy of the Verified Petition.

8. Petitioner admits that he became aware of the existence of the position of assistant superintendent for curriculum and instruction when he saw an employment advertisement for it in a newspaper dated January 19, 2003.

One year later, on January 5, 2004, petitioner sent a letter to the Board stating that he had knowledge of the new position and the Board's employment of a new administrator. The letter further requested that the Board "[enter] into negotiations with me for my letter of resignation as the tenured principal in that district and avoid litigation over your present administrative structure." Petitioner, however, maintains that the Board never actually notified him of the availability of the assistant superintendent position.

9. Petitioner admits that he became aware of the existence of the position of supervisor of curriculum and instruction "no earlier than May 2004."

Discussion

Summary Decision

N.J.A.C. 1:1-12.5(b) provides that summary decision should 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." This language is substantially similar to the guidelines for summary judgment under New Jersey Court Rule 4:46-2(c).[2] The OAL's standard for summary decision is as set forth by the New Jersey Supreme Court.

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a

[2] *R.* 4:46-2(c) provides, in part:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

hearing] 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, 250, 106 *S. Ct.* 2505, 2511, 91 *L. Ed.* 2d 202, 213 (1986)). The Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. When determining whether a genuine issue of material fact exists, "the court [should] be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. *Ibid.* This weighing differs from the weighing the judge would perform after a hearing in that, "[o]n a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." *Id.* at 536.

It is clear that the standard for summary decision has been met in the instant matter. As stated in *N.J.A.C.* 1:1-12.5(b), the requirement imposed on a party opposing the motion is to submit an affidavit setting forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. Thus, one must not only show that there is a genuine factual issue, but also that such issue can only be determined in an evidentiary proceeding.

In the instant matter, as will be discussed below, there are no genuine issues of material fact, and even granting petitioner all favorable inferences, there is no doubt that the facts necessary to a resolution are undisputed in any meaningful manner.

The 90-Day Rule

a) The Principal Position

The threshold issue in this matter is whether petitioner's claim for the principal position was timely filed.

The New Jersey Administrative Code provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of *N.J.A.C.* 6A:3-1.4. *See N.J.A.C.* 6A:3-1.3. In addition to serving the petition upon each respondent, the petition must be filed

> no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [*N.J.A.C.* 6A:3-1.3(i) (emphasis added).]

Although this provision does not address what circumstances constitute "adequate notice," the New Jersey Supreme Court has offered guidance, stating that "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate," *Kaprow v. Berkeley Township Bd. of Educ.*, 131 *N.J.* 572, 587 (1993). Specifically, the 90-day limitation period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." *Id.* at 587 (citing *Burd v. New Jersey Tel. Co.*, 76 *N.J.* 284, 291 (1978). Therefore, the 90-day period begins when a petitioner learns of facts that would enable him to file a timely claim. *Id.* at 588-89.

In *Kaprow,* the New Jersey Supreme Court held that an unofficial and informal note sent from the board secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of the 90-day period against his assertion of tenure rights. *Id.* at 587. The Court explained that the time limitation provides "a measure of repose, an essential element in the proper and efficient administration of school law." *Id.* at 582. Further, "[t]he 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.*

Moreover, the 90-day requirement has been strictly followed and applied almost without exception. For example, a petition filed only two days after the 90-day period has been dismissed as untimely. *See Dreher v. Jersey City Bd. of Educ.*, 1987 *S.L.D.* 1706, *aff'd*, St. Bd., 1988 *S.L.D.* 2439, *rev'd*, App. Div. A-6120-82 (Feb. 28, 1958) (reversed for further fact-finding to determine if Dreher was a ten- or twelve-month

employee, which did not affect the 90-day limitation holding). In fact, regardless of whether the board complies with statutory, administrative or regulatory requirements, the petitioner is required to file the petition no later than 90 days after receipt of notice of the final decision. *Portee v. Newark Bd. of Educ.*, 94 *N.J.A.R.*2d (EDU) 381, 383.

The State Board of Education has since clarified the importance of the petitioner either receiving notice of the final decision or "knowing of facts that enabled [the petitioner] to file a timely claim." *Eisenberg v. Fort Lee Bd. of Educ.*, St. Bd. of Educ. (Nov. 5, 2003) <http://www.nj.gov/njded/legal>. In *Eisenberg*, the petitioner received "final" notice on April 3, 2001, that the board decided not to renew his employment contract. Eisenberg requested a statement of reasons for his non-renewal, which he received on May 1, 2001. On May 10, 2001, Eisenberg requested a meeting with the board to discuss his non-renewal, and a public meeting was held on July 2, 2001. On July 3, 2001, Eisenberg received a letter stating "final determination regarding your employment status," which indicated that the board upheld its decision to not renew his contract. On September 29, 2001, Eisenberg filed his petition of appeal with the Commissioner challenging the board's action.

The board in *Eisenberg* contended that the final action in that matter took place on April 3, 2001, and, therefore, the 90-day limitation period started to run at that point, forcing the petition to be dismissed as untimely. The administrative law judge (ALJ) disagreed and determined that the 90-day limitation period began on July 3, 2001, when Eisenberg received the "final determination regarding [his] employment status." On appeal, the Commissioner reversed the ALJ's decision, agreeing with the board that the "Superintendent's letter of April 3, 2001, had alerted Eisenberg to the existence of facts that might equate in law with a cause of action." Eisenberg then appealed to the State Board of Education, which reversed the Commissioner's decision, holding that, in this particular set of circumstances, the final notice took place on July 3, 2001.

The State Board distinguished the matter, noting that Eisenberg did not learn of pertinent information until just prior to the meeting on July 2, 2001. This new information alerted him to the existence of an allegation not known to him until late June

and, therefore, "[t]he petitioner could not have made the same allegations prior to his becoming aware of such information." Accordingly, the July 3, 2001, decision had to be the final decision amenable to review, making Eisenberg's petition timely.

The instant matter is not controlled by *Eisenberg* because petitioner first learned of facts alerting him to a cause of action through the letter dated July 15, 2004. That letter stated, "The Board is unwilling to consider any changes to the proposed [contract]." Petitioner did not subsequently learn of any new information that would allow him to assert different claims from those he could have asserted after receiving that letter. Therefore, the instant matter is distinguishable from *Eisenberg*.

This conclusion is consistent with *Drapczuk v. Winfield Board of Education*, 2005 N.J. AGEN LEXIS 292 (N.J. AGEN 2005). There, the board sent a letter to the petitioner dated April 24, 2001, informing him that his employment contract would not be renewed when his present contract expired in June 2002. The board, however, did not formally pass a resolution until September 18, 2001. The petitioner argued that the letter dated April 24, 2001, did not constitute action or decision by the board for purposes of the 90-day rule. The board maintained that the April 24 letter was sufficient to trigger the 90-day period. The pivotal question in *Drapczuk*, therefore, was what constitutes a "final order, ruling or other action by the district board of education" necessary under *N.J.A.C.* 6A:3-1.3(i).

In *Drapczuk* the petitioner conceded that the letter dated April 24, 2001, notified him that he should expect his contract to not be renewed. The petitioner further admitted that he waited for the full board of education to take action on this matter. Accordingly, the administrative law judge in *Drapczuk* found that the letter dated April 24, 2001, provided adequate notice to the petitioner that the board intended not to renew his contract. The judge explained:

> Although the directive was not by formal motion or resolution, under *Kaprow* notice without formal action of the Board may be adequate because it was information that the petitioner had a right to know and that the Board had a duty

> to communicate. *The Board's resolution on September 18, 2001, was a mere formality that confirmed prior action as described in the letter dated April 24, 2001.*
>
> [*Drapczuk, supra*, 2005 N.J. AGEN LEXIS 292 (N.J. AGEN 2005) (emphasis added).]

In the instant matter, the board argues that the 90-day period began on July 15, 2004, when the board notified petitioner's attorney by letter that the reemployment offer was final by stating, "The board is unwilling to consider any changes to the proposed [contract]." Petitioner, however, contends that this letter fails to apprise him that the Board made its "final" offer or that any vote on his employment was conducted. Instead, petitioner argues that the 90-day period began on July 26, 2004, when the board sent a letter stating that it would construe petitioner's silence as a rejection of the offer.

Having considered the relevant case law, I **FIND** that the letter dated July 15, 2004, provided adequate notice to petitioner that the Board did not intend to alter the terms of the reemployment contract. Although the directive was not by formal motion or resolution, under *Kaprow* notice without formal action of the Board may be adequate because it was information that the petitioner had a right to know and that the Board had a duty to communicate. The Board's letter on July 26, 2004, declaring petitioner's silence a rejection can be considered a mere formality separate from the confirmed prior action contained in the letter dated July 15, 2004.

Petitioner further contends that the Board's letter dated July 15, 2004, did not trigger the 90-day rule because he and the Board still were engaged in negotiations concerning his employment rights. This contention is unpersuasive. First, there is nothing in the record to indicate that any negotiations were ongoing. The Board offered a reemployment contract, petitioner requested changes, and the Board refused to make changes. It is questionable whether this constitutes negotiations.

Furthermore, after the Board rejected petitioner's requested changes he did not continue to engage in "negotiations." If petitioner considered the letter to be a

"negotiation ploy," then he would have countered with further negotiations. Although petitioner commented in his July 16, 2004, letter that the Board's position was "arbitrary" and could be considered an attempt to avoid his tenure rights, similar to events in *Drapczuk* he took no action at all and simply waited for the full board to issue its letter dated July 26, 2004, declaring his silence a rejection of the proposed contract. Even then, petitioner took no action until October 20, 2004, when the Board was served with a copy of the Verified Petition.

Moreover, attempting to resolve a dispute with a board of education through other avenues before filing a petition with the Commissioner does not toll the running of the 90-day rule. *See Wise v. Trenton Bd. of Educ.*, 2000 N.J. AGEN LEXIS 462 (N.J. AGEN 2000). Specifically, the Commissioner had held that "requests to a board [of education] for reconsideration of its final decision do not toll the running of the 90-day rule." *Pacio v. Lakeland Reg'l Sch. Dist. Bd. of Educ.*, 1989 *S.L.D.* 2060, 2069. Similarly, as I pointed out in a previous case, *M.N. and E.Y. o/b/o K.N. v. Jersey City School District*, EDU 11336-03 (June 17, 2004), *adopted*, Comm'r (July 21, 2004) <http://lawlibrary.rutgers.edu/oal/search.html> (citations omitted):

> As stated by the New Jersey Supreme Court in *Kaprow, supra*, attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal.
>
> In fact, . . . there is no competent proof [that the issue was] ever actually under review or would be reversed through negotiation.

Accordingly, petitioner's attempt to change the proposed reemployment contract by asking the Board to change some of its terms is irrelevant and does not toll the running of the 90-day period. Such a request does not negate the fact that the petitioner received adequate final notice through the Board's letter dated July 15, 2004, advising him that the Board was unwilling to change any of the contract terms.

Therefore, the 90-day period began on July 15, 2004, and ended on October 13, 2004. Since petitioner filed the petition on October 20, 2004, after the 90-day deadline, and because the 90-day rule is strictly adhered to, the petition is considered untimely.

(b) Assistant Superintendent for Curriculum and Instruction

With respect to this position the petitioner contends that the burden of proving adequate notice falls on the Board and relies on *Metaxas v. Hoboken Board of Education*, 96 *N.J.A.R.*2d (EDU) 708. In *Metaxas*, the petitioners' positions were abolished and the board made a number of appointments two months later in public session. The board argued that the petitioners reasonably should have known, or at least investigated the possibility, that these appointments might have affected their tenure rights entitlements.

The petitioners contended that while they may have known of the new appointments, they did not have specific notice that those persons had less seniority than they until three months later. Accordingly, the administrative law judge found that the 90-day period did not begin to run until the petitioners had notice of possible errors in the district's seniority determinations.

The local board argued that such a ruling "essentially rewards petitioners for doing nothing to ascertain their own status and permits them to rely on information conveyed by a local education association officer who had full knowledge of the operative facts in June 1992 but did not so advise petitioners until September." *Metaxas, supra*, 96 *N.J.A.R.*2d (EDU) at 714.

On review, the Commissioner concurred with, and the State Board of Education affirmed, the ALJ's conclusion that "a district board is 'clearly required' to give a staff member affected by a reduction in force notice of its action appointing non-tenured individuals to positions to which such staff member claims tenure rights." *Id.* at 715.

In *Beshaw v. Board of Education of Borough of Oakland*, 97 *N.J.A.R.*2d (EDU) 494, the petitioner was notified in April 1995 that the Board would recommend that her employment not be renewed, and in May 1995 the Board officially voted to not renew her employment. In July 1995 the Board posted notice of full-time teaching positions. The petitioner, however, claimed that she never saw the postings due to knee surgery resulting in her incapacity. On September 5, 1995, the principal announced that a new teacher had been hired to teach the courses. The petitioner argued that she did not become aware of a potential claim until she received the curricula for the courses in January 1996, since the Board had never supplied her with the curricula, and, instead, she had to get them from another source. Thus, the petitioner argued that the Board never gave her adequate notice that a cause of action existed. The administrative law judge found:

> Petitioner did not know that she may have had a potential cause of action until the new positions were posted and a nontenured teacher was hired to teach the courses. When the nontenured teacher was hired, however, petitioner was on notice of the Board's action. "The final order, ruling, or other action by the Local Board occurred when it appointed nontenured persons to positions to which petitioner claims tenure rights." The 90 days period began on the date of some identifiable action taken by the Board. Indeed, the regulation specifically requires that notice or action by the board triggers the running of the 90 days, not action or knowledge on the part of a claimant.
>
> [*Beshaw, supra*, 97 *N.J.A.R.*2d (EDU) at 496 (*citing Kaprow v. Berkeley Bd. of Educ.*, 131 *N.J.* 572, 588 (1993) (emphasis added).]

Accordingly, the ALJ held that the petitioner had notice of the Board's action on September 5, 1995, when the principal announced that a new teacher had been hired and assigned to teach the courses claimed by petitioner. Consequently, the 90-day period began on the date of the Board's official action, not when the petitioner acquired specific knowledge of a cause of action.

The Commissioner disagreed with the initial decision, finding summary decision inappropriate. The Commissioner explained:

> Because petitioner could not have reasonably concluded from the job posting and its attendant certification requirement that she may have had a possible claim to the courses at issue, notice cannot automatically be reckoned from the date of appointment of the teacher for those courses in question. Thus, the question becomes when petitioner knew, or reasonably should have known, about a possible claim so that the timeliness of her petitioner may be determined. In this regard, the record includes insufficient facts and further reveals that there exists a fundamental factual dispute which directly impacts upon the threshold issue of timeliness. Specifically, petitioner and the Board offer contradicting accounts with respect to when petitioner first requested a copy of the curricula for the courses in question, a fact which is crucial to the underlying determination of when petitioner knew, or reasonably should have known, that she had a possible claim to teach the courses in question.
>
> [*Id.* at 498-99 (citing *Metaxas, supra*, 96 *N.J.A.R.*2d (EDU) 708).]

Similarly, in *Meyer v. Board of Education of Wayne*, 1986 *S.L.D.* 3094, 3098, the State Board of Education observed that "in the absence of actual knowledge, the cause of action accrues only upon notice sufficient to alert the teaching staff member who has been adversely affected . . . ."

Although under *Beshaw* a board is required to give a petitioner adequate notice of an official action creating a possible claim of rights, *Beshaw* is distinguishable from the instant matter. In *Beshaw*, the petitioner did not know a claim existed until viewing the curricula of the posted job openings. Here, petitioner had all the facts necessary to alert him that a possible claim existed when he learned that the Board employed another in his claimed position. In fact, petitioner's letter dated January 5, 2004, revealed that petitioner indeed was aware of a possible claim at that time and, in fact, the letter threatened litigation over the Board's "present administrative structure." This

indicates that the petitioner knew a possible claim existed, and needed no additional facts to come to such a conclusion.

Further, the letter alerted the Board to petitioner's knowledge of the possible claim. The limitation period is designed to give boards the security of knowing that administrative decisions cannot be challenged after 90 days. To allow petitioner to bring a claim more than 90 days after the January 5, 2004, letter conflicts with the intent of the 90-day rule providing the Board with the security of knowing that a claim can no longer be brought after a certain time. Otherwise, petitioner could hold such a claim over the Board indefinitely.

Additionally, *Beshaw* supports the argument that the 90-day period does not necessarily begin on the date of a school board's official action. Instead, *Beshaw* stands for the proposition that the 90-day period begins when the petitioner knew, or reasonably should have known, about a possible claim. Thus, under *Beshaw*, a school board is not required to give a petitioner notice to trigger the running of the 90-day period. The time limit begins when the petitioner actually knew, or reasonably should have known, about a possible claim. Here, petitioner had actual knowledge of the possible claim no later than January 5, 2004. Therefore, to be timely, the petition had to be filed by April 5, 2004. The petition here was not filed until October 2004, is untimely under the 90-day rule, and, accordingly, Taylor's claim to this position is dismissed.

(c) Supervisor of Curriculum and Instruction

Petitioner also claims entitlement to the position of supervisor of curriculum and instruction. Petitioner concedes that he became aware of this position "no earlier than May 2004," but contends that respondent never directly notified him of the position.

Respondent asserts that petitioner's claim to the position previously was the subject of an appeal in 1996 in which he sought this same position, (which was in existence at that time), and to which there has been no change. More particularly,

respondent points out that the position has always contained a teaching component (for which petitioner apparently does not have the requisite credentials). Since the same position was the subject of Judge Springer's Initial Decision, OAL Dkt. No. EDU 7070-96, dated December 11, 1997, denying petitioner's claim, which was affirmed by the Commissioner of Education on February 2, 1998, respondent asserts that petitioner is estopped from making this identical claim. Further, respondent contends that despite petitioner's letter of January 5, 2004, which clarified that he had knowledge of the Board's administrative structure and that he believed his tenure and seniority rights were violated, petitioner did not timely challenge the Board's actions or make a claim to any position. In fact, neither the petition in this case nor the prehearing order makes any reference to the position.

Petitioner counters that the current position of supervisor of curriculum and instruction has changed since 1996, that it is now a full-time position, not part time, and no longer contains a teaching component.

In reaching a determination on whether petitioner is barred by the 90-day rule from pursuing this position, I have afforded him all favorable inferences. Thus, I do not rely for my determination on whether the position petitioner appealed from in 1996 is identical to the current position. Nor do I rely on petitioner's January 5, 2004, letter, since I do not know when petitioner alleges this "current" position was created. I am also willing to give petitioner the benefit of the doubt that his current appeal does encompass a claim to this position since it is mentioned in the petition of appeal, *albeit* not in his request for relief.

However, I still must **CONCLUDE** that petitioner is barred from relief from seeking this position pursuant to the 90-day rule. By petitioner's own admission he knew of the position "no earlier than May 2004." Since he then had actual knowledge of the position, for the reasons expressed in my determination in (b) above, his time in which to make a claim began to run at that time. Since petitioner did not file the petition in this matter until October 20, 2004 (approximately five months later), he clearly filed after the 90-day deadline.

Relaxing the 90-Day Rule

Under certain circumstances, pursuant to *N.J.A.C.* 6A:3-1.16 the 90-day rule may be relaxed. However, the authority to relax or waive the 90-day rule is rarely invoked and is generally unsuccessful unless "strict adherence would be inappropriate, unnecessary or where injustice would occur." *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 449, 453 (citing *Gordon v. Passaic Bd. of Educ.*, 1985 *S.L.D.* 1929, 1931, *aff'd*, A-3294-84 (App. Div. May 27, 1986), *certif. denied*, 105 *N.J.* 534 (1986)).

Thus, certain cases may be excepted from the 90-day rule where they involve:

> (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification.
>
> [*Brunetti v. New Milford*, 68 *N.J.* 576, 586 (1975) (footnotes omitted).]

Nevertheless, relaxation of the 90-day rule occurs only under exceptional circumstances, or if there is a "compelling" reason to do so. *See Kaprow, supra*, 131 *N.J.* at 590 (finding no exceptional circumstances compelling the Commissioner to waive the 90-day limitation); *DeMaio, supra*, 96 *N.J.A.R.*2d (EDU) at 453 ("There are no compelling reasons in the present matter to justify a waiver or relaxation of the 90-day limitations period"); *Bland-Carter v. State-Operated Sch. Dist. of the City of Newark*, OAL Dkt. No. EDU 1505-00, Initial Decision (July 11, 2000), *adopted*, Comm'r (September 11, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (refusing to relax the 90-day rule when petitioner filed outside of the time limitation where genuine personal problems of the petitioner occurred during the first part of the 90-day period and the petitioner returned to work several weeks before the 90th day).

On the other hand, the Appellate Division has held that there is justification for relaxation of the 90-day rule where "the Commissioner's finding that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for his petition are adequately supported by the record and that strict adherence to the 90-day time limitation . . . would result in individual justice not being served." *Brown v. Sussex County Vocational Sch. Bd. of Educ.*, No. A-4854-83 (App. Div. April 4, 1985).

In *Bogart v. East Orange Board of Education*, OAL Dkt. No. EDU 6245-82 (Jan. 26, 1983), *adopted*, Comm'r (March 14, 1983), ALJ Weiss stated that the 90-day rule will be relaxed "only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves." ALJ Weiss further held:

> Obviously, every time an otherwise meritorious claim is time barred, for whatever reason, there is, in a general sense, an 'injustice.' . . . [T]he point to be made is that there will always be an arguably harsh result when the 90-day rule is applied. But the cases which have interpreted and applied the rule teach that this is no reason not to use it. Indeed, if the rule was relaxed simply because the result would be harsh if applied, then the rule might as well be ignored in its entirety on nearly every occasion.

In the instant matter, petitioner cites *Polaha v. Buena Regional School District*, 212 *N.J. Super.* 628 (App. Div. 1986), to support his contention that even if the petition was filed in an untimely fashion, the 90-day rule should be relaxed because there were "ongoing negotiations involving tenure rights." In *Polaha*, however, actual ongoing discussions were taking place. Specifically, there was an exchange of correspondence between the petitioner and the board over a three-month period attempting to resolve the dispute. Here, it is highly questionable whether ongoing "discussions" were taking place. The Board offered petitioner a contract, petitioner asked for changes, and the Board refused. The discussions ended there. There are no alleged facts to support a conclusion that there were ongoing exchanges attempting to resolve the dispute. Accordingly, *Polaha* is distinguishable and inapplicable here.

I, therefore, **CONCLUDE** that no compelling or exceptional circumstances exist to warrant relaxation or waiver of the 90-day rule. The Board provided petitioner with adequate notice enabling him to file a timely claim and he has failed to demonstrate that this matter involves any constitutional issue, the review of an administrative determination, or a matter of significant public interest requiring adjudication or clarification beyond that of concern to petitioner himself. Petitioner simply has failed to demonstrate that strict adherence to the 90-day rule would be inappropriate, unnecessary or result in an injustice.

Conclusion

Based upon the above, I **CONCLUDE** that summary decision on the timeliness of the appeal is appropriate. Petitioner has failed to set forth specific facts showing that there is a genuine issue of material fact necessitating a hearing on that issue. I **CONCLUDE** that petitioner's claim was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i) and that the circumstances do not warrant relaxation of the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16.

Order

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 13, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 13, 2005
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 14 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

389-05

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
KELLY WENZEL, SCHOOL DISTRICT OF :
THE CHATHAMS BOARD OF EDUCATION, :
MORRIS COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board sought suspension of the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of resignation from her position as a teacher at Chatham High School. Respondent does not oppose suspension of her certificate, but disputes the length and effective date, arguing that the Commissioner should exercise her statutory discretion and determine that the one-year suspension should run from the date of resignation or 60 days thereafter; i.e., mid-September, 2004, or mid-November, 2004, rather than from the date of the Commissioner's final decision in this matter.

The Board submitted that there are no material facts in dispute and the Board is entitled to summary judgment pursuant to *N.J.S.A.* 18A:26-10. Respondent filed no affidavit or certification to detail mitigating circumstances or offer any special reason why the one-year suspension should have begun immediately upon her resignation. Accordingly, the ALJ granted the Board's motion for summary decision, finding: that respondent patently violated the 60 day notice provision of her contract as well as *N.J.S.A.* 18A:26-10; and there was no reason to modify the usual penalty in matters of this sort. Therefore, the ALJ recommended that the petition of appeal be dismissed.

Upon careful and independent review, the Commissioner concurs with the grant of the Board's motion for summary decision, and agrees that respondent violated the 60-day notice requirement and failed to provide any mitigating circumstances as to why a one-year suspension of her certificate should not be applied. Therefore, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner orders that respondent's instructional certificate be suspended for a period of one year commencing from the date of this decision, and forwards the matter to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 27, 2005

OAL DKT. NO. EDU 3238-05
AGENCY DKT. NO. 416-11/04

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
KELLY WENZEL, SCHOOL DISTRICT OF :
THE CHATHAMS BOARD OF EDUCATION, :
MORRIS COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of this matter, the Commissioner concurs with the grant of the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995). Moreover, the Commissioner agrees with the ALJ's conclusions that: 1) Ms. Wenzel violated the 60-day notice requirement set forth in both her contract and in *N.J.S.A.* 18A:26-10; and 2) Ms. Wenzel failed to provide any mitigating circumstances as to why the penalty assessed in similar matters, *i.e.,* a suspension of certification for one year from the date of the Commissioner's decision, should not be applied.

Accordingly, the Initial Decision of the Administrative Law Judge finding Kelly Wenzel guilty of unprofessional conduct and suspending her teaching certificate for a period of one year, which period shall commence upon the date of this decision, is adopted for

the reasons expressed therein. A copy of this decision is, therefore, being forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03238-05
AGENCY DKT. NO. 416-11/04

SCHOOL DISTRICT OF THE CHATHAMS BOARD OF EDUCATION, MORRIS COUNTY,

Petitioner,

v.

KELLY WENZEL,

Respondent.

Nicholas Celso III, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Joseph M. Wenzel, Esq., for respondent
(Lum, Danzis, Drasco & Positan, LLP, attorneys)

Record Closed: September 15, 2005 Decided: September 23, 2005

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education on March 17, 2005. The petitioner, Board of Education of the School District of the Chathams ("Board"), seeks a determination that the teaching certificate of respondent Wenzel be suspended for a period of one year as a result of her precipitous resignation from employment soon after school started in mid-September 2004. The Board has moved for summary decision.

DISCUSSION

In its motion the Board argues that unquestionably there was unprofessional conduct exhibited by Wenzel, a non-tenured teacher, when she submitted her resignation on or about September 13, 2004, to be effective September 15, 2004, even though her contract with the Board required 60 days written notice of that intent. The Board points out that pursuant to *N.J.S.A.* 18A:26-10 where a teaching staff member ceases to perform her duties before the expiration of the term of her employment without the Board's consent, he or she "shall be deemed guilty of unprofessional conduct" and the Commissioner may suspend that person's teaching certificate upon receiving notice thereof for a period not exceeding one year.

In support of its motion the Board submitted the affidavit of James F. O'Neil, Superintendent of Schools. In that affidavit he relates that on or about September 13, 2004, Wenzel tendered her resignation as a teacher of Earth Science, to be effective two days later on September 15, 2004. This, he says is a violation of her contractual obligations and constituted unprofessional conduct since it resulted in a substantial disruption to her students and caused the Board financial harm. More specifically, because of the abrupt notice given by Wenzel (indeed, since September 14, 2004 was a religious holiday the Board effectively had no advance notice) he could not immediately find a replacement teacher with appropriate certification. Thus, other teachers in the employ of the Board had to cover an extra class until a certified replacement could be hired. As a result, the Board was required to provide those teachers with additional pay. O'Neil also points that the person ultimately hired on a full-time basis to replace

respondent was an "alternate route" teacher with no prior background or experience in the field and additional pay had to be given to another teacher to be that person's "mentor".

In a reply memorandum in opposition to the Board's motion for summary decision Wenzel's attorney concedes the material facts; in particular, despite the 60 day notice requirement of her contract and the applicable statute, admittedly Wenzel gave hardly any notice to the Board. However, he argues that the Commissioner should exercise his statutory discretion and determine that the one year suspension (which is not challenged) authorized by *N.J.S.A. 18A:26-10* should run from the date of Wenzel's resignation, or alternatively, 60 days thereafter. Thus, the Commissioner is requested to begin Wenzel's suspension either from the date of receipt of her resignation (September 14 or 15, 2004) or from the 60th day thereafter (November 14 or 15, 2004).

In its brief in support of the motion for summary decision the Board relies upon the decision in *Bd. of Ed. of Penns Grove-Carneys Point Reg. Sch. Dist. v. Leinen,* 94 *N.J.A.R.* 2d (EDU) 405. Counsel points out that under that decision a teaching staff member who seeks relief from the strict language of the statute must demonstrate the existence of mitigating factors to warrant a penalty of less than a year. In reply, counsel for Wenzel emphasizes that his client is not seeking a reduction in the one year time frame. Rather, she is simply seeking an exercise of discretion by the Commissioner to begin running the suspension from mid-September or mid-November, 2004, rather than from the date of any final decision.

In Wenzel's letter of resignation which was attached to the O'Neil affidavit as Exhibit "B" she explained that "circumstances have arisen in my home life that makes it virtually impossible to perform my duties at school" and therefore "it is not fair to the students, their parents, support staff and other teachers that I am unable to properly prepare and execute my lessons and attend to the necessary administrative tasks required to make things run smoothly." She further noted that her decision had been "a very difficult" one for her family and herself.

No sworn affidavit or certification in opposition to the Board's motion was even filed by Wenzel or anyone on her behalf detailing any mitigating circumstances or offering any special reason why the one year suspension should have begun. Her only response was her attorney's memorandum in opposition pointing out the existence of discretion. That is not adequate.

Accordingly, in the absence of any factual dispute the Board's motion for summary decision pursuant to OAL rules should be **GRANTED**. See *N.J.A.C.* 1:1-12.5. By her conduct in resigning on such short notice (effectively just 1 day) Wenzel patently violated both the 60 day notice provision of her contract as well as *N.J.S.A. 18A:26-10.* Since that conduct was unprofessional, and its consequences caused harm, a one year suspension of her teaching certificate (as even she concedes) is appropriate. I see no reason on this record to modify the usual approach in matters of this sort; namely, that the suspension should be for one year and run from the date of the Commissioner's decision.

ORDER

ACCORDINGLY, the Board's motion for summary decision is **GRANTED** and the petition of appeal is **ORDERED DISMISSED.**

I hereby **FILE** this initial decision with the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for her consideration.

This recommended decision may be adopted, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Acting 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 **ACTING 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 23, 2005
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 26, 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 27 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

390-05

OAL DKT. NO EDU 6714-05
(EDU 91-05 ON REMAND)
AGENCY DKT. NO. 438-12/04

IN THE MATTER OF THE TENURE	:	
HEARING OF GARY WILLIS,	:	
NORTH HUNTERDON-VOORHEES	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION
HUNTERDON COUNTY.	:	
	:	

The record, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edar

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6714-05

(On Remand EDU 91-05)

AGENCY DKT. NO. 438-12/04

IN THE MATTER OF THE TENURE HEARING OF GARY WILLIS, NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY

Sara J. Simberg, Esq., for petitioner (Riker Danzig Scherer Hyland Perretti, attorneys)

Stephen E. Klausner, Esq., for respondent (Klausner & Hunter, attorneys)

Record Closed: September 10, 2005 Decided: September 26, 2005

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 9, 2005, on remand 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 or for the purposes of modifying the previously submitted Settlement Agreement to satisfy legal requirements. The originally transmitted case bore OAL Docket Number EDU 91-05 and the same agency docket number.

The parties appeared for hearing on April 11, 12, 13 and 14, 2005 and testimony was taken. On the last day they conferred and agreed to a settlement and prepared a Settlement Agreement and Release which was subsequently modified to satisfy legal standards. The revised Settlement Agreement (J-1), which is attached and fully incorporated herein, memorializes the terms of the settlement.

After being placed under oath, the respondent stated he fully understood and voluntarily agreed to be bound by the terms of the settlement and that representation is set forth in the Settlement Agreement.

I have reviewed the record and the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The Resolution of the school district attached to the Settlement Agreement authorizes the School Board Secretary to enter into the Agreement on behalf of the district.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 26, 2005
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

9-29-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 2005

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

F-1 Emd 8/28/05

SETTLEMENT AGREEMENT AND RELEASE

2005 AUG 22 A 10:

The North Hunterdon-Voorhees Regional School District Board of Education (the "District") and Gary Willis ("Willis") (together "Parties") hereby agree to settle the pending matter, subject to the terms and conditions contained herein:

WHEREAS, Willis shall mean in this Agreement himself, his respective heirs, assigns or successors in interest, and every agent or any other representative acting on behalf of Willis; and

WHEREAS, the District filed tenure charges on or about December 15, 2004, resulting in the matter titled In the Matter of the Tenure Charges Against Gary Willis, North Hunterdon-Voorhees Regional High School District Board of Education, Docket No. EDS 891-05 ("Tenure Matter"), and alleging (1) Conduct Unbecoming, consisting of repeated outbursts of anger by Willis, and (2) Insubordination, consisting of failure by Willis to follow the directives of his superiors and District personnel; and

WHEREAS, Willis disputed the charges, the matter was transferred by the Commissioner of Education to the Office of Administrative Law, and a plenary hearing before an Administrative Law Judge was partially conducted; and

WHEREAS, certain circumstances exist justifying the settlement of this matter, including that: (a) trial in this matter is projected to last a minimum of two weeks, requiring the expenditure by the District of large amounts of public, taxpayer funds to the detriment of the students and taxpayers of the North Hunterdon-Voorhees Regional School District ("School District"), (b) in addition to the costs of litigation, the District will be required to further expend taxpayer money starting April 14, 2005, as it must begin paying Willis his full salary again on the 121st day of his suspension, (c) the

District wants to ensure that Willis no longer continues his employment with the District; and (d) Willis no longer desires to continue his employment with the District and instead wishes to find new employment, as he has been unemployed during the course of his suspension; and

WHEREAS, the Parties hereto wish to amicably resolve this matter, in order to avoid the risk, cost and inconvenience of litigation; and

WHEREAS, settlement of this matter will benefit the public interest by (a) ensuring the safety of the students, employees and community members of the School District through the removal of Willis, who the District perceives to be a threat, (b) reducing the amount of public, taxpayer funds that would potentially be spent to achieve removal of Willis from the School District, and (c) precluding the expenditure of public, taxpayer funds by the District starting on the 121st day of Willis' suspension; and

WHEREAS, the Parties address the standards established by the State Board of Education in the matter titled In Re Cardonick, 1990 S.L.D. 842, 846, and justify this Agreement for the above reasons;

NOW, THEREFORE, it is hereby agreed as follows:

1. The Agreement, and every condition and term set forth within, is not effective until approved by the Commissioner of Education. In the event the Agreement is not approved by the Commissioner of Education, the Parties hereby reserve their rights and defenses should the Parties be required to continue the hearing in this matter.
2. Willis shall resign his employment with the District, effective July 31, 2005 or the date upon which Willis commences new employment, whichever occurs

first. As part of this Agreement, Willis' resignation is dependent upon the approval by the Commissioner of Education of this Agreement. Willis' resignation letter shall be signed and received by the District's attorneys within 10 days of the execution of this Agreement and contingent upon the approval of the Commissioner of Education. By resigning, Willis waives any and all rights to tenure, seniority, recall or reinstatement, as well as any of the benefits or emoluments of his employment, except his pension rights, and understands that effective immediately, he is not to report to work or otherwise enter school grounds except to the extent permitted to members of the public.

3. Within thirty days of the approval by the Commissioner of Education of the Agreement, the District shall issue a check to Willis in the gross amount of $14,384.30, representing back pay from December 15, 2004 through April 13, 2005.
4. Willis shall receive his normal pay from April 14, 2005 through July 31, 2005, or until the date he commences new employment, whichever shall occur first, and shall be paid with the regular payroll checks issued by the District.
5. Willis shall make a good faith effort to secure and begin new employment as soon as possible. If Willis obtains new employment before July 31, 2005, he shall immediately notify the District in writing, including the date his new employment commences.
6. Willis shall receive payment for 28 accrued vacation days, in the gross amount of $5,163.48. These payments shall be made in three installments,

and issued in conjunction with the regular District payroll cycle. The District shall commence these payments on August 1, 2005 or the date Willis commences new employment, whichever occurs first.

7. In the event Willis in unable to secure new employment by July 31, 2005, or if his new employer has a waiting period for eligibility for health insurance, or does not make family health insurance available to its employees, the District shall provide health insurance for Willis and his family through December 31, 2005, or until the new employer's family health insurance begins, whichever occurs first.

8. In consideration of the payments set forth in paragraphs 2, 3, 5 and 6, Willis agrees that this Agreement constitutes a complete and final Release with respect to all costs, damages, any and all past, present, or future liability, claims, demands, rights and causes of action, guarantees, claims for compensatory or punitive damages, settlements, costs, attorneys' fees, and compensation of any kind or nature whatsoever, whether those claims are known or unknown, suspected or unsuspected, asserted or unasserted, in the past, present, or future, against the District arising out of or in connection with Willis' employment with the District and/or the Tenure Matter.

9. This Agreement is made without admissions of liability or responsibility by the Parties.

10. This Agreement constitutes the full and complete Agreement of the Parties and may not be changed or modified, unless required by the Commissioner of Education. This Agreement is binding upon the Parties and their respective

heirs, assigns or successors in interest. This Agreement shall be governed by and construed in accordance with New Jersey law. This Agreement shall be construed as if it were drafted contemporaneously by both Parties.

11. The Parties agree that this document constitutes their full understanding of the settlement of the Complaint. It is further agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present matter.

12. Both Parties consent to the terms and conditions set forth in this Agreement.

13. The Parties further mutually agree between themselves that the terms and conditions of this Agreement shall be kept confidential by the Parties, to the fullest extent possible. The Parties agree and recognize that tenure charge documents are a matter of public record. The Parties further agree and recognize that the Board may take any action necessary with respect to disclosure of information regarding this tenure matter, including disclosure of this Agreement and disclosure of the reason for Willis' separation from service with the District, to fulfill and fully comport with the requirements of state law and regulations, including New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.*

14. The District and the Plaintiff both 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 full understanding of their rights and the Agreement's its meaning.

DATE: 8-01-05

Gary Willis

NORTH HUNTERDON-VOORHEES
REGIONAL SCHOOL DISTRICT BOARD
OF EDUCATION

DATE: 8/3/05

Mark Albert
Business Administrator/Board Secretary

STATE OF NEW JERSEY)

SS:

COUNTY OF ~~HUNTERDON~~ Somerset)

I CERTIFY that on 8-1, 2005, Gary Willis 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.

Attorney or Notary Public

SHARON OROS
A Notary Public of New Jersey
My Commission Expires 09/04/2005

Superintendents Report

2005 AUG 22 A 10:42
OFFICE OF ADMIN LAW

Motion by Kulick and seconded by Schwab to approve the following resolution:

RESOLUTION
NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

Resolved, That the North Hunterdon-Voorhees Regional High School District Board of Education ("the Board") hereby approves the settlement of the matter: In The Matter Of The Tenure Hearing Of Gary Willis, North Hunterdon-Voorhees Regional High School District, Hunterdon County, Agency Dkt. NO. 438-12/04, Docket No. EDU 00091-05, based upon the conditions set forth in the Settlement Agreement and Release to be executed by both parties, and per the order of the Commissioner of Education; and

Resolved, That the Board of Education hereby authorizes and designates Mark D. Albert, Business Administrator/Board Secretary, to sign and execute the Settlement Agreement and Release on its behalf.

Vote: Aye's: Eggert, Flynn, Kulick, Marra, Nicolai, Roosen, Schwab, Walter.
Motion carried.

I Mark D. Albert, Board Secretary/Business Administrator of the North Hunterdon Voorhees Regional High School District certify that the above resolution was adopted at the meeting held on August 2, 2005.

Board Seal

Mark D. Albert, Board Secretary/
Business Administrator

393-05

HILDA DORIS SUAREZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner contends that she had acquired tenure, and her "non-reemployment" by the respondent constituted an unlawful termination in violation of tenure rights. Respondent filed a motion for summary decision, seeking dismissal of the petition based on petitioner's failure to file within the 90-day period prescribed by *N.J.A.C.* 6A:3-1.3(i). Petitioner maintains that the filing was timely because it was within 90 days of her receipt of a second letter, dated June 24, 2004, from respondent upholding the non-renewal after a hearing that she had requested; petitioner argues that the second letter was the final action that triggered the ninety-day limitation period.

The ALJ found that respondent's notice to petitioner — by letter dated May 7, 2004, advising her that her contract would not be renewed — was issued in accordance with *N.J.S.A.* 18A:27-10, which requires written notice of non-renewal by May 15. The ALJ therefore concluded that: the petition was not filed within the 90-day limit set forth in *N.J.A.C.* 6A:3-1.3(i); petitioner has not advanced any argument to relax the prescribed time limit, and there does not appear to be any reason to do so. The ALJ granted respondent's motion for summary decision and dismissed the petition.

The Commissioner adopts the Initial Decision of the OAL and dismisses the petition for untimeliness, finding that: under the applicable case law, the May 7, 2004 notice triggered the 90 day limitations period; petitioner's claim of tenure does not change the effect of the 90-day rule; and the notice of non-renewal was not compromised by the fact that it was signed by a district associate superintendent.

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 28, 2005

393-05

OAL DKT. NO. EDU 11077-04
AGENCY DKT. NO. 287-8/04

HILDA DORIS SUAREZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been independently reviewed. Upon such review, the Commissioner is constrained to adopt the Initial Decision of the administrative law judge (ALJ) dismissing the petition for untimeliness for the following reasons.

Petitioner began working in the respondent district in September 2000. Respondent contends that petitioner worked as a pool substitute during the 2000-2001 school year, while petitioner contends — and respondent does not deny — that she taught biology and pathology during the entire 2000-2001 school year, was evaluated on a regular basis, and "received all the emoluments of a regular teacher including sick leave benefits and medical insurance." Petitioner alleges that in June 2001 she "completed the requirements of the Alternate Route Program and was issued Provisional Licenses to teach Health & Elementary Education,"

but respondent maintains that it has no copies of such certificate/endorsements in petitioner's personnel file.[1]

According to petitioner, in August 2001 "she took Part 1 courses at St. Peter's College, Jersey City leading to the alternate route for full certification." She was "assigned a mentor for the alternate program" in September 2001, and taught in one of respondent's high schools.

Respondent's answer contains contradictory allegations concerning the point at which petitioner commenced a tenurable position. It states in paragraph one of the First Count that petitioner was appointed to a tenurable position in September 2001, but it states in the Second Defense that petitioner was not assigned to a tenurable position until January 4, 2002.

While it is not clear from the record before us what petitioner was teaching during the 2001-2002 school year — nor what, if any, instructional certificate/endorsements she held — the petitioner and respondent agree that during the 2002-2003 school year she taught biology and physical science, and during the 2003-2004 school year she taught science classes and gave home instruction.

Petitioner contends that in January 2004 she "completed the requirements for standard certification for biological sciences and was notified that her certificate would shortly issue." She further contends that by the end of the 2003-2004 school year she held standard certification in health, elementary education, and biological sciences. Respondent professes to have no knowledge of petitioner holding such endorsements by the end of the 2003-2004 school year. In any event, by letter dated May 7, 2004, respondent notified petitioner that her contract would "not be renewed for the 2004-2005 School Year." That determination was upheld after a

[1] The Commissioner notes that if the only credential petitioner held during the 2000-2001 school year was the county substitute certificate issued pursuant to *N.J.A.C.* 6:11-4.5(a), she should not have been permitted to serve for more than 20 consecutive days in the same position. *N.J.A.C.* 6:11-4.5(c) (Now called "county substitute credential" and recodified at *N.J.A.C.* 6A:9-6.5(b))

hearing at which petitioner appeared, and the result was communicated to petitioner by letter dated June 24, 2004.

In her first count petitioner maintains that she achieved tenure in September 2003, rendering respondent's action of not rehiring her for the 2004-2005 school year a termination in violation of her alleged tenure rights. In her second count — seemingly by way of alternative argument — she contends that in the 2000-2001 school year, when she "was eligible for a 'Letter of Eligibility'," respondent "failed, refused and neglected to offer her a contract," thereby taking advantage of her "and as a consequence she did not receive a 'Letter of Eligibility' and consequently she did not receive her emergency certificate." This inaction on respondent's part was, according to petitioner, negligent and unlawful.

In its answer, respondent referred to the fact that emergency certificates can only be applied for and issued for certain areas of need as designated by the State.

The petition was filed on August 18, 2004, the answer was filed on September 3, 2004, and the matter was transmitted to the OAL on September 30, 2004. On May 3, 2005, respondent filed a motion to dismiss, alleging that petitioner failed to file her petition within the 90-day period prescribed by *N.J.A.C.* 6A:3-1.3(i).

There is no dispute about the filing date of the petition, or about the fact that a petition must be filed within 90 days of "receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." *N.J.A.C.* 6A:3-1.3 (i). Rather, petitioner argues that the May 7, 2004, letter to her from the Jersey City Public School Associate Superintendent advising her that the Superintendent had decided not to renew her contract, was not "notice of a final order, ruling or other action." According to petitioner, a letter dated June 24, 2004 upholding the

non-renewal after the hearing that she had requested to ascertain the reasons for non-renewal, was the notice of a final action that triggered the ninety-day limitation period. Thus, summary judgment may be employed in this case, since the Commissioner's task is not to find facts, but rather to determine the proper application of the law to the undisputed material facts.

For the reasons set forth in the Initial Decision, the Commissioner must conclude that applicable case law does not support petitioner's position. The ninety-day period commences when a teacher knows or should know that he or she will not be offered a contract for the next year. *Nissman v. Board of Educ. of Long Beach Island*, 272 *N.J. Super.* 373, 379 (App. Div.) *certif. den.* 137 *N.J.* 315 (1994). Decisions in cases with fact patterns similar to the present case have established that it is the first notice of non-renewal — not the letter confirming non-renewal after a hearing or review — that triggers the ninety-day limitation period. *See, e.g., Pacio v. Bd. of Ed. of Lakeland Reg'l High School Dist.,* 1989 *S.L.D.* 2060, 2069 (the first written communication provided to a staff member of an action by the Board initiates the 90-day timeline); *Wise v. Bd. of Ed. of the City of Trenton*, decided by the Commissioner September 11, 2000, *aff'd* State Bd. January 4, 2001 (when a teaching staff member receives notice that his contract will not be renewed is when the 90-day period is initiated). *See also, LeMee v. Bd. of Ed. of the Village of Ridgewood*, 1990 *S.L.D.* 663, 667, wherein the Commissioner concurred that the day petitioner received notice that her contract was not renewed was the date that the 90-day timeline commenced, notwithstanding the request to appear before the board of education to try to convince that board to change its decision and offer a contract of employment.

The Commissioner does not agree with petitioner's contention in her exceptions that her claim of tenure changes the effect of the ninety-day rule. The rule does not distinguish

between the claims of tenured or non-tenured employees. A petitioner is obliged to initiate his or her challenge to an action once he or she has notice "sufficient to inform [him or her] of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow v. Bd. of Ed. of Berkeley Tp.,* 131 *N.J.* 572, 587 (1993).

The Commissioner further disagrees with petitioner's assertion that the adequacy of the May 7, 2004 notice of non-renewal was compromised by the fact that it was signed by a district associate superintendent. The notice informed petitioner of the action taken by the superintendent who, in a state-operated district, has the prerogative to make such decisions. *N.J.S.A.* 18A:7A-35; *N.J.S.A.* 18A:7A-38. Petitioner neither claims that the superintendent lacks such authority, nor offers legal support for the proposition that only the superintendent may issue notice of same.

Accordingly, the Commissioner adopts the ALJ's determination that the petition in this matter must be dismissed for lack of timeliness.

IT IS SO ORDERED[2]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/05

Date of Mailing: 10/31/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11077-04
AGENCY DKT. NO. 287-8/04

HILDA DORIS SUAREZ,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: August 4, 2005 Decided: September 13, 2005

BEFORE **RICHARD McGILL**, ALJ:

This matter involves a petition by Hilda Doris Suarez ("petitioner") in which she alleges that a determination by the State-Operated School District of the City of Jersey City ("respondent" or "School District") not to renew her contract was in reality an unlawful termination in violation of her tenure rights. In addition to denying that petitioner acquired

tenure, respondent maintains that the petition was not filed within the ninety-day time limit prescribed by *N.J.A.C.* 6A:3-1.3(i). Respondent now moves for summary decision based on failure to comply with the ninety-day time limit.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on August 18, 2004, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on September 3, 2004, and the matter was transmitted to the Office of Administrative Law on October 15, 2004, for determination as a contested case.

On May 3, 2005, respondent filed a motion for summary decision seeking dismissal of the petition. Petitioner's response to the motion was filed on June 14, 2005, and respondent's supplemental submission was received on August 4, 2005.

MOTION FOR SUMMARY DECISION

In support of the motion, respondent contends that petitioner was notified of the non-renewal of her contract by letter dated May 7, 2004, and that the petition was filed more than ninety days after receipt thereof. Moreover, there is no reason for relaxation of the ninety-day time limit.

Petitioner maintains that the letter dated May 7, 2004, was not the final action of the School District. Petitioner requested a disclosure of the reasons for the non-renewal, and she was given a hearing. Thereafter, the School District sent a letter dated June 24, 2004, stating that the decision was to uphold the recommendation of the principal not to renew petitioner's contract. Petitioner maintains that the ninety-day period begins with the letter dated June 24, 2004, and that relative to this date the filing of the petition was timely. Thus, the issue is whether the

ninety-day period in which to file the petition began with receipt of the letter dated May 7, 2004, or the letter dated June 24, 2004.

A. Legal Standard for Summary Decision

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "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. of America*, 142 *N.J.* 520, 523 (1995).

B. Facts

There is no genuine issue as to any material fact in this matter in relation to the time limit in *N.J.A.C.* 6A:3-1.3(i). The material facts are as follows:

1. Petitioner was employed by respondent as a teacher during the 2003-2004 school year and prior thereto.

2. By letter dated May 7, 2004, Associate Superintendent Flavio Rubano advised petitioner that her contract would not be renewed for the 2004-2005 school year.

3. Petitioner received the letter dated May 7, 2004, no later than May 13, 2004.

4. Petitioner requested a statement of reasons and a hearing. These requests were granted.

5. Thereafter, Associate Superintendent Flavio Rubano sent petitioner a letter dated June 24, 2004, advising her that after consideration of her testimony, documentation and arguments, the decision was made not to renew her contract for the 2004-2005 school year.

6. Petitioner filed her petition with the Commissioner of Education on August 18, 2004.

C. Law and Analysis

The applicable regulation is *N.J.A.C.* 6A:3-1.3(i), which provides in pertinent part as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The ninety-day limitation period has been upheld by the Supreme Court of New Jersey as "a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes

under the school laws." *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 582 (1993). The Court further stated as follows:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. *Ibid.*

Petitioner relies upon *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236 (1974) for the proposition that a school district upon request must disclose to a teacher the reason for nonrenewal of a contract. In this case, petitioner was given a "Donaldson hearing." In petitioner's view, the subsequent determination as set forth in the letter dated June 24, 2004, was the final action in this matter. In effect, petitioner argues that the determination set forth in the letter dated May 7, 2004, was not a final action within the meaning of *N.J.A.C.* 6A:3-1.3(i).

The ninety-day period commences when a teacher "knew or should have known" that he or she was not going to be offered a new contract for the following academic year. *Nissman v. Board of Educ.*, 272 *N.J. Super.* 373, 379 (App. Div.) *certif. den.*, 137 *N.J.* 315 (1994). Various school law cases address a situation where a teacher is given written notice of non-renewal of a contract for the following school year and then tries some means other than an appeal to the Commissioner to persuade the local school board to change its determination. The teacher typically contends that subsequent action in regard to the effort to change the determination constitutes the action which commences the ninety-day period. However, the consistent determinations are that the first written notice begins the ninety-day limitations period. *E.g., Pacio v. Lakeland Reg'l High School Dist. Bd. of Educ.*, 1989 *S.L.D.* 2060.

In this case, the notice of non-renewal was issued in accordance with *N.J.S.A.* 18A:27-10, which provides as follows:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.

This section requires written notice that employment will not be offered for the next school year by May 15. Written notice pursuant to this section certainly should alert the non-renewed teacher to the consequences.

The first written notice was the letter dated May 7, 2004, advising petitioner that her contract would not be renewed for the 2004-2005 school year. Petitioner received this letter no later than May 13, 2004. The petition in this matter was filed on August 18, 2004, which was more than ninety days after May 13, 2004. Therefore, I **CONCLUDE** that the petition in this matter was not filed within the ninety-day time limit set forth in *N.J.A.C.* 6A:3-1.3(i).

Rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. *N.J.A.C.* 6A:3-1.16. An example would be a compelling public interest. *DeMaio v. New Providence Board of Education,* 96 *N.J.A.R.*2d (EDU) 449, 453. Here, petitioner has not advanced any argument to relax the ninety-day time limit in *N.J.A.C.* 6A:3-1.3(i), and there does not appear to be any reason to do so.

Based upon the above, I **CONCLUDE** that petitioner failed to file her petition within the ninety-day time limit in *N.J.A.C.* 6A:3-1.3(i) and that therefore the petition in this matter should be dismissed.

Accordingly, it is **ORDERED** that:

1. Respondent's motion for summary decision is granted.

2. The petition in 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 13, 2005
DATE

Richard McGill
RICHARD McGILL, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/13/05
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 14 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

397-05

OAL DKT. NO. EDU 1864-04
AGENCY DKT. NO. 459-12/03

M.F.S. and N.S., on behalf of minor child, M.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement and adopts it as the final decision in this matter. In so doing, however, the Commissioner observes that certain terms appear to have been effectuated prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. Accordingly, the Commissioner cautions that, in controverted matters transmitted to the OAL, proposed settlements should not include terms requiring effectuation prior to approval by the Commissioner, and that parties act at their peril in effectuating such terms.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edley

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05
Date of Mailing: 11/02/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1864-04

AGENCY DKT. NO. 459-12/03

M.F.S. and N.S. o/b/o
minor child M.S.,

Petitioners,

v.

BOARD OF EDUCATION OF
GREEN TOWNSHIP, SUSSEX
COUNTY,

Respondent.

F. William Lavigne, Esq., for petitioners

Mark H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: September 14, 2005 Decided: September 21, 2005

BEFORE **ELINOR R. REINER**, ALJ:

On or about December 9, 2003, petitioners, M.F.S. and N.S. on behalf of their minor child, M.S., filed a petition of appeal with the Commissioner of Education, alleging that M.S. was eligible to attend Green Hills School in the District of Green Township

during the school year 2003-2004 and requesting an exception to district policy due to exigent circumstances. On or about January 15, 2004, respondent filed an answer, alleging that petitioners failed to articulate any basis upon which M.S. would be entitled to a free education in the Green Township Public Schools and counterclaiming for tuition costs for the entire period of M.S.'s ineligible attendance during the applicable school years. On February 27, 2004, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on April 5, 2004, and a prehearing conference was scheduled for May 5, 2004. On that date, as well as June 10, 2004, settlement conferences were held with counsel. Another settlement conference scheduled for July 7, 2004 was adjourned at counsel's request, but additional settlement conferences were held between the parties and updates on the progress of settlement were received from counsel.

By letter dated February 17, 2005, counsel for respondent advised the undersigned that the matter had not been resolved, and he would file a motion for summary decision. This was discussed with counsel on February 24, 2005, when the parties confirmed that if they could not reach a settlement, they would file a stipulation of facts and motions for summary decision, and the matter was adjourned to March 8, 2005. On March 8, 2005, during a telephone conference with counsel, dates for the filings were established. On March 31, 2005, counsel for respondent filed its motion for summary decision. No response was received and during a telephone conference with counsel on May 17, 2005, the parties agreed to settle this matter. Although counsel for respondent indicated on August 8, 2005 that he had not yet received the signed stipulation of settlement from petitioners, on August 11, 2005, he acknowledged its receipt and stated that he would forward it to the Board for its approval. On September 14, 2005, the undersigned received the fully executed Stipulation of Settlement, as well

as a Board resolution approving the settlement and authorizing the Board President to execute it on behalf of the Board.

I have reviewed the record and the Stipulation of Settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

9-23-05
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 28 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Extract from the Minutes of the

Green Township Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 14 P 1:59

The Board of Education of the Township of Green in the County of Sussex, New Jersey convened in regular meeting of Wednesday, August 17, 2005 at 7:30 p.m. in the Green Hills School library.

Members present: Dr. Cercone, Mr. Granger, Mr. Mott, Mr. Noll, Mrs. Cooke, Mr. Ippolito and Mr. Graham who arrived at 7:55pm. Mrs. McDonnell and Mr. Wood were absent.

THE FOLLOWING ACTION WAS TAKEN:

TITLE OF RESOLUTION: Resolution of Settlement.

Motion made by Mrs. Cooke, second by Mr. Graham to approved the resolution of settlement.

Resolved that the Board hereby approves the residency settlement in the matter of M.F.S. and N.S. o/b/o minor child M.S. v Green Township Board of Education in accordance with the terms and conditions set forth in the Settlement Agreement between the parties dated July 29, 2005, where the family has agreed to pay the Board $23,876.47 for the period of their child's ineligible attendance at the Green Hills School, a copy of which shall be included in the permanent minutes of this meeting, and

Be It Further Resolved that the Board President and Board Secretary/Business Administrator are hereby authorized to execute this Agreement on behalf of the Board.

YES: Dr. Cerone, Mr. Graham, Mr. Granger, Mr. Mott, Mr. Noll, Mrs. Cooke and Mr. Ippolito.

NO: None

ABSTAIN: None

MOTION PASSED.

I, Sallyann McCarty, Secretary of the Board of Education of Green Township School District in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on **August 17, 2005** has been compared by me with the original minutes as officially recorded in the Board of Education office in the minute book of said Green Township Broad of Education and is a true, complete copy hereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **September 9, 2005.**

Sallyann McCarty – Board Secretary

Seal

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; FAX (973) 301-0203
Attorneys for Respondent
Green Township Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 14 P 1:5

M.F.S. and N.S. on behalf of minor child M.S.,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	OAL Dkt. No.: EDUOS 01864-2004N Agency Ref. No.: 459-12/03
vs.	:	**STIPULATION OF SETTLEMENT**
GREEN TOWNSHIP BOARD OF EDUCATION, SUSSEX COUNTY,	:	
Respondent/Counterclaimant.	:	

This Stipulation of Settlement is made by and between the Green Township Board of Education ("Board"), with administrative offices located at 69 Mackerley Road, Greendell, New Jersey 07839 and Michael Sesera, Jr. and Natalie Sesera, 21 Woodfield Road, Andover, New Jersey 07821 ("Petitioners"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, the Petitioners filed a Petition of Appeal with the Commissioner of Education on or about December 8, 2003 against the Board, challenging the Board's decision to disenroll their daughter, M.S., for failing to meeting the residency requirements set forth in N.J.S.A. 18A:38-1 *et seq.*; and

WHEREAS, on January 14, 2004, the Board filed its answer to the Petition of Appeal with a counterclaim for tuition; and

WHEREAS, M.S. is currently enrolled in the Green Township School District,

pursuant to the stay-put provision of N.J.S.A. 18A:38-1 *et seq.* ; and

WHEREAS, Petitioners and their child are not presently domiciled in Green Township, nor have they been domiciled in Green Township at any time during their child's enrollment in the Green Township Public Schools; at all relevant times herein, Petitioners have lived in Hopatcong, New Jersey; and

WHEREAS, based upon the foregoing facts the Board, filed a motion for summary decision with the Court on or about March 30, 2005; and

WHEREAS, Petitioners did not oppose said motion and through their attorney acknowledged to the Court that the Board's position is legally correct; and

WHEREAS, the Court, in lieu of deciding said motion, instructed the parties to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises and covenants the parties agree as follows:

1. Petitioners will pay the Board back-tuition in the amount of $23,876.47 in full and complete satisfaction of the alleged amount which is due and owing.
2. This tuition amount will be paid directly to the Board's legal counsel, Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932, with a certified check made payable to the "Green Township Board of Education", by no later than August 31, 2005.
3. Petitioners understand that if they fails to remit the agreed-upon amount by August 31, 2005, the Board will take whatever legal action is necessary to enforce this Agreement and collect the sum set forth herein.
4. Petitioners agree to pay the Board's attorney's fees and costs, in addition to all

collection fees, in the event that the Board must take action to collect the aforesaid sum of money.

5. Petitioners agree to withdraw M.S. from the Green Township School before August 31, 2005;

6. Petitioners, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to M.S.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.

7. The Board, in consideration of this Agreement, hereby releases Petitioners from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to M.S.'s attendance in Green Township and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement. This release does not preclude the Board from instituting any legal action in the future challenging any future enrollment/attendance of Petitioners children or attempts at enrollment in the Green Township School District.

8. Petitioners acknowledge that they have reviewed this Agreement with independent legal counsel and that they enter into it without duress, and of their

own free will and volition. They further acknowledge that they fully understand the terms of this Agreement and the duties and obligations enumerated herein.

9. The parties, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraw, with prejudice, the above-docketed Petition of Appeal and Counterclaim, respectively.

10. Nothing contained in this Agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

11. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

12. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

13. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date first above written.

FOR THE GREEN TOWNSHIP BOARD OF EDUCATION:

By: _____ By: _____

Bill Ippolito Board President

Sallyann McCarty, Bd. Sec./Bus. Admin.

FOR PETITIONERS:

_____

Michael Sesera, Jr.

Sworn and subscribed before me this
29th day of July, 2005

_____

F. Wm. LaVigne
F. WM. LAVIGNE
ATTORNEY AT LAW
OF N.J.

_____

Natalie Sesera

Sworn and subscribed before me this
11th day of July, 2005

_____

F. Wm. LaVigne
F. WM. LAVIGNE
ATTORNEY AT LAW
OF NEW JERSEY

398-05

IN THE MATTER OF ROSE L. FUNCHES, :

GATEWAY CHARTER SCHOOL BOARD OF : COMMISSIONER OF EDUCATION

TRUSTEES, HUDSON COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that Gateway Charter School Board of Trustees member Rose Funches committed "multiple, flagrant violations" of the School Ethics Act and the Code of Ethics for School Board Members, encompassing violations of *N.J.S.A.* 18A:12-24(b)-(c), *N.J.S.A.* 18A:12-25(c)3, and *N.J.S.A.* 18A:12-24.1(a), (e) and (g). After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of removal from the Board.

Upon a thorough review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Rose Funches be removed, as a school official found to have violated the School Ethics Act, from the Board of Trustees of the Gateway Charter School as of the filing date of this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 2, 2005

AGENCY DKT. NO. 260-9/05

IN THE MATTER OF ROSE L. FUNCHES,	:	
GATEWAY CHARTER SCHOOL BOARD OF	:	COMMISSIONER OF EDUCATION
TRUSTEES, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of removal, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent, a member of the Board of Trustees of the Gateway Charter School, based upon the Commission's finding that she committed "multiple, flagrant violations" of the School Ethics Act and the Code of Ethics for School Board Members, encompassing violations of *N.J.S.A.* 18A:12-24(b)-(c), *N.J.S.A.* 18A:12-25(c)3, and *N.J.S.A.* 18A:12-24.1(a), (e) and (g).

Upon issuance of the decision of the Commission, respondent was provided thirteen days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. No such comments were filed.

Initially, the Commissioner emphasizes that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable herein. Rather, the Commissioner's jurisdiction is limited to review of the sanction recommended by the Commission following its finding of violation.

In light of that standard, the Commissioner determines to accept, for the reasons expressed in the Commission's decision, the recommendation that removal is the appropriate penalty in this matter. In so holding, the Commissioner notes that the Commission considered

the facts presented and took aggravating and mitigating circumstances into account, reasonably concluding that its recommended penalty was commensurate with the violations found. Therefore, the Commission's recommendation will not be disturbed.

Accordingly, IT IS ORDERED that Rose L. Funches be removed, as a school official found to have violated the School Ethics Act, from the Board of Trustees of the Gateway Charter School as of the filing date of this decision.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ROSE L. FUNCHES	:	**Docket No. C09-05 & C10-05**
GATEWAY CHARTER SCHOOL	:	
BOARD OF TRUSTEES	:	
HUDSON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from two complaints filed by Gregory John Monte, an employee of the Gateway Charter School Board of Trustees (Board), against Rose L. Funches, Vice-President of the Board. The first complaint, C09-05, was filed on March 29, 2005, and alleged that Ms. Funches violated N.J.S.A. 18A:12-25(c)3 and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act when she engaged in certain conduct as noted below. The second complaint, C10-05, was filed on April 8, 2005, and alleged that Ms. Funches violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a) and (e) of the Code of Ethics for School Board Members when she engaged in certain conduct as noted below. Following are the complainant's allegations:

(1) As Vice-President of the Board, Ms. Funches participated in a closed executive meeting of the Gateway Charter School Board of Trustees (Board), held on March 17, 2005, without public notice in violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq.;

(2) Ms. Funches filed a personal/financial disclosure statement that contained information which she knew to be false;

(3) Ms. Funches co-signed several checks without Board authorization, which included several checks made out to a company owned by her husband;

(4) Ms. Funches voted to hire Unique Maintenance to strip and polish floors at the school when her husband and son were employed by the company to do the actual work;

(5) Ms. Funches voted on bill lists which included payments to a company owned by her husband;

(6) Ms. Funches recommended that Sheila Ruiz be hired as a clerk to help the secretary of the Board complete the minutes after recommending that the complainant be fired; and

(7) Ms. Funches voted to approve a contract with HP Contractors when the owner was her close friend.

After receipt of the complaints, the Commission forwarded both complaints to Ms. Funches and notified her that, pursuant to N.J.A.C. 6A:28-6.5(a), she had 20 days to submit an answer under oath to the Commission. Ms. Funches failed to answer either complaint within the 20 day time limit. The Commission then notified her that she had an additional 10 days to answer the complaint and that the complaint was scheduled for the June 28, 2005 meeting. Ms. Funches never submitted an answer to the complaint.

The Commission invited Mr. Monte to attend its June 28, 2005 meeting to present witnesses and testimony, but did not require that he be present. Neither party attended the hearing. At its June 28, 2005 meeting, the Commission consolidated C09-05 and C10-05 and voted to find probable cause to credit allegations one through five that Ms. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25 of the School Ethics Act (Act), and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. The Commission also voted to find no probable cause to credit allegations six and seven that Ms. Funches violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(f) and N.J.S.A. 18A:12-24.1(a).

The Commission found that the material facts were not in dispute with respect to the allegations upon which it found probable cause and, therefore, the Commission advised Ms. Funches that it would decide the matter on the basis of written submissions. Ms. Funches was invited to provide a written submission to the Commission by August 30, 2005, and set forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25 of the Act, and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. Ms. Funches was also told that her written submission should include her position on an appropriate sanction should the Commission determine that the Act was violated. Ms. Funches did not provide a written submission in response to the Commission's probable cause determination.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to these complaints, Ms. Funches was Vice-President of the Board and co-signed, with the Board President, checks issued by the Board. Ms. Funches' husband owns Professional Maintenance and Carpeting, which is a company that was under contract with the Board from July 26, 2004 through February 13, 2005. Ms. Funches' husband and son were both employed by Unique Maintenance and performed work at the school. At all times relevant to the complaints, complainant was employed by the Board.

(1) March 17, 2005 Closed Executive Meeting

On March 16, 2005, Ms. Funches sent an e-mail to all Board members asking if they were going to attend the closed Board meeting to be held the following evening. The closed executive meeting of the Board was held on March 17, 2005. The public was not provided with any type of notice of the meeting.

(2) Personal/Financial Disclosure Statement

On March 4, 2005, Ms. Funches filed a Personal/Financial Disclosure Statement as required by N.J.S.A. 18A:12-25 and 26. Ms. Funches indicated "N/A" in response to all questions asking for financial information for the previous calendar year. The only section in the form that she completed was the section requesting personal information such as name and address.

(3) Check Signing

Ms. Funches co-signed several checks that were not authorized by the Board, which included several made out to a company owned by her husband, as follows:

1. Ms. Funches co-signed check No. 7087 dated June 5, 2004 in the amount of $4,375; check No. 7169 dated September 14, 2004 in the amount of $5,000; and check No. 7241 dated November 11, 2004 for $3,500, which were all made out to her husband's company, Professional Maintenance and Carpeting;
2. Ms. Funches co-signed the following checks without Board approval: 7104-7127; 3024-3025; 3020-3023; 7128-7165; 7166-7167; 7169-7193; 7208-7240 and 7241-7242; and
3. At the January 10, 2005 Board meeting, the Board authorized 23 checks, but Ms. Funches co-signed 32 checks, thus, 9 checks were not approved by the Board.

(4) Unique Maintenance

At the March 21, 2005 Board meeting, Ms. Funches voted to hire Unique Maintenance to strip and polish the floors at Gateway Charter School. Unique Maintenance is owned by her brother-in-law. Ms. Funches' husband and son are employees of Unique Maintenance and they performed the work that was done at the school. The minutes indicate that Unique Maintenance was the lowest bidder. However, the actual bids show that Unique Maintenance submitted a bid that was approximately $1,124.00 more then the lowest bid from Capital Contractors, Inc.

(5) Vote on Bill Lists

Ms. Funches voted on bill lists which included payments to her husband's company, Professional Maintenance and Carpeting, during the Board meetings for the months of July 2004, October 2004, December 2004 and January 2005.

ANALYSIS

(1) March 17, 2005 Closed Executive Meeting

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) when she participated in a March 17, 2005 closed executive meeting of the Board of which the public had no knowledge. N.J.S.A. 18A:12-24.1(a) provides:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

The OPMA at N.J.S.A. 10:4-9 requires all public bodies to provide adequate notice of meetings that are held by the public bodies. The Board falls within the definition of "public body" at N.J.S.A. 10:4-8, which, in part, defines the term as meaning "a commission, authority, board... organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function..." Furthermore, N.J.S.A. 18A:36A-6 requires the board of trustees of a charter school to comply with the provisions of the OPMA. "Adequate notice" is also defined, in part, at N.J.S.A. 10:4-8 to mean, "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting..." The March 17, 2005 closed executive meeting of the Board was held without the provision of a 48 hour written advance notice giving the time, date, and location of the meeting. Based on the foregoing, the Commission finds that, by participating in this meeting, Ms. Funches violated N.J.S.A. 18A:12-24.1(a) because she failed to uphold and enforce all laws pertaining to the schools.

(2) Personal/Financial Disclosure Statement

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-25(c)3 when she filed a personal/financial disclosure statement that failed to include information that her husband owned Professional Maintenance and Carpeting, which was under contract with the Board from July 26, 2004 through February 13, 2005. N.J.S.A. 18A:12-25(c)3 provides, in part:

> A school official who fails to file a statement or who files a statement containing information which the school official knows to be false shall be subject to reprimand, censure, suspension, or removal pursuant to the procedures established in [N.J.S.A. 18A:12-29]...

Pursuant to N.J.S.A. 18A:12-25(a)2 a school official is required to disclose relatives who are a party to a contract with the school district with which the school official holds office. Ms. Funches' personal/financial disclosure statement for 2004 indicated "N/A" in all of the sections requesting financial information. Specifically, she

indicated that no relative by marriage is employed by the charter school, is party to a contract with the charter school, or receives compensation or has any interest in any business which is a party to a contract with the charter school. Ms. Funches' husband owns Professional Maintenance and Carpeting, which was a party to a contract with the Board from July 26, 2004 through February 13, 2005. Ms. Funches failed to indicate that her husband's company was a party to a contract with the charter school. Thus, she knowingly provided false information on her 2004 personal/financial disclosure statement. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-25 when she filed her 2004 personal/financial disclosure statement without providing information that her husband's company, Professional Maintenance and Carpeting, was a party to a contract with the charter school.

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(g) when she filed a personal/financial disclosure statement that was inaccurate. N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

When Ms. Funches failed to disclose her husband's company's contract with the charter school on her 2004 personal/financial disclosure statement, she did not provide accurate information on the form. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24.1(g) when she did not list her husband's business on her 2004 personal/financial disclosure form.

(3) Check Signing

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) and (e), which are set forth above, when she signed certain checks without Board authorization, including several made out to her husband's company. Pursuant to N.J.S.A. 18A:19-1(d), prior to expenditure of Board funds, the Board must approve the expenditure by resolution. The evidence shows that Ms. Funches co-signed several checks that had not been approved at the January 10, 2005 Board meeting. The evidence also shows that Ms. Funches co-signed other checks that were not approved by the Board, including several made out to her husband's company. Based on the foregoing, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) and (e), when she signed checks without Board approval in violation of N.J.S.A. 18A:19-1 et seq., and when she failed to recognize that the authority to expend school funds lies with the entire Board.

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(b) when she signed certain checks made out to her husband's company without Board authorization. N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others; and

Ms. Funches' husband falls within the definition of "member of immediate family," which is defined at N.J.S.A. 18A:12-23 to mean, "the spouse or dependent child of a school official residing in the same household." Ms. Funches co-signed checks made out to her husband's company, Professional Maintenance and Carpeting, without Board approval. She co-signed the checks as part of her duties as Board Vice-President. In doing so, Ms. Funches used her official position as Board Vice-President to secure the unwarranted privilege or advantage of obtaining funds from the Board for her husband without Board approval. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(b).

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she signed certain checks made out to her husband's company without Board authorization. N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Ms. Funches and her husband have a direct financial involvement in the checks that were made out to Professional Maintenance and Carpeting because the company is owned by her husband. The public could reasonably perceive that her objectivity and independence of judgment would be impaired in that matter. The Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she acted in her official capacity as Board Vice-President in a matter where she had a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment.

(4) Unique Maintenance

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(b), which is set forth above, when, on March 21, 2005, she voted to approve the bid of Unique Maintenance to strip and polish the floors at the school. The Board minutes show that Ms. Funches voted to approve the bid of Unique Maintenance. Her husband and son were employed by Unique Maintenance and they performed the work at the school. The approval of Unique Maintenance was unwarranted because their bid was over $1,000 more than the lowest bid. This gives the impression that Ms. Funches voted to approve Unique Maintenance because her husband and son were employed by that

company. In N.J.S.A. 18A:12-22(a), the Legislature declared that board members must avoid conduct which is in violation of the public trust or which creates a justifiable impression among the public that such trust is being violated. When Ms. Funches voted to hire a company that employed her husband and son, which was not the lowest bidder, it created a justifiable impression that the public trust was being violated and that the approval of Unique Maintenance was unwarranted. Based on the foregoing, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(b) when she used her official position to secure unwarranted employment for her husband and son.

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c), which is set forth above, when she voted to approve the bid of Unique Maintenance to strip and polish the floors at the school. Ms. Funches has a direct financial involvement in the employment of her husband. There is no evidence to show that her son was a dependent residing in the same household. However, she has a personal involvement in ensuring the employment of her son. When she voted to approve the bid of Unique Maintenance, she was acting in her official capacity as a Board member on a matter where she has a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment and a personal involvement that created a benefit to her. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she voted to hire Unique Maintenance.

(5) Vote on Bill Lists

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c), which is set forth above, when she voted on bill lists that included payments to a company owned by her husband. Board minutes show that Ms. Funches voted on bill lists that included payments to her husband's company at four different Board meetings. As noted above, she has a direct financial involvement in Professional Maintenance and Carpeting because the company is owned by her husband. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she acted in her official capacity as Board Vice-President on a matter in which she had a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment.

DECISION

For the reasons discussed above, the Commission finds that Rose L. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25(c)3 of the Act, and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. Because of the multiple, flagrant violations of the Act, the Commission recommends that the Commissioner of Education impose a penalty of removal.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was

mailed to the parties, Ms. Funches may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C09-05 & C10-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of September 27, 2005, the Commission found that Rose L. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25(c)3 of the School Ethics Act (Act), and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of removal; and

Whereas, at its meeting of September 27, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C09 & 10-05

399-05

399-05SEC

AGENCY DKT. NO.: 271-10/05

IN THE MATTER OF JANET P. GRAHAM,	:	
SOUTH BELMAR BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the South Belmar Board of Education in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Board member responded that the training dates offered posed conflicts with the probationary period imposed by her new job and that she would make arrangements to attend this year; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille Edary

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T05-05**
JANET P. GRAHAM,	:	
South Belmar Board of Education	:	**DECISION FOR FAILURE**
Monmouth County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Janet P. Graham was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had until May 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Janet P. Graham to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Graham responded that she had failed to attend training she started a new position at work and the training dates did not coincide with her new schedule during her probationary period; and

WHEREAS, the Commission notified Ms. Graham that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Graham has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Janet P. Graham violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

400-05

#400-05

MR. AND MRS. T.F.S., on behalf of minor child, C.M.S.,

PETITIONERS,

V.

BOARD OF EDUCATION OF SOUTH BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY, DR. SAMUEL STEWART, SUPERINTENDENT OF SCHOOLS AND DEBRA JOHNSON, MAYOR,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, in August 2002, challenged the respondent Board's decision denying their child transportation services to the Crossroads South Middle School; alleged that the walk route designated by the Board is unsafe; and demanded that the Board's decision be reversed as arbitrary, capricious and unreasonable. Four hearings occurred between October 2004 and February 2005, and the record closed on September 2, 2005. Subsequently, respondent submitted that C.M.S. is currently a student at South Brunswick High School, and is now receiving transportation services to and from school.

The ALJ concluded that given the change in circumstances, the issue is an improper subject for judicial review, and should be dismissed as moot. Therefore, the Initial Decision of the OAL recommended dismissal of the petition.

The Commissioner rejects the Initial Decision of the ALJ, finding that under the circumstances, the graduation of C.M.S. from the Crossroads Middle School does not render moot petitioners' action challenging the Board's refusal to bus C.M.S., as the specific action complained about is currently being repeated in regard to petitioners' younger child, J.R.S. The Commissioner notes that petitioners' claim they requested to amend their petition to substitute J.R.S. for C.M.S. prior to the ALJ's decision in this case, but were denied and told to file a new petition. The Commissioner concludes that no reasonable purpose would be served by requiring petitioners to file a new petition when the underlying facts, other than the name of the child, are identical; such an exercise would equate to a needless waste of scarce administrative and adjudicative resources. Accordingly, this matter is remanded to the OAL, where petitioners shall be allowed to submit an amended petition substituting J.R.S. for C.M.S.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 2, 2005

OAL DKT. NO. EDU 6674-02
AGENCY DKT. NO. 266-8/02

MR. AND MRS. T.F.S., on behalf of minor child, C.M.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY, DR. SAMUEL STEWART, SUPERINTENDENT OF SCHOOLS AND DEBRA JOHNSON, MAYOR,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4. No reply exceptions were submitted.

Petitioners' exceptions vehemently oppose dismissal of this matter as moot by the Administrative Law Judge (ALJ). They assert that the instant Petition of Appeal was instituted over three years ago and now, "after much lengthy delay on the part of the OAL," is being dismissed, "after 4 full days of hearing, an extensive developed record, and final Briefs submitted by both Parties to this matter," solely because C.M.S. has moved on to high school. (Petitioners' Exceptions at 2) This result is particularly egregious, petitioners argue, since they now have a second child, J.R.S., who in September 2005 began attending the same school

previously attended by C.M.S., thereby continuing the same intolerable situation as previously existed as a consequence of the Board's determination here.

Petitioners claim that, prior to the ALJ's decision in this case, they communicated with him and made a "formal" request to amend their petition to substitute J.R.S. for C.M.S. and were refused, notwithstanding that *N.J.A.C.* 1:1-6.2 clearly contemplates free amendment of pleadings. Rather, they report, the ALJ informed them that they would have to file a new petition and begin this whole case anew. (*Id.* at 2-3) Petitioners charge that bringing an entirely new action before the Commissioner on behalf of their second child "when the [second] child is exposed to the same Hazardous Parameters and conditions that existed in the matter with [their first] child" is senseless. (*Id.* at 3) They urge that the ALJ's decision be rejected and that this matter be remanded to the OAL for adjudication on the merits.

Upon careful and independent review of the record in this matter, the Commissioner determines to reject the Initial Decision of the ALJ, finding, instead, that under the circumstances, the graduation of petitioners' child, C.M.S., from the Crossroads South Middle School does not render moot the petitioners' action challenging the Board's refusal to bus their middle school child. In this regard, the Commissioner is mindful that:

> An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. *See Black's Law Dictionary* 409 (5th ed. 1979), and *In re Conroy*, 190 *N.J. Super.* 453, 458 (App. Div. 1983)***. (*Barshatky v. Freehold Regional High School District Bd. of Educ.*, 95 *N.J.A.R.* 2d (EDU) 71, 73)

Although it is well-established that the Commissioner does not decide moot issues, (*See Carolyn Henry v. Board of Education of the City of Wildwood, Cape May* County, 1975 *S.L.D.* 1, 3), it is likewise well-established that an issue is not moot where the potential for

recurrence exists. *Galloway Township Board of Education v. Galloway Township Education Association*, 78 *N.J.* 25. Such is the case here. Notwithstanding C.M.S.'s graduation, as pointed out in petitioners' exceptions, their second child, J.R.S., began attendance at this same middle school in September 2005. As such, it is without question that the specific action of the Board complained about is currently being repeated.

Irrespective of the fact that the record in this matter evidences that the delays in the movement of this appeal — filed in August 2002 — are, in large measure, attributable to petitioners' own dilatoriness, in light of the stage of record development at this point in time and given that all of the underlying facts of this matter, other than the name of the specific child involved, are *identical*, the Commissioner finds and concludes that no reasonable purpose would be served by requiring petitioners to file an entirely new petition but, rather, such an exercise would equate to a needless waste of scarce administrative and adjudicative resources.

Accordingly, the Initial Decision of the OAL dismissing this case as moot is rejected. This matter is remanded to the OAL, where petitioners shall be allowed to submit an amended petition substituting J.R.S. for C.M.S., and this matter shall proceed for a determination on petitioners' underlying claim.

IT IS SO ORDERED.*

Lucille Edley

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11-02-05

Date of Mailing: 11-03-05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6674-02
AGENCY DKT. NO. 266-8/02

MR. and MRS. T.F.S. o/b/o C.M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF SOUTH BRUNSWICK TWP., MIDDLESEX COUNTY, DR. SAMUEL STEWART, SUPERINTENDENT OF SCHOOLS AND DEBRA JOHNSON, MAYOR
Respondent.

T.F.S., petitioner, *pro se*
John E. Collins, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 2, 2005 Decided: September 22, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ

Petitioners challenge the South Brunswick Township Board of Education's decision to deny their daughter, C.M.S., transportation services to and from the Crossroads South Middle School. In so doing, they allege that the Board failed to follow recommendations set forth in *The Relative Risks of School Travel*, Special Report 269 of the Transportation Research Board of the National Academies, and designated a walk route between their home in the Regents Square

development and the Middle School that is "obviously and significantly unsafe." They therefore demand that the Board's decision be reversed as arbitrary, capricious, and unreasonable.

Petitioners filed their complaint on August 28, 2002, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on October 9, 2002. A lengthy period of discovery, followed by a series of motions, briefs, orders, and one interlocutory appeal ensued and continued through July 2004, when Administrative Law Judge Steven C. Reback retired and the matter was reassigned to me for handling. The matter was subsequently heard on October 13, 2004; December 14 & 15, 2004; and February 9, 2005, and the record was closed upon receipt of petitioners' final post-hearing submission on September 2, 2005.

A thorough review of the record conducted prior to writing an Initial Decision disclosed that petitioners filed this action shortly before C.M.S. began attending the Crossroads South Middle School as a sixth grade student in September 2002. Since the Middle School is comprised of grades six, seven, and eight, logic dictated that C.M.S. presumably graduated from Crossroads South in June 2005 and began attending South Brunswick High School at approximately the same time the record was closed.

During a conference call conducted on September 12, 2005, petitioner T.F.S. confirmed that his daughter, C.M.S., was in fact attending and receiving transportation services to and from South Brunswick High School.[1] Four days later, on September 16, 2005, I received from counsel for respondent the certification of Jeffrey R. Scott, Assistant Superintendent for Business, in which he stated that "C.M.S., the subject of this proceeding, is now a ninth grade student at South Brunswick High School; she receives daily transportation services based on the distance between her home and the High School."

Ordinarily, an issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. *In re Conroy*, 109 *N.J. Super.* 453, 458 (App. Div. 1983). In such cases, the issues that have become moot or academic

[1] T.F.S. also indicated that he was no longer demanding the "stipend" or reimbursement for any of the days he or his wife drove C.M.S. to, or drove her home from, the Middle School.

prior to judicial scrutiny" are generally considered to be ... improper subject[s] for judicial review." *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed. *Ibid.*

This is just such a case. Since C.M.S. is no longer attending Crossroads South Middle School, the issue of whether she is entitled to transportation services to and from that school is now academic and any decision I render will have no practical effect on the existing controversy. I therefore **CONCLUDE** that given the change in circumstances, the issue is an improper subject for judicial review and should be dismissed as **MOOT**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 22, 2005

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 22, 2005

DATE

Mailed to Parties:

SEP 28 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

401-05SEC

AGENCY DKT. NO.: 270-10/05

IN THE MATTER OF MARIA MANLEY,	:	
MORRIS PLAINS BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MORRIS COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Morris Plains Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Board member responded that she did not attend training because she gave birth three months after her election to the Board but was registered for the October 25, 2005 training; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T06-05**
MARIA R. MANLEY,	:	
Morris Plains Board of Education	:	**DECISION FOR FAILURE**
Morris County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Maria R. Manley was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Maria R. Manley to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Manley responded that she did not attend training because she had a baby three months after she was elected to the board, but she is registered for the October 25, 2005 training session; and

WHEREAS, the Commission notified Ms. Manley that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Manley has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Maria R. Manely violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

402-05SEC

AGENCY DKT. NO.: 266-10/05

IN THE MATTER OF KAREN ROSE,	:	
HARMONY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
WARREN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Harmony Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that her son was sick on the day of the training session in March 2005 and, because she is a stay-at-home mom, she could not attend the training sessions offered in June 2005; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T09-05**
KAREN ROSE,	:	
Harmony Board of Education	:	**DECISION FOR FAILURE**
Warren County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Karen Rose was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had to until April 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Karen Rose to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Rose responded that her son was sick on the day of the training session in March 2005 and because she is a stay at home mom she could not attend the training sessions offered in June 2005; and

WHEREAS, the Commission notified Ms. Rose that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Rose has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Karen Rose violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

404-05

404-05SEC

AGENCY DKT. NO.: 269-10/05

IN THE MATTER OF PHILLIP REPELLA III,	:	
QUEEN CITY ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, UNION COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Queen City Academy Charter School Board of Trustees in January 2004 and, therefore, had until January 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 19, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the above-named Board member did not respond to the Commission's Order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on his behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if he fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if he fails to attend the January 28, 2006 session.*

Kuille EDay

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T11-05**
PHILLIP REPELLA, III,	:	
Queen City Academy Charter School	:	**DECISION FOR FAILURE**
Board of Trustees	:	**TO ATTEND TRAINING**
Union County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Phillip Repella, III was newly elected or appointed in January 2004 to a local school board or charter school board and therefore, had to until January 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 19, 2005, directing Phillip Repella, III to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Repella did not respond to the Commission's Order; and

WHEREAS, the Commission notified Mr. Repella that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Mr. Repella has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if he fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Phillip Repella, III violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if he fails to attend the October 25, 2005 training session and removal from the board if he fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

403-05

403-05SEC

AGENCY DKT. NO.: 267-10/05

IN THE MATTER OF BONNIE SHIMP,	:	
QUINTON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
SALEM COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Quinton Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that because she was a board member in 1990 and never received training she called the NJSBA who advised her that since she was on the Board in 1990 that she did not have to attend training, but she is registered for the October 25, 2005 training session; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/3/05

Date of Mailing: 11/3/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T07-05**
BONNIE SHIMP,	:	
Quinton Board of Education	:	**DECISION FOR FAILURE**
Salem County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Bonnie Shimp was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Bonnie Shimp to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Shimp responded that because she was a board member in 1990 and never received training she called the NJSBA who advised her that since she was on the Board in 1990 that she did not have to attend training, but she is registered for the October 25, 2005 training session; and

WHEREAS, the Commission notified Ms. Shimp that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Shimp has failed to attend the required training program for the one year allowed since she never received training during her 1990 term on the board; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Bonnie Shimp violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

405-05

OAL DKT. NO. EDU 10158-04
AGENCY DKT. NO. 260-7/04

ALFRED SZOLACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edar
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10158-04
AGENCY DKT. NO. 260-7/04

ALFRED SZOLACK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

William S. Donio, Esq., for respondent (Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys)

Record Closed: October 3, 2005 Decided: October 5, 2005

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 5, 2005
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

OCT 12 2005
DATE

DEPARTMENT OF EDUCATION

OCT 13 2005

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2005 OCT -3 A 10:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

William S. Donio, Esquire
Cooper Levenson April
Niedelman & Wagenheim, P.A.
1125 Atlantic Avenue – 3rd Floor
Atlantic City, NJ 08401
(609)344-3161
Attorneys for Respondent

ALFRED SZOLACK, an individual,	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
Petitioner,	
v.	**AGENCY DOCKET NO.: 260-7/04**
BOARD OF EDUCATION OF TOWN OF HAMMONTON, COUNTY OF ATLANTIC,	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	

This Settlement Agreement and General Release is made as of the ____ day of _____, 2005 by and among Alfred Szolack, (hereinafter "Petitioner"); and the Hammonton Board of Education, Atlantic County, New Jersey, its successors, predecessors and assigns, (hereinafter the "Board") as follows:

WHEREAS, the Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and administration of the Hammonton School District in Atlantic County, New Jersey; and

WHEREAS, Petitioner was employed by the Board from about March of 1995; and

WHEREAS, Petitioner filed a Petition of Appeal against the Board with the Commissioner of Education, entitled *Alfred Szolack v. Board of Education of Town of Hammonton, County of Atlantic,* Agency Docket Number 260-7/04 and has asserted

claims against the Board in conjunction with the Board's announcement of a reduction in force ("RIF") effective on the first day of the 2004-2005 school year; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioners claims in the Petition of Appeal set forth above, and any and all related claims which could have been asserted by Petitioner against the Board; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and that no party admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **SETTLEMENT.**

(a) Effective the start of the 2005-2006 school year, Petitioner will be hired by the Board to work 2/5 of the time of a regular work week as a Substance Abuse Coordinator ("SAC") and 3/5 of the time of a regular work week as a health/physical education teacher ("H/PE Teacher").

(b) It is presently anticipated that Petitioner's time will be split within the school day as follows:

(i) Petitioner will act in his capacity as an H/PE Teacher during periods one, two, three and eight of the school day.

(ii) During periods four, five six and seven, which represent the student lunch periods, Petitioner will act in his capacity as a SAC.

(iii) Petitioner may be required to rotate his schedule based on the needs of the school.

(iv) Petitioner will also be assigned a homeroom, lunch period, prep period and such other duties and rights of an H/PE Teacher.

(c) The Board recognizes Petitioner's tenure and acknowledges his seniority as an H/PE Teacher in a position of one (1) day a week for his previous nine (9) years of service with the Board.

2. **DISMISSAL OF ACTION.** Petitioner dismisses with prejudice all claims contained in the Petition against the Board relating to his work, seniority, tenure and civil rights.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, Petitioner, personally and for his estate and/or heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state

statutes, regulations and/or common law. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of his tenure and seniority rights under *N.J.S.A.* 18A:6-10 *et seq.*, *N.J.S.A.* 18A:28-5 *et seq.*, *N.J.S.A.* 18A:28-10 *et seq.*, *N.J.S.A.* 18A:29-9 *et seq.*, and *N.J.A.C.* 6:3-5.1 *et seq.* This release specifically excludes 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.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives his right to file any charge or complaint in his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law. This covenant specifically excludes 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.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

6. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Agreement, nor any other action taken by the Board in conjunction with Petitioner's claims or this settlement, constitute admission by the Board of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by Petitioner as to the merits of his claims or the lack thereof.

7. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party has relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

8. **APPROVAL BY COMMISSIONER**. The Parties will seek the Administrative Law Judge's recommendation of and the Commissioner's approval of this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to order the petition of appeal to be withdrawn and dismissed with prejudice. Should the Commissioner fail to approve this Settlement Agreement without modification, the Parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void in

every respect, the Parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for hearing and the Parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

9. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

Witnessed or Attested by:

ALFRED SZOLACK

HAMMONTON BOARD OF EDUCATION

LESLEY A. MOTZ
BOARD SECRETARY

LORETTA REHMANN
BOARD PRESIDENT

CPAC; 595207.1

William S. Donio, Esquire
Cooper Levenson April
Niedelman & Wagenheim, P.A.
1125 Atlantic Avenue – 3rd Floor
Atlantic City, NJ 08401
(609)344-3161
Attorneys for Respondent

ALFRED SZOLACK, an individual,	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
Petitioner,	
v.	**AGENCY DOCKET NO.: 260-7/04**
BOARD OF EDUCATION OF TOWN OF HAMMONTON, COUNTY OF ATLANTIC,	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	

This Settlement Agreement and General Release is made as of the ____ day of _____, 2005 by and among Alfred Szolack, (hereinafter "Petitioner"); and the Hammonton Board of Education, Atlantic County, New Jersey, its successors, predecessors and assigns, (hereinafter the "Board") as follows:

WHEREAS, the Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and administration of the Hammonton School District in Atlantic County, New Jersey; and

WHEREAS, Petitioner was employed by the Board from about March of 1995; and

WHEREAS, Petitioner filed a Petition of Appeal against the Board with the Commissioner of Education, entitled *Alfred Szolack v. Board of Education of Town of Hammonton, County of Atlantic,* Agency Docket Number 260-7/04 and has asserted

claims against the Board in conjunction with the Board's announcement of a reduction in force ("RIF") effective on the first day of the 2004-2005 school year; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioners claims in the Petition of Appeal set forth above, and any and all related claims which could have been asserted by Petitioner against the Board; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and that no party admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **SETTLEMENT.**

(a) Effective the start of the 2005-2006 school year, Petitioner will be hired by the Board to work 2/5 of the time of a regular work week as a Substance Abuse Coordinator ("SAC") and 3/5 of the time of a regular work week as a health/physical education teacher ("H/PE Teacher").

(b) It is presently anticipated that Petitioner's time will be split within the school day as follows:

(i) Petitioner will act in his capacity as an H/PE Teacher during periods one, two, three and eight of the school day.

(ii) During periods four, five six and seven, which represent the student lunch periods, Petitioner will act in his capacity as a SAC.

(iii) Petitioner may be required to rotate his schedule based on the needs of the school.

(iv) Petitioner will also be assigned a homeroom, lunch period, prep period and such other duties and rights of an H/PE Teacher.

(c) The Board recognizes Petitioner's tenure and acknowledges his seniority as an H/PE Teacher in a position of one (1) day a week for his previous nine (9) years of service with the Board.

2. **DISMISSAL OF ACTION.** Petitioner dismisses with prejudice all claims contained in the Petition against the Board relating to his work, seniority, tenure and civil rights.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, Petitioner, personally and for his estate and/or heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state

statutes, regulations and/or common law. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of his tenure and seniority rights under *N.J.S.A.* 18A:6-10 *et seq.*, *N.J.S.A.* 18A:28-5 *et seq.*, *N.J.S.A.* 18A:28-10 *et seq.*, *N.J.S.A.* 18A:29-9 *et seq.*, and *N.J.A.C.* 6:3-5.1 *et seq.* This release specifically excludes 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.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives his right to file any charge or complaint in his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law. This covenant specifically excludes 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.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

every respect, the Parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for hearing and the Parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

9. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

Witnessed or Attested by:

ALFRED SZOLACK

HAMMONTON BOARD OF EDUCATION

LESLEY A. MOTZ
BOARD SECRETARY

LORETTA REHMANN
BOARD PRESIDENT

CPAC; 595207.1

HAMMONTON BOARD OF EDUCATION

School Business Administrator 609 567 7000
Board Secretary 609 561 4420

Approved Employment/ Non-emergent

Resolution No. 05 8 51R: On a motion made by Mr. Condo and seconded by Dr. Johnson, the Hammonton Board of Education went to a roll call vote to approve the following on a non-emergent basis and as part of a settlement agreement discussed in closed session:

Alfred Szolack - high school 3/5 Health and Physical Education teacher and 2/5 Substance Abuse Coordinator

At the call of the roll, the vote was as follows: Mr. Condo-yes; Mr. Costa-yes; Mr. DiDonato-yes; Mr. Giralo-yes; Dr. Johnson-yes; Mr. Lyons-no; Mr. Velardi-yes; Mr. Walker-yes; Mr. Weiss-yes; Mrs. Rehmann-yes. Of ten voting members present; nine voted in the affirmative; one in the negative. The motion carried.

RECEIVED
2005 OCT -5 A 11:25
STATE OF NEW JERSEY
DEPARTMENT OF AUDIT

SELIKOFF
&COHEN, PA

Labor and Employment Lawyers for more than 25 years

S. Selikoff◇
Steven R. Cohen◇*
Carol H. Alling
*Michael C. Damm**
*Keith Waldman**
members NJ bar
◇ *members DC bar*
* *members PA bar*

September 30, 2005

307 Fellowship Road
Suite 314
Mount Laurel, NJ
08054-1233

t 856-778-6055
f 856-778-6056
selikoff.cohen@verizon.net

Honorable W. Todd Miller, ALJ
Office of Administrative Law
1601 Atlantic Ave., 6th Floor
Atlantic City, NJ 08401

Re: *Alfred Szolack v. Board of Education of the Town of Hammonton, County of Atlantic*
OAL Docket No. EDU 10158-04; Agency Docket No. 260-7/04
▸**Enclosure of Settlement Agreement and General Release**
Our File No. 4816

Dear Judge Miller:

I am pleased to enclose two originals of a fully executed Settlement Agreement and General Release in the above matter. The parties respectfully request that you review the Agreement and if it meets with your approval, that you issue an order approving settlement and forward it to the Commissioner of Education for review.

Thank you for your consideration in this matter.

Respectfully yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN

KW:kaz
Enclosures
c: William S. Donio, Esq.(w/encl.)
Myron Plotkin, NJEA Reg. #6 (w/encl.)
Alfred Szolack (w/encl.)

RECEIVED
2005 OCT -3 A 10:21
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

406-05

#406-05

OAL DKT. NO EDU 1165-05
AGENCY DKT. NO. 441-12/04

IN THE MATTER OF THE TENURE	:	
HEARING OF MYRNA SMITH,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1165-05

AGENCY DKT. NO. 441-12/04

IN THE MATTER OF THE TENURE HEARING OF MYRNA SMITH, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Ronald C. Hunt, Esq., for Petitioner Irvington Board of Education
(Hunt, Hamlin & Ridley, attorneys)

Mary Frances Palisano, Esq., for Respondent Myrna Smith
(Law Offices of Alan I. Zegas, attorneys)

Record Closed: September 15, 2005 Decided: October 11, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 12, 2005, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were scheduled on May 17, 23, 24 & 31, 2005 at the OAL, 33 Washington Street, Newark, New Jersey.

After numerous settlement discussions, the parties agreed to a settlement and have prepared a Settlement Agreement, which was approved by the Board, indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law, including those criteria which the State Board of Education set forth in *Cardonick v. BOE of Borough of Brooklawn, Camden County.*

Among those criteria is the requirement that the agreement be accompanied by supporting documentation as to the nature of the charges. That documentation is included in the Statement of Evidence in Support of the Charges, Proof of Service and the Certification of Determination with respect to said charges submitted to the Commissioner. Copies of those documents are attached hereto as Exhibit 1.

The circumstances justifying the settlement are set forth in the agreement at ¶ 9. In addition, to those set forth, I note that Respondent has been an exemplary teaching staff member for over 20 years of service to the District and has been the recipient of numerous awards. The charges arose out of a single alleged incident. Weighed against the accomplishments of Respondent throughout her years of service, the public interest is served by retaining such a professional. I do so **FIND.**

By her signature as well as through discussion with counsel, I am persuaded Respondent understands her rights and has entered this agreement knowingly and voluntarily.

I **CONCLUDE,** therefore, 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 **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board 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.

October 11, 2005
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10-14-05
DATE

M. Kathleen Duncan/CH
MERIT SYSTEM BOARD

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 18 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

HUNT, HAMLIN & RIDLEY
60 Park Place, 16th Floor
Newark, New Jersey 07102
(973) 242-4471
Attorneys for Petitioner,
Irvington Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 16 P 2:39

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DOCKET NO.: EDUOR 1165-05
AGENCY DOCKET NO.: 441-12/04

IN THE MATER OF THE TENURE HEARING OF MYRNA SMITH AND THE IRVINGTON BOARD OF EDUCATION

SETTLEMENT AGREEMENT

This settlement agreement (hereinafter "the settlement agreement" or "the proposed agreement") is made and entered into this ____ date of August, 2005, by and between Myrna Smith, Respondent (hereinafter "Ms. Smith" or "Respondent"), and the Irvington Board of Education, Petitioner (hereinafter "Petitioner", "the Board" or "the District"). The parties agree to the terms of this settlement agreement, which shall be presented to the Office of Administrative Law and the Commissioner of Education for approval and for the withdrawal of the Tenure Charges (hereinafter the "tenure charges" or "the charges") filed by Petitioner. The basis for urging the resolution agreed upon is as follows:

1. Ms. Smith is presently an employee of the District and is employed as a teaching staff member by the Board at the Mount Vernon Avenue Elementary School (hereinafter "Mt. Vernon").

2. Ms. Smith is a veteran teaching staff member at Mt. Vernon with over twenty (20) years of service to the District, which represents her entire professional career as an educator.

3. Ms. Smith has been the recipient of numerous awards for her accomplishments as an educator over the years and has consistently obtained "effective," the highest rating possible, on her teaching evaluations.

4. The instant tenure charges arose out of a single incident that allegedly occurred on September 30, 2004, at the Augusta Street Elementary School (hereinafter "Augusta"), which is not where Ms. Smith teaches. At the time of the alleged incident, Ms. Smith was the PTA President of Augusta, which was a volunteer position independent of her teaching position at Mt. Vernon. Ms. Smith's granddaughter was a student at Augusta at the time Ms. Smith served as PTA President. Ms. Smith held the Augusta PTA position for approximately four (4) years.

5. Petitioner alleged that after school hours on September 30, 2004 Respondent was present at Augusta in her capacity as PTA President. At that time, a verbal disagreement ensued between Ms. Smith, the Augusta Principal and the Augusta Social Worker, over the operation of the PTA Toys for Tots Program. In the course of the disagreement, Respondent made personal, derogatory and inflammatory remarks against the Principal and the Social Worker.

6. As a consequence of this confrontation, the Board filed tenure charges against Ms. Smith, alleging that her speech was unbecoming of a teaching staff member, in violation of N.J.S.A. 18A:6-10.

7. Ms. Smith, through her attorneys, responded to the charges, adamantly denying that she engaged in any conduct unbecoming a public employee.

8. Thereafter, the Commissioner of Education transferred the matter to the Office of Administrative Law for a hearing.

9. After reflection, the Board determined that it would be in the public interest to enter into settlement negotiations with Ms. Smith for reasons, including the following: (1) the alleged incident occurred after school hours at Augusta (not Mount Vernon) while Ms. Smith was acting as PTA President of Augusta, which is completely independent and unrelated to Ms. Smith's teaching position at Mt. Vernon; and (2) the circumstances did not affect or relate in any way to the Respondent's ability to teach in the future.

10. Prior to the hearing, the parties conferenced the case with the Honorable Maria LaFiandra, A.L.J. before reaching a resolution of the tenure charges within the parameters of the law.

11. In lieu of Petitioner pursuing tenure charges for conduct unbecoming a teaching staff member, the following resolution has been approved by the District and the Irvington Superintendent of Schools on the Court's record and is jointly proposed by the parties to the Office of Administrative Law and the Commissioner of Education:

    a. Respondent shall agree to forfeit her salary increment for the 2005-2006 school year;

b. Respondent shall agree to a 100-day suspension without pay pursuant to N.J.S.A.18A:6-14 (calculated by the loss of net salary for seven (7) pay periods);

c. Respondent shall relinquish her position as PTA President at Augusta and agrees not to hold a similar office in any school in the District.

d. Petitioner shall return Respondent to her teaching position at the Mount Vernon Avenue School commencing at the start of the 2005-2006 school year.

e. Petitioner shall agree to withdraw its tenure charges filed with the Commissioner of Education and urges approval by the Commissioner of the within settlement.

12. It is the belief of all parties that the proposed agreement serves the public interest.

13. By entering into this agreement, Ms. Smith is not admitting liability or guilt regarding any of the factual or legal allegations set forth in the charges or in other related documents.

14. Respondent accepts the terms of this proposed agreement voluntarily, on the advice of competent counsel, with ample time to deliberate and with full knowledge of her right to challenge the charges and require competent proofs from Petitioner on all allegations of unbecoming conduct.

15. If the proposed agreement is approved, it shall constitute the entire agreement between the parties with regard to the matters at issue herein. This settlement agreement may not be utilized by either party in any other proceeding as support

or proof of any contention raised by that party in this proceeding. Neither party is admitting any liability with regard to the allegations set forth in these proceedings.

16. This proposed agreement is subject first to approval by the Irvington Board of Education, then by the Office of Administrative Law, and finally by the Commissioner of Education, before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any acts that may be required to effectuate the terms, conditions and spirit of the proposed agreement.

17. As further consideration for the proposed agreement, the parties agree that following the full execution of the settlement agreement they will keep all terms of this agreement completely confidential. It is expressly understood and agreed that neither the District, Respondent, nor their attorneys or representatives will take any action to publicize the terms or nature of this agreement, except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement of this agreement; (2) as may be required by any court or agency of competent jurisdiction; or (3) as may be required by law.

18. Respondent and the Board are each responsible for payment of their own attorney's fees and costs incurred in this matter.

END OF PAGE

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Agreement effective on the date and year first above written.

Date: 8/29/05

By: Myrna Smith
Myrna Smith

LAW OFFICES OF ALAN L. ZEGAS
Attorneys for the Respondent

Date: 8/29/05

By: Mary Frances Palisano
Mary Frances Palisano, Esq.

BOARD OF EDUCATION OF THE IRVINGTON SCHOOL DISTRICT

Date: 9/14/05

By:
School Board President

HUNT, HAMLIN & RIDLEY
Attorneys for the Petitioner

Date: 9/14/05

By:
Ronald C. Hunt, Esq.

REGULAR BOARD MEETING MAY 18, 2005
FINANCE (continued)

ACTION:
Motion by: Ahmed Screven, Seconded by: Norma Carty
Roll Call: Roll; Unanimously approved on a roll call vote

WALK – ON

SETTLEMENT – Gruber V. Irvington Board of Education

RESOLVED, that the Board of Education accepted the recommendation of the Superintendent and approved the settlement in the matter entitled Paul Gruber V. Irvington Board of Education. ESXL11648-00 currently pending in the Superior Court of New Jersey, Essex County.

ACTION:
Motion by: Ahmed Screven, Seconded by: Anna Scott
Roll Call: 7 Ayes, Vann-Dupree, Burgess, Carty, Derisse, Hardy, Scott, Screven, Witherspoon, 1 abstained, Bryant.

SETTLEMENT – Smith V. Irvington Board of Education

RESOLVED, that the Board of Education accepted the recommendation of the Superintendent and approves the settlement in the administrative matter entitled In the Matter of Myrna Smith, Agency No 441-12/04, the details of which are more fully set forth in the Settlement Agreement:

ACTION:
Motion by: Ahmed Screven, Seconded by: Anna Scott
Roll Call: Unanimously approved on roll call vote.

PUBLIC COMMENT:

Yolanda English, 184 Union Avenue, Irvington, New Jersey 07111, questioned the board as to why her child's teacher Mr. Beckle, was going to be removed from the classroom? What steps does a principal take to remove a teacher, and as a parent, what could the parent do to prevent it? Ms. English further stated that Mr. Beckle was the only teacher that ever contacted her concerning her child, whether it was good, or bad.

Ms. English further stated that she has twins, and she wanted to know how is it that one twin was recommended to the Union Avenue, Magnet Program, and the other was not? After speaking with the guidance counselor, and principal several times, the principal informed her that she would look into. The principal told her she had to wait awhile, however, the principal never called her back. She wanted to know what she could do to keep her twins together?

IRVINGTON PUBLIC SCHOOLS

Office of the Superintendent

Dr. Ernest H. Smith, Jr.
Superintendent of Schools

1 UNIVERSITY PLACE
IRVINGTON, NEW JERSEY 07111-2486
(973) 399-6800 x2110
(973) 371-6542 Fax

CERTIFICATION OF DETERMINATION

Re: Myrna Smith, Teacher

I hereby certify that the Irvington Board of Education, at a meeting on Wednesday, December 15, 2004, at 5:30 p.m., at 1324 Springfield Avenue, Florence Avenue School, located in the Township of Irvington, New Jersey, upon a vote of the majority of the whole number of members of the Board, made the following determinations:

a. That there is probable cause to credit evidence in support of charges.

b. That the charges hereto attached and made a part hereof and evidence in support of the charges is sufficient, if true in fact, to warrant the dismissal of Myrna Smith, a tenured Teacher in the Irvington School District.

c. That the charges pursuant to which probable cause has been found were of such consequence that said Myrna Smith should be suspended from her employment without pay, effective Thursday, December 16, 2004.

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.

Victor R. Demming

Victor R. Demming
Assistant Superintendent for
Business/Board Secretary

Dated: December 15, 2004

Exhibit 1

THE LAW FIRM OF

HUNT, HAMLIN & RIDLEY

COUNSELORS AT LAW
MILITARY PARK BUILDING
60 PARK PLACE, 16TH FLOOR
NEWARK, NEW JERSEY 07102

TELEPHONE: (973) 242-4471
TELEFAX: (973) 242-8295
WEBSITE: www.HuntHamlinRidley.com

RONALD C. HUNT*
RAYMOND L. HAMLIN
TERRY RIDLEY

JEANNET E. PAVEZ
RASHEEDAH R. TERRY
LESTER E. TAYLOR, III◆

OF COUNSEL
CEDRIC ASHLEY■
KECIA M. CLARKE■
CYNTHIA H. HARDAWAY■
VIELKA A. VELAZQUEZ

* ALSO ADMITTED IN PA
◆ ALSO ADMITTED IN MD
■ ALSO ADMITTED IN NY

RECEIVED BY
DISPUTES
04 DEC 21 PM 1:40

November 29, 2004

Irvington Board of Education
One University Place
Irvington, New Jersey 07111
Attn : Lorraine Capers

Re: Myrna Smith

Dear Board Member:

Enclosed please find Disciplinary Charges together with a Statement of Evidence relative to the above matter. Kindly review same as well as the response sent by Ms. Smith's attorney which will be available for review at either Dr. Smith or Ms. Davion's office. If there are any questions after your review, please call me directly.

Very truly yours,

HUNT, HAMLIN & RIDLEY

RONALD C. HUNT

Enclosures

DISCIPLINARY CHARGES

Person Bringing Charges:	Dr. Ernest Smith, Superintendent of Schools
Address:	Irvington Board of Education Administration Building 1 University Place Irvington, New Jersey 07111
Charges Brought Against:	Myrna Smith

The Respondent, Myrna Smith, Teacher at the Mt. Vernon Avenue School and PTA President for the Augusta Street School, has been charged with conduct unbecoming an employee. Said unbecoming conduct has been demonstrated by the Respondent as follows:

1. Open and public use of profanity in a loud and argumentative manner toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine in the presence of other teachers, employees and students.

2. Respondent's repeated use of racial epithets toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine, referring to same as "white bitches" and "white crackers" in a loud manner in the presence of other teachers employees and students.

3. Respondent's repeated use of derogatory gender bias language toward the building Principal Margaret Wells and Social Worker Jeannette Valentine referring to same as "fucking lesbians" and remarking "I hate that lesbian" in a loud manner and in the presence of other teaching employees and students.

4. Respondent's use of derogatory and threatening language toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine stating in a loud manner "I'm going to crush that lesbian", in the presence of other teachers, employees and students.

5. The Respondent, Myrna Smith, as a teacher and PTA President of the Augusta Street School, has been charged with conduct subversive of discipline and morale of the school district by verbally attacking the building principal which amounts to conduct unbecoming an employee. Said conduct was subversive of discipline and morale of the school district which amounts the unbecoming conduct has been demonstrate by the Respondent's:

a) Communicating negative, disrespectful and belittling remarks about the building Principal, Margaret Wells and a Social Worker, Jeannette Valentine in the presence of other employees, teachers and students.

b) Communicating negative, disrespectful and belittling remarks about the building Principal, Margaret Wells and Social Worker, Jeannette Valentine which remarks were designed to belittle and insult the building Principal, Margaret Wells and Social Worker, Jeannette Valentine and included derogatory racial epithets as well as an attack upon said employees perceived sexual orientation in the presence of other employees, teachers and students.

c) Communicating negative, disrespectful and belittling comments to the building Principal, Margaret Wells and Social Worker, Jeannette Valentine which same statement was designed to insult the building Principal in an effort to negatively impact upon employee morale.

I certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Victor R. Demming

Victor Demming, Board Secretary

STATEMENT OF EVIDENCE IN SUPPORT OF CHARGES

1. Respondent, Myrna Smith is a Teacher at the Mt. Vernon Avenue School. She also serves as PTA President for the Augusta Street School which conducts monthly meetings at the Augusta Street School Facility, presently located at the St. Leo's Catholic School site.

2. Margaret Wells is the Building School Principal at the Augusta Street School and Jeannette Valentine is a Social Worker at the same school.

3. On Thursday, September 30, 2004 at approximately 3:15 p.m. Myrna Smith come to the Augusta Street School and verbally confronted Mrs. Wells and Ms. Valentine regarding the operation of the "TOYS for TOTS" program.

4. At the time Mrs. Smith spoke in a loud argumentative tone to both Principal Wells and Ms. Valentine in the presence of several other teachers, employees, students.

5. Thereafter at the same date and place, Mrs. Smith was heard to use racial epithets referring to Mrs. Wells and Ms. Valentine as "white bitches" and "white crackers" in the presence of other teachers, employees and students.

6. At the same date and place Mrs. Smith was further heard to reference remarks about Mrs. Wells and Ms. Valentine stating " I hate that lesbian" in the presence of other teachers, employees and students.

7. At the same date and place Mrs. Smith was heard to state "I'm going to crush that fucking lesbian" in the presence of other teachers, employees and students.

8. All of the actions above by the Respondent amount to conduct unbecoming an employee, conduct, subversive of discipline and morale of the school district.

9. Said conduct of respondent has resulted in a negative impact upon the morale of other teaching staff members and Principal Wells' ability to effectively manage the school.

10. The unbecoming conduct of the Respondent, an Irvington Board of Education employee is set forth in the report and statements provided by the Irvington Board of Education. This charge is further supported by the investigation and determination by the Assistant Superintendent for Academic Affairs, Ethel W. Davion, serving in her capacity as Affirmative Action Officer. The allegations were made and certified by the Superintendent under oath and are true to the best of his knowledge.

I certify that the foregoing statements are true. I am aware that if any statements are willfully false, I am subject to punishment.

_____

Dr. Ernest Smith, Superintendent

408-05

OAL DKT. NO. EDU 7455-05 :
(EDU 1362-03 ON REMAND)
AGENCY DKT. NO. 73-3/01
:

JANICE HUNTER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF : DECISION ON REMAND
THE CITY OF IRVINGTON,
ESSEX COUNTY, :

RESPONDENT. :

The record of this matter, the proposed settlement agreement, as revised on remand, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner approves the settlement, as revised on remand, and adopts same as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

ACTING COMMISSSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/04/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7455-05

AGENCY DKT. NO. 73-3/01

(Remand OAL Dkt. No. EDU 1362-03)

JANICE HUNTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF IRVINGTON,

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner (Oxfeld & Cohen, PC, attorneys)

Lester E. Taylor, Esq., for Respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: September 16, 2005 Decided: September 21, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was remanded to the Office of Administrative Law (OAL) from the Department of Education on June 30, 2005, for revision of the Settlement Agreement bearing OAL Dkt. No. EDU 1362-03, Agency Dkt. No. 73-3/02.

Prior to the case being scheduled, counsel for both parties agreed to comply with the Commissioner's determination and have submitted a revised settlement indicating the terms thereof and bearing the signatures of the parties' attorneys in compliance with

the decision of the Commissioner in EDU 1362-03, dated June 7, 2005. The settlement agreement is attached hereto and fully incorporated herein.

I have reviewed the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 21, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

9-28-05
DATE

M. Kathleen Dawson
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 29 2005
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 16 P 1:26

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOA 07455-2005N
Agency Dkt. No. 73-3/01

JANICE HUNTER,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
Respondent.	:	

Janice Hunter, Petitioner in this matter, and the Board of Education of the Township of Irvington, Respondent in this matter, hereby agreed to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's absences for the following dates:

December 18, 2000

December 19, 2000

December 20, 2000

December 21, 2000

December 22, 2000

shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-21;

2. The Respondent shall return to the Petitioner's accumulated sick days the five sick days for which she was charged for her absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future as needed;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

OXFELD COHEN, PC
Attorneys for Petitioner

By: _____
NANCY I. OXFELD, ESQ.

Dated: 9/15/05

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent

By: _____
LESTER E. TAYLOR, ESQ.

Dated: 9-14-05

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 16 P 1:26

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOA 07455-2005N
Agency Dkt. No. 73-3/01

JANICE HUNTER,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
Respondent.	:	

Janice Hunter, Petitioner in this matter, and the Board of Education of the Township of Irvington, Respondent in this matter, hereby agreed to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's absences for the following dates:

December 18, 2000

December 19, 2000

December 20, 2000

December 21, 2000

December 22, 2000

shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-21;

2. The Respondent shall return to the Petitioner's accumulated sick days the five sick days for which she was charged for her absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future as needed;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

OXFELD COHEN, PC
Attorneys for Petitioner

By: _____
NANCY I. OXFELD, ESQ.

Dated: 9/15/05

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent

By: _____
LESTER E. TAYLOR, ESQ.

Dated: 9-14-05

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

November 4, 2005

Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, LLC
50 Commerce Street
Newark, NJ 07102-4003

Susan W. D'Angelo, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
Ten James Street
Florham Park, NJ 07932

Dear Parties:

REXHEP LEKA V. BOARD OF EDUCATION TOWNSHIP OF MONTVILLE, MORRIS COUNTY, AGENCY DKT. NO. 28-1/00, OAL DKT. NO. EDU 03100-00

We are enclosing a copy of the decision of the Commissioner of Education dated November 3, 2005, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/rleka
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

OAL DKT. NO. EDU 3100-00 AGENCY DKT. NO. 28-1/00	:	
REXHAP LEKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/04/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03100-00

AGENCY DKT. NO. 28-1/00

REXHAP LEKA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

Susan W. D'Angelo, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: September 9, 2005 Decided: September 22, 2005

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 21, 2000, 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. On August 23, 2002, the matter was placed on inactive status by ALAJ Thomas E. Clancy pending the outcome of a companion worker's compensation matter.

A hearing was scheduled on May 27, 2005. On the date of hearing the parties settled the matter. The attached Settlement Agreement was submitted on September 9, 2005, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, 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** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 22, 2005
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

9-28-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 29 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is made this ____ day of _____, 2005, by and between the **Montville Township Board of Education**, (hereinafter the "Board"), and **Rexhap Leka**, his successors, heirs and assigns (hereinafter "Mr. Leka").

WHEREAS, Mr. Leka is a former employee of the Board, having served as a custodial/maintnence person from February 19, 1998 through December 21, 1999; and

WHEREAS, Mr. Leka alleges he sustained an injury in the course of his employment; and

WHEREAS, Mr. Leka has filed a Petition of Appeal with the Commissioner of Education which was transferred to the Office of Administrative Law and bears Docket Number EDUOA 03100-2000N in which he seeks restoration of his sick day bank and his full salary for one year from the date of his injury; and

WHEREAS, the Board denies all allegations of wrongdoing; and

WHEREAS, the parties are desirous of amicably settling this matter and wish to resolve all disputes among them;

NOW, THEREFORE, in consideration of the promises contained herein and other good and valuable consideration, the parties agree as follows:

1. The Board agrees to remit a one-time, lump sum payment in the amount of $718.24 (Seven Hundred and Eighteen Dollars and Twenty-Four Cents) to Mr. Leka in accordance with the provisions of this Agreement. Normal payroll and withholding deductions shall be taken from this payment by the Board.

2. In exchange for the above consideration, Mr. Leka shall immediately withdraw with prejudice his claim bearing Docket Number EDUOA-3100-2000N currently pending before

the Office of Administrative Law. Additionally, Mr. Leka, his successors, heirs and assigns, do hereby waive, release and forever discharge any and all claims which he or they may have against the Board, its affiliates, subsidiaries; its past and present officers, agents, employees, Board members, officially and individually, arising out of the employment relationship between Mr. Leka and the Board, including, but not limited to any claims which were or could have been asserted in a lawsuit; claims for attorney's fees, back pay or front pay; claims for emotional distress or pain and suffering; claims involving tax liability stemming from this settlement, and claims arising under any federal, state or local law or ordinance, including, but not limited to: Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, and any other claim for harassment, discrimination or retaliation of any kind, or any other cause of action in any forum of any kind whatsoever.

3. Mr. Leka further waives all rights to continued employment with the Board and agrees that he shall not apply for employment with the Board at any point in the future.

4. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, heirs and assigns.

5. Each party to this Agreement is represented by counsel and represents that it enters into this agreement freely and without duress.

6. Mr. Leka represents that he shall not disclose or discuss this matter and within settlement with any person or entity except that Mr. Leka may disclose this matter and settlement to his spouse, accountant or attorney, if any, and to tax and pension agencies, as required.

7. This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter. This Agreement may not be introduced into evidence or used in any other way in any legal or administrative proceeding other than a proceeding seeking enforcement of the terms of this Agreement.

8. This Agreement shall be governed by the laws of the State of New Jersey and any dispute arising out of this Agreement shall be subject to the exclusive jurisdiction of the Courts of the State of New Jersey.

9. If any provision of this Agreement or the application thereof is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

10. 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.

11. This Agreement constitutes the complete understanding and entire agreement of the parties and it cannot be amended, terminated, discharged or waived, except by a suitable writing which the parties shall duly execute.

12. Mr. Leka acknowledges that he was given the opportunity to fully consider this Agreement and has consulted with counsel as part of his review of this Agreement. It is further

understood that this Agreement shall not become effective or enforceable nor shall any of the consideration described in this Agreement be paid or provided by the Board until all parties have signed it, the Board has officially approved it, and Mr. Leka has notified the Commissioner of Education and Office of Administrative Law, in writing, of the withdrawal with prejudice of his aforementioned pending petition.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date written below.

Rexhap Leka

Dated: 7-20-05

Witness/Attest

Dated: 7-20-05

Montville Township Board of Education

By:

Dated:

Witness/Attest

Dated:

EXTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK:

The board of education of the Township of Montville in the County of Morris, New Jersey, convened in regular session on August 22, 2005 at 8:02 p.m. in the meeting room of the Montville Municipal Building, Montville, NJ.

The following members of the Board of Education were present:

Jon Alin, President

Steven Cohen, Frank Cooney, Michael Duddy, Karl; Feaster, Timothy Lindert, Michael Palma, John Petrozzino (left the meeting at 9:20 p.m.), and Arlene Sullivan.

The following members of the board of education were absent:

None.

The following resolution was offered by Member Petrozzino and seconded by Member Cooney and adopted by the board of education by the following roll call vote:

RESOLVED: That the board of education approves the resolution regarding the settlement between the Montville Township Board of Education and Rexhep Leka as indicated in the official minute book..

ROLL CALL AYES: 9 NOES: 0

STATE OF NEW JERSEY
COUNTY OF MORRIS

I, Dominic J. Butler, Secretary of the Board of Education of the Township of Montville in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district, duly called and held on August 22, 2005 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Montville Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 26th day of August 2005.

(Board Seal)

Dominic J. Butler, Board Secretary

RESOLUTION

The Montville Township Board of Education hereby approves the Settlement between it and Rexhap Leka, resolving all disputes in connection with the Petition of Appeal filed with the Commissioner of Education bearing Docket Number EDUOA 03100-2000N. The Board authorizes the Board President to execute the Settlement Agreement and authorizes the Business Administrator/Board Secretary to implement the terms of the Settlement Agreement as set forth therein.

410-05

410-05L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

November 4, 2005

Michael J. Herbert, Esq.
Herbert, Van Ness, Casci, & Goodell
22 Chambers Street
Princeton, NJ 08542

David Rubin, Esq.
Bridgepointe, 44 Bridge Street
P. O. Box 4579
Metuchen, NJ 08840

Dear Counsel:

I have reviewed the respondent's Motion for Reconsideration, together with Petitioner's Opposition to the Motion and Cross-Motion for Reconsideration, filed in the matter of *Board of Education of the Town of Phillipsburg, Warren County, et al. v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 369-10/03, Commissioner Decision #344-05. I have additionally reviewed the November 1, 2005 letter from respondent's counsel, asking, on behalf of counsel for all parties, that I defer the filing date of my September 26, 2005 decision in the above-captioned matter until the pending motions are resolved.

While I am cognizant of the fact that the schedule originally contemplated for briefing of this matter would allow for further submissions, in light of the parties' concern about the time frame for appeal—and in view of my assessment of the parties' claims on their face as judged against the stated purpose and criteria for reconsideration of Commissioner decisions, *N.J.A.C.* 6A:3-1.15(b)—I have determined that the best course of action under the circumstances is a prompt ruling on the motions.

In support of its motion for reconsideration, respondent (NJSIAA) has argued that my decision: 1) misunderstood the compromise procedure agreed to by the parties, thereby erroneously concluding that the Skyland conference could not participate in the hearing absent formal intervention procedures, notwithstanding that there were ample indications of Skyland's opposition to petitioners' (Phillipsburg) request and its intent to express such opposition at hearing; and 2) erred in concluding that members of

the Special Committee on Leagues and Conferences (SCLC) should not have participated in the Executive Committee review of the SCLC decision, primarily because such participation was not objected to by Phillipsburg apart from passing references, has been customary for over two decades, has been "expressly approved" by the Commissioner in every league and conference decision issued since, poses no conflict because Executive Committee proceedings are conducted *de novo* based on the record developed by the SCLC, and is similar to the process used by the Department of Education and other agencies—such as the State Board of Education Legal Committee—whose members are not precluded from participating in full Board discussions of matters it has considered. [1]

In support of its cross-motion, Phillipsburg has argued that reconsideration *is* warranted, but on the following grounds rather than those proffered by NJSIAA: 1) My decision failed to address rejection of NJSIAA's rule on policy grounds, which is the Commissioner's right under *N.J.S.A.* 18A:11-5; 2) NJSIAA's prior waiver to the Moorestown Friends School may have been granted for reasons in addition to religion, but the record shows religion to have, indeed, been *a* factor; and 3) Compelling, unrefuted evidence was overlooked in the decision, such that Phillipsburg should have been found to have prevailed rather than "penalized with [the] additional litigation expense and delay" resulting from the decision's directive for remand, while NJSIAA and Skyland are rewarded with a "second bite at the apple" based on procedural deficiencies that were their fault rather than petitioners.'

Initially, I note that *N.J.A.C.* 6A:3-1.15 reads in pertinent part:

> (b) Any party may make a motion for reconsideration or clarification of the Commissioner's decision within 10 days of the filing of the Commissioner's decision.
>
> 1. A motion shall be filed with the Commissioner together with proof of service on each other party, shall be briefed in accordance with the directives of the Commissioner, and shall be decided by the Commissioner in accordance with applicable rules of the OAL.
>
> 2. A motion for reconsideration shall be considered based upon the following:
>
> i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon

[1] Phillipsburg countered that no reconsideration is warranted on these grounds because: 1) knowledge of Skyland's general opposition and notice of its intent to make an evidentiary presentation at hearing are not the same thing, so that my decision rightly struck Skyland's evidence from consideration in light of agreed-upon procedures for NJSIAA hearing; and 2) while the decisions cited by NJSIAA may have resulted from the two-step hearing process used herein and referred to such process in passing, none of them focused on, much less "expressly approved" the active, *ex parte* participation by individual SCLC members in closed-door Executive Committee deliberations on SCLC decisions—which, unlike State Board Legal Committee Reports—are actual decisions from which litigants appeal rather than recommendations to the larger body that will actually make the decision.

which it is based, shall not constitute "mistake" for purposes of this section;

ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;

iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation or misconduct could not have been previously known; or

iv. Reversal of a prior judgment on which the present matter is based.

3. A motion for clarification shall be considered based upon necessity as specifically demonstrated in the papers submitted with the motion.

(c) The filing of a motion for clarification or reconsideration shall not, in and of itself, relieve the parties from compliance with any judgment or order of the Commissioner.

(d) The filing of a motion for clarification or reconsideration shall not, in and of itself, alter the filing date of the Commissioner's decision for purposes of appeal.

Public comment on this rule as it was originally proposed, and the agency's response thereto, are instructive as to the rule's intent:

11. COMMENT: The grounds and time frame established in the proposed section on motions for reconsideration, N.J.A.C 6A:3-1.15(b), invite relitigation and abuse, causing extra expense to the prevailing party. Any such motions should be required to be filed within 10 days, as provided in court rules, and the grounds of mistake and misrepresentation or other misconduct by an adverse party should be eliminated. Mistakes can be addressed on appeal and misconduct would be known prior to the Commissioner's decision and could be addressed in that context. If the provision regarding misrepresentation or misconduct is not eliminated, it should be qualified by the condition "newly discovered." (6) [Bucceri and Pincus, Counselors at Law]

RESPONSE: The department agrees that requests for reconsideration should not be used as a substitute for appeal or a means of prolonging litigation, and that substantive changes to this section are appropriate. However, the department prefers that the Controversies and Disputes chapter proceed on schedule, since no other substantive changes are being recommended. Therefore, the proposed N.J.A.C. 6A:3-1.15 is being recommended for adoption without change, other than correction of a typesetting error in the section title.

However, an amendment to the newly adopted N.J.A.C. 6A:3-1.15 is concurrently being recommended for proposal in the New Jersey Register.***

(32 *N.J.R.* 1177(a), 1178; rule proposed at 31 *N.J.R.* 4173(a))

The actual proposal of the referenced amendment is further instructive:

During the public comment period for the proposed readoption and recodification with amendment of the Controversies and Disputes rules, the Department received a comment to the effect that the proposed subsection on motions for reconsideration, N.J.A.C 6A:3-1.15(b), invited relitigation and abuse. The commenter suggested that any such motions should be required to be filed within 10 days, as in court rules, and that the grounds of mistake and misrepresentation or other misconduct by an adverse party should be eliminated, or at least delimited, since mistakes could be addressed on appeal and misrepresentation or misconduct would be known, and could be addressed, prior to the Commissioner's decision.

The Department agreed that requests for reconsideration should not be used as a substitute for appeal or as a means of prolonging litigation, and that substantive changes to the referenced section would be appropriate so as to prevent this result. However, the Department preferred that the proposed readoption and recodification with amendment of the Controversies and Disputes chapter proceed as scheduled, since no other changes of a substantive nature were being recommended. Therefore, no change was made to N.J.A.C. 6A:3-1.15 as proposed prior to adoption, and, instead, the present amendment is being proposed to the newly adopted section so as to address the issue identified during the public comment process.

The following summarizes the content of the proposed amendment, noting changes to the existing rules:

N.J.A.C. 6A:3-1.15 Motion for stay, reconsideration or clarification

The proposed amendment would align with court rules the time frame for filing requests for reconsideration, reducing the allowable filing period from 30 days to 10 days. Additionally, it would define the terms "mistake" and "misrepresentation or misconduct," so as to make it clear that disagreement with the outcome of a decision or with the analysis upon which it is based does not constitute "mistake" for purposes of applying for reconsideration, and that any purported misrepresentation or other misconduct of an adverse party must be newly ascertained and unable to have been previously known in order for it to serve as a basis for reconsideration. Finally, the provision on clarification is modified to more clearly require that the specific basis for the request be set forth in the moving papers.

Social Impact

The proposed amendment will clarify the bases on which the Commissioner will accept requests for reconsideration or clarification of decisions in contested cases, so that the nature and purpose of these processes will be more understandable to regulated parties. Such clarification will prevent reconsideration requests from being used in lieu of appeals or as a means of prolonging litigation, thus benefiting all parties to administrative proceedings.

Economic Impact

The proposed amendment will save costs both for litigants and the State, since establishing the limited nature of the reconsideration/clarification process will prevent needless filings and unwarranted extensions of the administrative hearing process.

(32 *N.J.R.* 1112(a); adopted 32 N.J.R. 2469(a))[2]

Bearing in mind the clear intent of the controlling rule that reconsideration not be substituted for appeal and thereby prolong litigation, I find that neither the grounds proffered by NJSIAA nor those proffered by Phillipsburg meet the criteria for reconsideration of my prior decision. Certainly, there is no claim of newly discovered evidence, misrepresentation, misconduct, or reversal of precedent; and with respect to the parties' respective claims of error, I find these to constitute—contrary to *N.J.A.C.* 6A:3-1.15(b)2i—disagreement with the decision's various outcomes or with the analyses upon which they are based, rather than "mistakes" in the sense contemplated by rule. Thus, in my view, the objections raised by both NJSIAA and Phillipsburg are more appropriately pursued on timely appeal to the Appellate Division.

---

[2] The actual text of the amendment read as follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

(b) Any party may make a motion for reconsideration or clarification of the Commissioner's decision within [30] **10** days of the filing of the Commissioner's decision.

1. A motion shall be filed with the Commissioner together with proof of service on each other party, shall be briefed in accordance with the directives of the Commissioner, and shall be decided by the Commissioner in accordance with applicable rules of the OAL.

2. A motion for reconsideration shall be considered based upon the following:

i. Claim(s) of mistake, **provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;**

ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;

iii. **Newly ascertained misrepresentation** or other misconduct of an adverse party, **where such misrepresentation or misconduct could not have been previously known**; or

iv. Reversal of a prior judgment on which the present matter is based.

In one respect, however, I would take this opportunity to clarify my September 26, 2005 decision. In light of NJSIAA's concerns regarding the broad-based impact of precluding SCLC members from participation in Executive Committee review of SCLC decisions, I stress that the holding of that decision was based upon the unique nature of the special "compromise" proceeding devised by the parties and the Department for NJSIAA (rather than Office of Administrative Law) hearing of this matter, and that it was not intended to reflect upon, or be extended to, NJSIAA proceedings generally; that is a different issue, neither raised nor briefed—nor appropriately decided—in the present context.[3]

Accordingly, apart from the clarification set forth above, I hereby DENY the parties' motion and cross-motion for reconsideration as based upon claims more properly argued on appeal.[4]

Sincerely,

Lucille E. Davy
Acting Commissioner

VIA FAX AND REGULAR MAIL
c: Addo Jones, State Library

[3] SCLC participation in Executive Committee deliberations has not been challenged in prior matters appealed to the Commissioner following hearing in accordance with established NJSIAA procedures.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

412-05SEC

SEC Dkt. No. T04-05
AGENCY DKT. NO.: 272-10/05

IN THE MATTER OF ANA M. BETANCES,	:	
GUTTENBERG BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Guttenberg Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and

times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that she had failed to attend the training due to her son's disabilities, but she was registered for the October 25, 2005 training session; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member had failed to attend board member training within the one year allowed and that such failure constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was advised of the sanction recommended to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted a response; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with

and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/07/05

Date of Mailing: 11/07/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T04-05**
ANA M. BETANCES,	:	
Guttenberg Board of Education	:	**DECISION FOR FAILURE**
Hudson County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Ana M. Betances was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Ana M. Betances to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Betances responded that she had failed to attend training due to her son's disabilities, but she was registered for the October 25, 2005 training session; and

WHEREAS, the Commission notified Ms. Betances that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Betances has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ana M. Betances violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

415-05

415-05SEC

SEC Dkt. No. T03-05
AGENCY DKT. NO.: 273-10/05

IN THE MATTER OF DORA JAMES,	:	
BEVERLY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Beverly Board of Education in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and

times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member did not respond to the Order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member had failed to attend board member training within the one year allowed and such failure constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted a response; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T03-05**
DORA JAMES,	:	
Beverly Board of Education	:	**DECISION FOR FAILURE**
Burlington County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Dora James was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had until May 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Dora James to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. James did not respond to the Order; and

WHEREAS, the Commission notified Ms. James that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. James has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dora James violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

417-05

417-05SEC

SEC Dkt. No. T10-05
AGENCY DKT. NO.: 268-10/05

IN THE MATTER OF STEPHEN CANDIO,	:	
SUSSEX COUNTY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, SUSSEX COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Sussex County Charter School Board of Trustees in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 22, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the above-named Board member responded that the schedule for the training sessions conflicted with his prior professional and personal commitments and he is scheduled to attend training on March 4, 2006; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session; and

Whereas, on October 17, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner;[1] and

Whereas, neither the above-named Board member nor anyone on his behalf submitted comments to the Commissioner; and

[1] The October 17, 2005 letter of the Commission explaining the opportunity to submit comments noted Mr. Candio's intention to attend training on December 3, 2005.

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if he fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if he fails to attend the January 28, 2006 session.[2]

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T10-05**
STEPHEN CANDIO,	:	
Sussex County Charter School	;	**DECISION FOR FAILURE**
Board of Trustees	:	**TO ATTEND TRAINING**
Sussex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Stephen Candio was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had to until May 2005, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 22, 2005, directing Stephen Candio to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Candio responded that the schedule for the training sessions conflicted with his prior professional and personal commitments and he is scheduled to attend training on March 4, 2006; and

WHEREAS, the Commission notified Mr. Candio that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Mr. Candio has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if he fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Stephen Candio violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if he fails to attend the October 25, 2005 training session and removal from the board if he fails to attend the January 28, 2006 session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

L419-05

OAL DKT. NO. EDU 4686-04
AGENCY DKT. NO. 106-3/04

BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FINANCE AND BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY.	:	DECISION
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/10/05

Date of Mailing: 11/10/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 4686-04
AGENCY DKT. NO. 106-3/04

BOARD OF EDUCATION OF
BERKELEY TOWNSHIP, OCEAN COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF FINANCE
AND BOARD OF EDUCATION OF THE
TOWNSHIP OF BRICK, OCEAN COUNTY
Respondent.

Kevin B. Riordan, Esq., appearing for the petitioner (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for the respondent, New Jersey State Department of Education, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Ben Montenegro, Esq., appearing for respondent, Brick Township Board of Education, (Wilbert, Montenegro & Thompson, attorneys)

Record Closed – October 18, 2005 Decided – October 20, 2005

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on June 25, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Petitioner challenged the determination by the Department of Education which found petitioner to be the district of residency for the minor child V.D.

A plenary hearing was set for December 22, 2004, at the OAL but was adjourned at the request of Mr. Riordan due to his unavailability. It was rescheduled for February 16 and 17, 2005. On February 11, 2005, the parties advised and represented that they had agreed to a settlement and Mr. Montenegro would draft a settlement incorporating all of the relevant terms. Subsequently, Berkeley challenged/questioned the impact of State aid for the years that Berkeley had paid for V.D.'s tuition. A computation of those fees was eventually resolved to the parties' satisfaction after a peremptory hearing was scheduled for October 17, 2005.

On that date, Deputy Attorney General Labin advised that she was in receipt of the fully executed agreement, which would be delivered to the OAL by October 18, 2005. The hearing was adjourned based upon her representation. Upon receipt of the executed agreement on October 18, 2005. The hearing record closed.

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 record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 20, 2005
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

12-25-05
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ, P.C.
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Brick Township School District

RECEIVED
2005 OCT 18 P 4:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BERKELEY TOWNSHIP BOARD OF EDUCATION, Plaintiff, vs. **NEW JERSEY DEPARTMENT OF EDUCATION and BRICK TOWNSHIP BOARD OF EDUCATION,** Defendants.	**BEFORE THE COMMISSIONER OF EDUCATION** Agency Docket No. 106-3/04 OAL Docket No. 04686-2004S **STIPULATION OF DISMISSAL/ SETTLEMENT AGREEMENT**

THIS AGREEMENT made on this 17TH day of October 2005, by and between:

BERKELEY TOWNSHIP BOARD OF EDUCATION, a body politic duly organized under the law of the State of New Jersey, with offices located at 53 Central Parkway, Bayville, New Jersey 08721 (hereinafter "Berkeley")

AND

NEW JERSEY DEPARTMENT OF EDUCATION, an Agency of the State of New Jersey, with offices located at Riverview Executive Plaza, Building 100, Route 29, P.O. Box 500, Trenton, New Jersey 08625 (hereinafter "NJDOE")

AND

BRICK TOWNSHIP BOARD OF EDUCATION, a body politic duly organized under the law of the State of New Jersey, with offices located at 101 Hendrickson Avenue, Brick, New Jersey 08724 (hereinafter "Brick")

WHEREAS, Berkeley filed a Petition of Appeal pending under Office of Administrative Law, Docket No. 04686-2004S, appealing the NJDOE's rulings as to the domicile of Z.D. and responsibility for the educational costs of her minor child, V.D.;

WHEREAS, without making any admissions of liability or other concessions, and for the purpose of avoiding the expense and distraction of further litigation, Berkeley, NJDOE and Brick desire to resolve their differences amicably and to settle and dispose of the pending litigation.

NOW, THEREFORE, Berkeley, NJDOE and Brick, intending to be legally bound, and in consideration of these promises, hereby agree as follows:

1. Berkeley shall be the District responsible for the education of V.D. from December 2001 through the present. Berkeley shall reimburse Brick the total sum of $46,376.00, payable on or before October 30, 2005. The $46,376.00 represents the tuition paid by Brick on behalf of V.D. during the 2001-2002 school year and 2002-2003 school year, less State aid (core curriculum aid and tier two special education funding) received by Brick for having declared V.D. for the 2001-2002 and 2002-2003 school years. The parties recognize that $23,188.00 of the $46,376.00 has been paid. The remaining $23,188.00 shall be made payable to the Trust Account of Montenegro, Thompson, Montenegro & Genz, P.C., provided to the attention of Board Attorney, Nicholas C. Montenegro, Esq., P.O. Box 1049, Brick, NJ 08724.

2. This Settlement Agreement/Stipulation of Dismissal has been negotiated by the parties through counsel of their choice and is voluntarily accepted by the parties.

3. This Settlement Agreement/Stipulation of Dismissal contains the entire agreement between the parties relating to the District of residency and obligation to education V.D. in accord with the Law of the State of New Jersey. There are no other understandings or agreements, verbal or otherwise, in relation thereto,

between the parties except those herein expressly set forth.

4. This Agreement may be executed in one or more counterparts; provided, however, that all properly executed counterparts shall constitute a single valid and enforceable Agreement.

5. This Settlement Agreement/Stipulation of Dismissal shall be construed and interpreted in accordance with the laws of the State of New Jersey.

Berkeley Township Board of Education

Attest: _____
Laura Venter, BA/Bd. Sec.

By: _____
Anthony DePaola, President

Dated: 10/14/05

State of New Jersey
Department of Law and Public Safety
Attorney for New Jersey Department of Education

Dated: 10/17/05

By _____
CAROLYN GRACE LABIN, DAG

Montenegro, Thompson, Montenegro & Genz, P.C.
Attorneys for Brick Township School District

Dated: _____

By _____
BEN A. MONTENEGRO, ESQ.

4. This Agreement may be executed in one or more counterparts; provided, however, that all properly executed counterparts shall constitute a single valid and enforceable Agreement.

5. This Settlement Agreement/Stipulation of Dismissal shall be construed and interpreted in accordance with the laws of the State of New Jersey.

Berry, Sahradnik, Kotzas, Riordan & Benson
Attorney for Berkeley Township Board of Education

Dated: _____ By_____
KEVIN B. RIORDAN, ESQ.

State of New Jersey Department of Law and Public Safety
Attorney for New Jersey Department of Education

Dated: _____ By_____
CAROLYN GRACE LABIN, DAG

Montenegro, Thompson, Montenegro & Genz, P.C.
Attorneys for Brick Township School District

Dated: 10/14/05 By_____
BEN A. MONTENEGRO, ESQ.

IN THE MATTER OF RUDOLPH MCCULLERS, :

BOARD OF TRUSTEES OF GATEWAY : COMMISSIONER OF EDUCATION

CHARTER SCHOOL, HUDSON COUNTY : DECISION

:

SYNOPSIS

The School Ethics Commission determined that Rudolph McCullers, former president of the Gateway Charter School Board of Trustees, violated the School Ethics Act, *N.J.S.A.* 18A:12-24(d), when he violated several provisions of the school laws and other statutes; took action on several occasions without Board approval; and committed other unauthorized acts. The Commission found probable cause that respondent, *inter alia,* failed to provide adequate notice of a closed executive meeting of the Board; signed certain checks without board authorization; knowingly hired an uncertified business administrator; violated public school bidding laws; and failed to carry out various duties as board president, resulting in the school being placed on probation.

After considering the nature of the charges, the Commission recommended a penalty of censure since Mr. McCullers is no longer a member of the Board and censure is the highest penalty that may be imposed on a former board member. Because of the extensive violations of the School Ethics Act, the Commission indicated that they would have recommended a sanction of removal if Mr. McCullers was still on the Board.

Upon review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29 (c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Rudolph McCullers 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.

November 9, 2005

416-05 SEC

SEC Dkt. Nos. C06-05 & C12-05
Agency Dkt. No. 264-9/05

IN THE MATTER OF RUDOLPH MCCULLERS,	:	
BOARD OF TRUSTEES OF GATEWAY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY	:	DECISION
	:	

The record in this matter and the decision of the School Ethics Commission (Commission) have been reviewed. Respondent filed no written comments to the Commission's decision. Upon full consideration, the Commissioner is constrained to adopt the recommendation of the Commission that respondent be censured.

Two complaints were consolidated in this matter. An answer to one of them was submitted, but it did not comply with the requirement set forth in *N.J.S.A.* 18A:12-29(b) that answers be given under oath. No answer to the other complaint was presented. Thus, the Commission considered the complaints as unrebutted. Further, because respondent did not file perfected answers, he could not attend the hearings on the two complaints.

The multiple paragraphs in the two complaints alleged that during his tenure as president of the Gateway Charter School Board of Trustees, respondent had: violated several provisions of the school laws and other statutes; taken action on several occasions without Board approval; and committed other *ultra vires* acts. Among the identified violations were the unilateral dismissal, without proper notice, of the complainant as Secretary to the Board, and the hiring of an unqualified replacement; interference in the administration of the school; unauthorized signing of checks, including several to himself; unilateral hiring of contractors; failure to timely file certain financial documents and certifications on behalf of the school.

At a May 24, 2005 hearing the Commission determined that the material facts were not in dispute, and found probable cause to credit the allegations that respondent had violated *N.J.S.A.* 18A:12-24 (b) and (c), and *N.J.S.A.* 18A:12-24.1 (a) through (f). It notified respondent that it would decide the matter on the papers, and invited the respondent to provide a written submission by August 29, 2005, as to why the Commission should not find him in violation of the above referenced statutes, and should not impose a sanction. No written submission was received from respondent.

At a public meeting on September 27, 2005, the Commission found that respondent violated the above-referenced statutes. It recommended that the Commissioner impose the penalty of censure, since respondent was at that point no longer on the Board of Trustees, and since censure is the highest penalty that may be imposed upon a former Board member. The Commission also noted that "[b]ecause of the extensive violations of the Act, the Commission would have recommended a sanction of removal if Mr. McCullers was [sic] still on the Board." The Commission's decision was duly adopted by a formal resolution and forwarded to the Commissioner for action on the sanction only, pursuant to *N.J.S.A.* 18A:12-29.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

The Commissioner accepts the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons set forth in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. The Commissioner accordingly imposes the penalty of censure.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

* The Commissioner's decision, limited to the imposition of a penalty only, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
RUDOLPH McCULLERS	:	**Docket No. C06-05 & C12-05**
GATEWAY CHARTER SCHOOL	:	
BOARD OF TRUSTEES	:	
HUDSON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from two complaints filed by Gregory John Monte, an employee of the Gateway Charter School Board of Trustees (Board), against Rudolph V. McCullers, Jr., President of the Board. The first complaint, C06-05, was filed on March 23, 2005, and alleged that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act when he engaged in the conduct noted below. The second complaint, C12-05, was filed on April 8, 2005, and alleged that Mr. McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (c) and (e) of the Code of Ethics for School Board Members when he engaged in the conduct noted below. Following are the complainant's allegations:

(1) As President of the Board, Mr. McCullers participated in a closed executive meeting of the Gateway Charter School Board of Trustees (Board), held on March 17, 2005, without public notice in violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq.;

(2) Mr. McCullers sent an e-mail on March 17, 2005 at 3:13 p.m., which effectively dismissed the complainant from the position of secretary to the Board without Board approval and without a showing of neglect, misbehavior or other offense;

(3) During the weekend of February 19-21, 2005, Mr. McCullers or his agent, without cause, removed items from the complainant's desk and rearranged his furniture;

(4) Mr. McCullers went directly to the complainant regarding a scheduling mix-up that occurred at the school;

(5) On February 25, 2005, Mr. McCullers entered a classroom, intervened in a dispute between two students and told one student with an IEP that he would not be suspended for his actions. He then went on to lecture teachers about student discipline. After that he entered several other classrooms and the cafeteria and lectured students about their bad behavior;

(6) Mr. McCullers signed several checks without Board authorization, which included several checks made out to him;

(7) As Board President, Mr. McCullers continued the employment of a Business Administrator that was not properly hired by Board approval, who did not hold proper certification as required by N.J.A.C. 6A:11-5.1(b)2, and who also served as Treasurer in violation of N.J.S.A. 18A:17-31;

(8) Mr. McCullers hired Professional Maintenance and Carpeting and Frank Ruiz without soliciting bids, and in early February 2005, he hired Unique Maintenance to strip and re-finish the floors in the school without Board approval, prior to a visit by representatives of the bank at which he is employed as Vice President;

(9) As Board President, Mr. McCullers failed to assure the timely filing of the following items:

1. The corrective audit plan for the 2002-2003 audit;
2. The Fiscal Section of the annual report for fiscal year 2003-2004;
3. The 2003-2004 independent audit;
4. The Board resolution approving the fiscal year 2004-2005 budget; and
5. The signed facility lease;

Furthermore, Mr. McCullers failed to provide certifications required by N.J.A.C. 6A:23-2.11(c)3 and 4 at Board meetings from September 2004 until March 2005. Mr. McCullers also failed to assure that all school expenditures were fully itemized, verified, and certified in writing and presented to the full Board for approval. Finally, Mr. McCullers failed to make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:17-36, N.J.S.A. 18A:19-1 et seq. and N.J.A.C. 6A:23-2.2; and

(10) Mr. McCullers instructed the Board secretary to draw up a spread sheet to keep track of bank employees who were at the school and, when it was misplaced, he instructed the complainant to get another and to make sure all of the instructors signed in.

After receipt of the complaints, the Commission forwarded both complaints to Mr. McCullers and notified him that, pursuant to N.J.A.C. 6A:28-6.5(a), he had 20 days to submit an answer under oath to the Commission. Mr. McCullers failed to answer either complaint within the 20-day time limit. The Commission then notified Mr. McCullers that, pursuant to N.J.A.C. 6A:28-6.5(d), if he did not provide an answer within 10 days of receipt of the notice, each allegation in both of the complaints would be deemed admitted and he would not be permitted to address the Commission. The Commission received a timely answer to C12-05 on May 20, 2005 that was mistakenly labeled as an answer to C06-05. However, the answer was not sworn under oath as required by N.J.S.A. 18A:12-29(b). Therefore, the Commission did not accept the answer and it was not considered when the Commission made its determination regarding these matters. The Commission did not receive an answer to the allegations in C06-05.

The Commission invited the complainant to attend its May 24, 2005 meeting to present witnesses and testimony, but did not require that he be present. The complainant attended the hearing with a witness. However, since the Commission did not have any questions for either him or the witness, they did not appear before the Commission. Since Mr. McCullers did not provide an answer to C06-05, he could not attend the hearing on C06-05. He was invited to the meeting to testify on C12-05, but then he submitted an uncertified answer, which the Commission could not accept pursuant to N.J.S.A. 18A:12-29(b). Therefore, he could not attend the hearing on C12-05. At its May 24, 2005 meeting, the Commission voted to consolidate C06-05 and C12-05 and voted to find probable cause to credit the allegations that Mr. McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised Mr. McCullers that it would decide the matter on the basis of written submissions. Mr. McCullers was invited to provide a written submission to the Commission by August 29, 2005, and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members. Mr. McCullers was also told that his written submission should include his position on an appropriate sanction should the Commission determine that the Act was violated. Mr. McCullers did not provide a written submission in response to the Commission's probable cause determination.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to these complaints, Mr. McCullers was President of the Board and employed at North Fork Bank as Vice President. Mr. McCullers resigned from the Board in June 2005. At all times relevant to the complaints, the complainant was employed by the Board as Vice Principal and, at certain times, employed by the Board as Board Secretary.

(1) March 17, 2005 Closed Executive Meeting

On March 14, 2005, Mr. McCullers sent an e-mail to all Board members asking them to review attachments to the e-mail for the executive Board meeting. The closed executive meeting of the Board was held on March 17, 2005. The public was not provided with any type of notice of the meeting.

(2) Complainant's Position as Board Secretary

On March 17, 2005, at 3:13 p.m., prior to the closed executive meeting of the Board held at 7:00 p.m. that same evening, Mr. McCullers sent an e-mail to the Board and the complainant with an enclosed letter to the complainant wherein Mr. McCullers

indicated that he was, "thanking him for his services and resigning him from holding the position of Board Secretary." His e-mail also indicated that it is the duty and responsibility of a Board member to be secretary to the Board and that he was assigning the responsibility to the business administrator. During the March 21, 2005 Board meeting, a Board member raised an objection to the procedure that was followed in the dismissal of the complainant. That Board member noted that the dismissal should have been brought before the Board for a vote and that he believed that Mr. McCullers did not follow the proper procedure.

(3) Mr. Monte's Office

During the weekend of February 19-21, 2005, Mr. McCullers and/or his agent entered the complainant's office and removed items from his desk. The furniture in the office was also completely rearranged during that time. The complainant discovered the changes on Tuesday, February 22, 2005 when he returned to work after President's Day weekend.

(4) Scheduling Problems

During February 2005, instructors from North Fork Bank were scheduled to present financial lessons to the 7th grade students. During the presentations, a scheduling mix up occurred. The chief administrative officer e-mailed an explanation to Mr. McCullers in the early morning on February 28, 2005, which provided details as to why the mix up occurred and provided a solution that she would undertake prior to the final visit of the North Fork Bank instructors. Shortly thereafter, Mr. McCullers contacted the complainant directly and asked him to explain the scheduling mix up that had occurred at the school the previous week. After the conversation with Mr. McCullers, the complainant felt compelled to also provide Mr. McCullers with a written explanation. The chief administrative officer was unaware that Mr. McCullers had contacted the complainant directly.

(5) Attendance at School on February 25, 2005

On February 25, 2005, Mr. McCullers entered the school building to deliver a letter to the chief administrative officer. At that time there was a loud argument going on in a classroom between two students. In the presence of the teacher, Mr. McCullers entered the classroom and intervened in the altercation. He spoke to the students about their behavior and then took one of the students into another room. This student had an Individualized Education Plan (IEP) that included specific requirements for behavior modification. Mr. McCullers asked the student to promise that he would not behave in that manner again and then told the student that he would not be suspended for his actions.

Shortly thereafter, Mr. McCullers went to the main office and spoke to several teachers regarding the lack of student discipline at the school. He noted that more students should be suspended and that if it was not done that he would handle it himself.

He also stated that a particular 7th grade student was probably autistic and needed an autism teacher to help out in the classroom. Mr. McCullers then went into several homerooms to lecture students on their behavior. After that, he went into the cafeteria and gave a speech to the students about their bad behavior.

(6) Check Signing

Mr. McCullers signed several checks that were not authorized by the Board, which included several made out to him, as follows:

1. At the January 10, 2005 Board meeting, the Board authorized 23 checks, but, sometime thereafter, Mr. McCullers signed 32 checks, thus, 9 checks were not approved by the Board;
2. Mr. McCullers signed check numbers 3020-3023, 3025 and 7128-7165, which were not approved by the Board;
3. Mr. McCullers signed check numbers 7208-7242 including a check made out to Mr. McCullers, which were not approved by the Board; and
4. Mr. McCullers signed check numbers 7089 and 7229, which were made out to Mr. McCullers, and were not approved by the Board.

(7) School Business Administrator

Mr. McCullers hired Ali Bangura as school business administrator. At the October 18, 2004 Board meeting, Mr. McCullers admitted that Mr. Bangura was not properly hired and stated that a Board member had said that "we should take on this guy before we lose him and we should be paying him." Mr. McCullers then stated that the Board should vote on whether Mr. Bangura should continue to work. Mr. Bangura does not have proper certification as required by N.J.A.C. 6A:11-5.1(b)2. Mr. Bangura, the school business administrator, also served as Treasurer.

(8) Vendors

Mr. McCullers hired Professional Maintenance and Carpeting, and Frank Ruiz, a maintenance professional, without soliciting bids as required by N.J.S.A. 18A:18A-3(a). Professional Maintenance and Carpeting, which is a firm that is owned by another Board member, was paid $3,500, and Mr. Ruiz was paid $12,190. Sometime in early February 2005, Mr. McCullers also hired Unique Maintenance, without Board approval, to strip and re-finish the floors in the school in preparation for the visit to the school of representatives of the bank where Mr. McCullers is employed as Vice President.

(9) Board Member Duties

The following items were not submitted by the due dates as required by statute and regulation:

1. The corrective audit plan for the 2002-2003 audit, which was due by June 30, 2004 as required by N.J.S.A. 18A:23-3, 23-4 and N.J.A.C. 6A:23-2.11;
2. The Fiscal Section of the annual report for fiscal year 2003-2004, which was due by August 1, 2004 as required by N.J.S.A. 18A:36(a)-16(b) and N.J.A.C. 6A:11-2.2;
3. The 2003-2004 independent audit, which was due by November 5, 2004 as required by N.J.S.A. 18A:23 et seq. and N.J.A.C. 6A:231-2.2(i)
4. The Board resolution approving the fiscal year 2004-2005 budget, which was due by March 30, 2004 as required by N.J.A.C. 6A:11-7.1(e); and
5. The signed facility lease, which was due on June 30, 2004.

In his role as Board President, Mr. McCullers failed to provide certifications required by N.J.A.C. 6A:23-2.11(c)3 and 4 at Board meetings from September 2004 until March 2005. He also did not make sure that all school expenditures were fully itemized, verified, and certified in writing and presented to the full Board for approval. Mr. McCullers also did not make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:17-36, N.J.S.A. 18A:19-1 et seq. and N.J.A.C. 6A:23-2.2.

On September 15, 2004, the Board was notified through correspondence from the Director of the Office of School Funding in the Department of Education (DOE) that it had to submit a corrective action plan to address the above, as well as other issues, where the school was found to be non-compliant with statute and regulations. That correspondence was followed by correspondence on January 7, 2005 notifying the Board that it still had not submitted the corrective action plan and that failure to comply would result in sanctions. Through correspondence dated February 24, 2005, the Board was again notified that failure to submit a corrective action plan would result in sanctions. Finally, in correspondence dated April 15, 2005, the Commissioner placed the school on probationary status as a result of the on-going fiscal problems raised in the previous correspondence and the March 30, 2005 on-site review of the school's fiscal-related activities and academic performance.

(10) Spreadsheet

On February 10 and 11, 2005, Mr. McCullers instructed the school secretary in the main office to draw up a spreadsheet to be used to keep track of North Fork Bank employees who were at the school on those days to provide financial instructions to the 7th grade students. When the spreadsheet was misplaced on February 10, 2005, Mr. McCullers instructed Mr. Monte to get another spreadsheet and told Mr. Monte that it would be his responsibility to make sure that all of the instructors signed in.

ANALYSIS

(1) March 17, 2005 Closed Executive Meeting

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he planned and participated in a closed executive meeting of the Board on March 17, 2005 without providing adequate notice. N.J.S.A. 18A:12-24.1(a) provides:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

The OPMA at N.J.S.A. 10:4-9 requires all public bodies to provide adequate notice of meetings that are held by the public bodies. The Board falls within the definition of "public body" at N.J.S.A. 10:4-8, which, in part, defines the term as meaning "a commission, authority, board... organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function..." Furthermore, N.J.S.A. 18A:36A-6 requires the board of trustees of a charter school to comply with the provisions of the OPMA. "Adequate notice" is also defined, in part, at N.J.S.A. 10:4-8 to mean, "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting..." The closed executive meeting of the Board that was held on March 17, 2005, was held without the provision of a 48 hour written advance notice giving the time, date, and location in violation of OPMA. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he failed to uphold and enforce all laws pertaining to the schools.

(2) The Complainant's Position as Board Secretary

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he sent an e-mail to all Board members, with a copy to the complainant, on March 17, 2005 just a few hours before the closed executive meeting of the Board, which effectively dismissed the complainant from his position as Board secretary.

As a preliminary matter, the Commission notes that although Mr. McCullers indicated that he was "resigning [the complainant] from his position," he was effectively dismissing the complainant from his position. "Resignation" is defined in the Black's Law Dictionary (Fifth Edition) as a formal renouncement or relinquishment of an office which must be accompanied by an act of relinquishment. At no time did the complainant take any action to relinquish or renounce his position as Board secretary. There was no resignation before Mr. McCullers or the Board to accept. It was Mr. McCullers who initiated the dismissal of the complainant from the position of Board secretary.

N.J.S.A. 18A:17-1 provides, in part, that, "no secretary...of a board of education of any school district shall, during the term for which he was appointed, be dismissed or

reduced in compensation, except for neglect, misbehavior or other offense unless it is otherwise provided in his contract of employment." When Mr. McCullers dismissed the complainant, it appears that he did not uphold the requirements of N.J.S.A. 18A:17-1 since he did not present any evidence that the complainant should be dismissed because of neglect, misbehavior or other offense. Moreover, in the e-mail and its attachment, rather than allege that the complainant should be dismissed because of neglect, misbehavior or other offense, Mr. McCullers thanked the complainant for his services. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he failed to uphold and enforce all laws pertaining to the schools.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) when he failed to recognize that authority rests with the board of education and acted on the dismissal alone and did not bring the matter before the entire Board. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In the e-mail and its attachment, Mr. McCullers thanked the complainant for his services, dismissed the complainant from the position of Secretary to the Board and assigned the responsibilities to the business administrator. The Commission notes that Mr. McCullers took it upon himself to dismiss Mr. Monte just hours before a closed executive meeting of the Board. This was not a decision of the Board, rather it was a decision made by Mr. McCullers alone. Furthermore, Mr. McCullers not only dismissed the complainant, but then went on to decide who would replace him. These are all decisions that properly reside with the entire Board. The Commission also notes that when Mr. McCullers made these decisions it was a private action, since no one Board member can decide to dismiss anyone. The private action could have compromised the Board since the complainant was not provided with a Rice[1] notice prior to the closed executive meeting. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) when he failed to recognize that authority rests with the Board and took private action that could have compromised the Board.

(4) Scheduling Problems

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d) when, on February 28, 2005, he directly contacted the complainant by phone and asked him to explain a scheduling mix up that had occurred when instructors from North Fork Bank were presenting a financial lesson to 7th grade students.

[1] "Rice" refers to the case *Rice v. Union City. Reg. H. Sch. Dist. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977) *certif. den.* 76 *N.J.* 238 (1978), which established the right of employees to have notice when they will be discussed by the Board of Education.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

Mr. McCullers took it upon himself to determine why scheduling problems had occurred at the school. First he went to the chief administrative officer and then he went to the complainant to find a solution to the scheduling problems. In doing so, Mr. McCullers failed to confine his action to policy making and planning. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

When the scheduling problems occurred, Mr. McCullers received an e-mail from the chief administrative officer, which provided an explanation as to why the scheduling problem occurred. The e-mail included an administrative solution that the chief administrative officer would undertake to ensure that the scheduling problems would not happen again. Shortly after he received the e-mail, Mr. McCullers phoned the complainant asking for an explanation as to why the scheduling mix up had occurred. Mr. McCullers did not call the chief administrative officer, but took it upon himself to call the complainant without the knowledge of the chief administrative officer. Mr. McCullers became involved in the administration of the schools when he contacted the complainant after he had been given a solution from the chief administrative officer. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(d).

(5) Attendance at School on February 25, 2005

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he intervened in a dispute between two students when he was at the school on February 25, 2005. N.J.S.A. 18A:12-24.1(b) provides:

> I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race creed, sex, or social standing.

On February 25, 2005, when Mr. McCullers was at the school, he overheard a dispute between two students and went into the classroom. He intervened in the dispute and spoke with the two students about their behavior. He then took one student aside, who had an IEP that included specific requirements for behavior modification. Without

knowledge of those specific requirements, Mr. McCullers asked the student to promise that he would not engage in that type of behavior again and told him that he would not be suspended for his actions. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he intervened in the behavior modification of a student with an IEP without knowledge of the IEP requirements, thus, failing to maintain a public school that meets the individual needs of all children regardless of their ability.

The Commission also found probable cause that, on February 25, 2005, Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d), which are set forth above. After he intervened in the dispute with the two students, he then went into the main office and lectured teachers about student discipline, and told the teachers that if there were not more student suspensions, he would handle discipline himself. He further gave the teachers his opinion that a specific student was probably autistic and would need an autism teacher to help out in the classroom. He then proceeded to other classrooms and the cafeteria and lectured the students on their bad behavior. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d) when he failed to confine his board action to policy making, planning and appraisal and instead took it upon himself to administer the schools by undertaking conduct that is more the province of a chief administrative officer.

(6) Check Signing

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (e), which are set forth above, when he signed certain checks without Board authorization, including several made out to himself. Pursuant to N.J.S.A. 18A:19-1(d), prior to expenditure of Board funds, the Board must approve the expenditure by resolution. McCullers signed checks that had not been approved at the January 10, 2005 Board meeting. Mr. McCullers also signed other checks which were not approved by the Board and were drawn on an account separate from the standard account. Mr. McCullers also signed checks without Board authorization made out to him. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (e), when he failed to present certain checks to the Board in violation of N.J.S.A. 18A:19-1 et seq., and when he failed to recognize that the authority to expend school funds lies with the entire Board.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24(b), which provides,

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

Mr. McCullers signed checks made out to himself without Board approval. He signed the checks as part of his duties as Board President. In doing so, Mr. McCullers used his official position as Board President to secure the unwarranted privilege or

advantage of obtaining funds from the Board without Board approval. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24(b).

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24(c) when he signed checks made out to himself without Board authorization. N.J.S.A. 18A:12-24(c) provides,

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Mr. McCullers had a direct financial involvement in the checks that were made out to him. The public could reasonably perceive that his objectivity and independence of judgment would be impaired in that matter. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24(c) when he acted in his official capacity as Board President, without Board approval, in a matter where he had a direct financial involvement that might reasonably be expected to impair his objectivity or independence of judgment.

(7) School Business Administrator

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), which is set forth above, when he knowingly hired an uncertified business administrator without Board approval and also had him serve as Board Secretary and Treasurer in violation of N.J.S.A. 18A:17-31. The Board minutes for the October 18, 2004 Board meeting reflect that the Board discussed the hiring of the school business administrator and, during the discussion, it became apparent that the school business administrator was never properly hired by the full Board, but that Mr. McCullers had hired him. The Board minutes also reflect that the school business administrator was not certified. The school business administrator also served as Treasurer for the school in violation of N.J.S.A. 18A:17-31, which provides that the Treasurer cannot be a member or employee of the Board. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), when he failed to uphold and enforce all laws and rules and regulations of the State Board of Education and hired a school business administrator without Board approval and who was not certified.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he hired an uncertified school business administrator without Board approval. The Board had received a request from the Director of the Office for School Funding in the DOE, for a corrective action plan in regards to the fact that the Board hired an uncertified business administrator in violation of N.J.A.C. 6A:11-5.1.

There were two follow up letters that told the Board that they risked sanctions if they failed to provide a corrective action plan to rectify the problem. As a result of the failure to submit a corrective action plan, the school was placed on probationary status. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b), when he jeopardized the educational welfare of the children of the school by failing to ensure that the school business administrator was certified.

(8) Vendors

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), which is set forth above, when he hired Professional Maintenance and Carpeting, which is owned by another Board member, without soliciting bids as required by N.J.S.A. 18A:18A-1 et seq. The Commission notes that Professional Maintenance and Carpeting was paid a total of $3,500 and N.J.S.A. 18A:18A-3(a) allows a purchasing agent authorized by a Board resolution to award a contract without soliciting bids if the contract sum does not exceed $17,500. Therefore, the purchasing agent did not have to solicit bids to hire Professional Maintenance and Carpeting. However, the Commission notes that there is no evidence that Mr. McCullers was authorized by a Board resolution to be a purchasing agent. Furthermore, there is no evidence to show that the Board hired Professional Maintenance and Carpeting. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Professional Maintenance and Carpeting.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Frank Ruiz as a maintenance professional at the school without soliciting bids as required by N.J.S.A. 18A:18A-1 et seq. The Commission notes that Mr. Ruiz was paid a total of $12,190, and N.J.S.A. 18A:18A-3(a) allows a purchasing agent authorized by a Board resolution to award a contract without soliciting bids if the contract sum does not exceed $17,500. Therefore, the purchasing agent did not have to solicit bids to hire Mr. Ruiz. However, again the Commission notes that there is no evidence that Mr. McCullers was authorized by a Board resolution to be a purchasing agent. Furthermore, there is no evidence that the Board hired Mr. Ruiz. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Frank Ruiz.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) and (f), which are set forth above, when, sometime in early February 2005, he hired Unique Maintenance without Board approval to strip and re-finish the floors in preparation for a visit to the school of representatives of North Fork Bank where Mr. McCullers is Vice-President. There was no Board resolution to hire Unique Maintenance for such work. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) because he failed to recognize that authority rests with the Board when he hired Unique Maintenance without Board approval. The Commission also finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(f) when he used the schools for personal gain by hiring Unique Maintenance to strip and re-finish the floors right before the visit to the school by representatives of North Fork Bank, thus giving the perception that he was

trying to impress the representatives who were from the bank in which he is employed as Vice President.

(9) Board Member Duties

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (b), which are set forth above, when he failed to submit numerous documents to the DOE by the required timeline, failed to provide certifications for several Board meetings, failed to make sure that all school expenditures were fully itemized, verified, and certified in writing and presented to the Board for approval, and failed to make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:36A-16, N.J.S.A. 18A:17-36, N.J.S.A. 18A:19 et seq. and N.J.A.C. 6A:23-2.2 as indicated in several communications from the DOE. Those communications warned the Board that it needed to address these violations or it would face sanctions. However, the Board did not respond to these many communications. This resulted in the school being placed on probation by the Commissioner. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), because he did not uphold and enforce all laws and rules and regulations of the State Board of Education. The Commission also finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b), when he failed to correct many problems identified by the DOE's communications resulting in the school being placed on probation, thus jeopardizing the educational welfare of the children of the school.

(10) Spreadsheet

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c), which is set forth above, when he instructed the school secretary to draw up a spread sheet to be used to keep track of North Fork Bank employees who were at the school to provide financial instruction. When the spreadsheet was misplaced, Mr. McCullers instructed the complainant to get another and then told the complainant that it was his responsibility to make sure that all of the instructors signed in. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) because he went directly to school employees and instructed them on their duties, thus administering the schools.

DECISION

For the reasons discussed above, the Commission finds that Rudolph McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of censure since Mr. McCullers is no longer a member of the Board and censure is the highest penalty that may be imposed on a former Board member. Because of the extensive violations of the Act, the Commission would have recommended a sanction of removal if Mr. McCullers was still on the Board.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. McCullers may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C06-05 & C12-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of September 27, 2005, the Commission found that Rudolph McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of September 27, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson 9/13

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 27, 2005.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C06 & 12-05

OAL DKT. NO EDU 2995-05
AGENCY DKT. NO. 102-5/05

IN THE MATTER OF THE TENURE	:	
HEARING OF CORDELIA McKNIGHT	:	
JOHNSON, SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF SAYREVILLE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/10/05

Date of Mailing: 11/10/0

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2995-05

AGENCY DKT. NO. 102-5/05

IN THE MATTER OF THE TENURE HEARING OF CORDELIA McKNIGHT JOHNSON, SCHOOL DISTRICT OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY

Viola S. Lordi, Esq., for petitioner (Wilentz, Goldman & Spitzer, P.A., attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: October 19, 2005 Decided: October 21, 2005

BEFORE **STEPHANIE M. WAUTERS**, 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, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 21, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

10-25-05
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for the Borough of Sayreville
Board of Education

2005 OCT 19 P 12:01
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF CORDELIA MCKNIGHT-JOHNSON, BOROUGH OF SAYREVILLE BOARD OF EDUCATION

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

AGENCY DOCKET NO.: 102-5/05

OAL DOCKET NO.: EDUTH 02995-2005S

STIPULATION OF SETTLEMENT

The Borough of Sayreville Board of Education (sometimes "Board"), with offices at 150 Lincoln Street, Sayreville, New Jersey 08872, and Cordelia McKnight-Johnson, residing at 336 High Street, Perth Amboy, NJ 08861, hereby set forth their full and complete agreement, as follows:

WITNESSETH:

WHEREAS, Ms. McKnight-Johnson is employed as a school counselor for the Board; and

WHEREAS, on April 12, 2005, pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6A:3-5.1 et seq., Dr. Frank R. Alfano, Superintendent of the Borough of Sayreville School District, filed with the Board Secretary a Statement of Tenure Charges and Statement of Evidence Under Oath with supporting documents against Ms. McKnight-Johnson, a tenured school counselor at

the Emma L. Arleth Elementary School and the Harry S. Truman Elementary School, alleging incapacity, unbecoming conduct and other just cause due to excessive absenteeism; and

WHEREAS, on April 26, 2005, the Board resolved by majority vote of the whole number of members of the Board as follows: (1) there was probable cause to credit the evidence in support of the Charges; (2) the Charges were sufficient to warrant the dismissal or reduction of salary of Ms. McKnight-Johnson; and (3) the Board Secretary was directed to forthwith notify Ms. McKnight-Johnson of the adoption of the Board's resolution and to forward the Charges to the Commissioner of the Department of Education for a hearing pursuant to N.J.S.A. 18A:6-16, together with a Certificate of Determination, all as is required by N.J.S.A. 18A:6-11; and

WHEREAS, on or about May 13, 2005, Ms. McKnight-Johnson filed an Answer to the Charges before the Commissioner of Education; and

WHEREAS, on May 13, 2005, the Commissioner determined that the Charges, if true, were sufficient to warrant dismissal or a reduction in salary, and transferred the charges against Ms. McKnight-Johnson to the Office of Administrative Law for a hearing; and

WHEREAS, Ms. McKnight-Johnson has been out on an unpaid leave of absence for the 2004-2005 school year; and

WHEREAS, in order to avoid the costs and burdens of a tenure dismissal hearing, the Board and Ms. McKnight-Johnson desire to settle fully and finally all outstanding issues regarding the aforesaid employment relationship and any and all differences between them, including any and all claims which could have been asserted, whether they are presently known or unknown, including any future claim for attorneys' fees or costs; and

WHEREAS, the parties agree that execution of this Stipulation of Settlement ("Stipulation") will constitute a complete and final disposition of any potential claim Ms. McKnight-Johnson could have brought against the Board; and

WHEREAS, Ms. McKnight-Johnson 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.

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. Settlement Payment. (a) Ms. McKnight-Johnson hereby resigns her employment with the Board effective on ~~January~~ March 1, 2006. Ms. McKnight-Johnson hereby surrenders any tenure rights that she has with the Board upon execution of this Stipulation. Simultaneously with her execution of this Stipulation, Ms. McKnight-Johnson will submit an irrevocable letter of resignation, in the form attached hereto as Exhibit A, for purposes of retirement, effective ~~January~~ March 1, 2006. The parties' written agreement will not now, nor at any time in the future, be considered by either party to be an unlawful discharge of Ms. McKnight-Johnson or in any way constitute discrimination against Ms. McKnight-Johnson under N.J.S.A. 10:5-1, et seq. Approval of Ms. McKnight-Johnson's resignation by the Board will occur as part of the approval of this entire settlement. It is agreed and understood by all parties that this Stipulation is contingent upon approval of the Board.

(b) Ms. McKnight-Johnson will be suspended with pay through ~~December 31,~~ February 28, 2006. Ms. McKnight-Johnson will receive her current salary less the standard payroll deductions taken for Ms. McKnight-Johnson as an employee of the Board (e.g. taxes, security, pension, etc.) through ~~December 31~~ February 28, 2006, provided Viola S. Lordi, Esq. of Wilentz, Goldman & Spitzer P.A. has received from Michael T. Barrett, Esq., counsel for Ms. McKnight-Johnson (1) an executed original of this Stipulation; (2) a signed copy of the non-revocation letter attached hereto as Exhibit B; and (3) Ms. McKnight-Johnson's signed letter of resignation.

(c) The health insurance benefits to which Ms. McKnight-Johnson is currently entitled as an employee of the Board shall be maintained through ~~December~~ February 28, 6 31, 2005, at which time Ms. McKnight-Johnson will be entitled to elect COBRA coverage.

(d) The Board agrees to assist in the preparation of paperwork relating to Ms. McKnight-Johnson's application for disability retirement with the State of New Jersey, Division of Pensions and Benefits.

2. Release. In consideration for the payment and other consideration provided for in this Stipulation, and except as prohibited by law, Ms. McKnight-Johnson, personally and for her estate and/or her heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown (including, but not limited to, any and all rights to discovery regarding events occurring, or claims arising, prior to the date of this Stipulation) that she may have against the Board and any and all of the Board's officers, board members, agents, representatives, attorneys, and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Ms. McKnight-Johnson's employment and/or association with the Board.

Ms. McKnight-Johnson specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or other relationship and/or association with releasees, based upon any act, event, or omission occurring before the effective date of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law (including, but not

limited to, any and all rights to discovery regarding such claims), expressly including, but not limited to, any potential claims (including individual and class action claims) relating to:

Title VII of the Civil Rights Act of 1964, as amended;

Sections 1981 through 1988 of Title 42 of the United States Code, as amended;

The Employee Retirement Income Security Act of 1974, as amended;

The Immigration Reform Control Act, as amended;

The Americans with Disabilities Act of 1990, as amended;

The Age Discrimination in Employment Act of 1967, as amended;

The Fair Labor Standards Act, as amended;

The Occupational Safety and Health Act, as amended;

The Family and Medical Leave Act of 1993;

The Equal Pay Act, as amended;

The New Jersey Law Against Discrimination, as amended;

The New Jersey Minimum Wage Law, as amended;

The New Jersey Wage and Hour Law, as amended;

Equal Pay Law for New Jersey, as amended;

The New Jersey Worker Health and Safety Act, as amended;

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-7 et seq.;

The New Jersey Family Leave Act, as amended;

The New Jersey Conscientious Employee Protection Act, as amended;

The New Jersey Employer-Employee Relations Act, as amended;

Any anti-retaliation provision of any statute or law including common law;

Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;

Any provision of any federal or state constitution;

Any public policy, contract, tort, or common law;

Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and

Attorneys' fees, litigation costs, medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature arising out of the allegations made in connection with Ms. McKnight-Johnson's employment with the Board.

Ms. McKnight-Johnson does not waive, release or give up any claim arising from an intentional act by the Board or any and all of the Board's officers, board members, agents, representatives, attorneys, and employees which unduly obstructs the processing of her application for disability retirement or her appeal of a denial of same.

3. No Claims Permitted/Covenant Not to Sue. Ms. McKnight-Johnson agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Ms. McKnight-Johnson from bringing an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Ms. McKnight-Johnson from contacting a state or federal civil rights agency; however, if Ms. McKnight-Johnson signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any complaint or charge filed with such agency. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Ms. McKnight-Johnson, it shall be dismissed with prejudice upon presentation of this Stipulation, and Ms. McKnight-Johnson shall reimburse the Board for the costs, including attorneys' fees, of defending any such action. Ms. McKnight-Johnson confirms that no such charge, complaint, or action currently exists in any forum or form.

4. No Right To Employment or Re-Employment. Ms. McKnight-Johnson understands and agrees that she has no right to or expectation of employment or re-employment with the Board.

5. Requests for Information. Except as otherwise required by law, the Board will divulge only public record information if a potential employer or other individual or entity contacts the Board seeking information regarding Ms. McKnight-Johnson. Pursuant to N.J.S.A. 47A:1-10, public record information shall include Ms. McKnight-Johnson's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received."

6. Attorneys' Fees. Ms. McKnight-Johnson and her attorney agree that Ms. McKnight-Johnson will bear her own costs and attorneys' fees which she has incurred in connection with the tenure hearing dismissal matter and that no amounts other than the payment to be made pursuant to Paragraph 1 of this Stipulation shall be sought by or owed to Ms. McKnight-Johnson or her attorney in connection with this matter.

7. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by the Board in connection with this Stipulation, constitutes an admission by the Board of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Ms. McKnight-Johnson's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that the Board has entered into this Stipulation in order to avoid the costs of a tenure dismissal hearing, and that the Board specifically denies any legal liability to Ms. McKnight-Johnson or to any other person.

8. Entire Agreement/Sought Assistance of Counsel. This Stipulation contains the sole and entire agreement between the parties hereto, and fully supersedes any and all prior

agreements and understandings pertaining to the subject matter hereof. Ms. McKnight-Johnson represents and acknowledges that, prior to executing this Stipulation, she consulted with her counsel (Bergman & Barrett, by Michael T. Barrett, Esq.), that she had ample time to do so, that she obtained the advice of her counsel prior to making the decision to execute this Stipulation, and that she has not relied upon any representation or statement not set forth in this Stipulation made by any other party thereto, or their counsel or representatives, with regard to the subject matter of this Stipulation. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

9. Severability. The parties agree that if any Court declares any portion of this Stipulation unenforceable, the remaining portions shall be fully enforceable.

10. Counterparts/Applicable Law/Breach. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey, venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that either party breaches this Stipulation and a subsequent action to enforce the Stipulation is successful, the prevailing party shall be entitled to the attorneys' fees and costs incurred with respect to any such action.

11. Notices. Unless otherwise specified herein, any notices sent in connection with this Stipulation shall be sent as follows:

As to Ms. McKnight-Johnson:

Michael T. Barrett, Esq.
Bergman & Barrett
Nine Tamarack Circle
U.S. Highway 206 North
Skillman, New Jersey 08558

As to the Board:

Viola S. Lordi, Esq.
Wilentz, Goldman & Spitzer P.A.
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095

12. Effective Date. This Stipulation shall not become effective or enforceable until the Board has approved this Stipulation by resolution and Viola S. Lordi, Esq. of Wilentz, Goldman & Spitzer P.A. is in receipt of (1) an executed original of this Stipulation; (2) a signed copy of the non-revocation letter attached hereto as Exhibit B; and (3) Ms. McKnight-Johnson's letter of resignation.

13. Voluntary Agreement. Ms. McKnight-Johnson hereby acknowledges that she is signing this Stipulation voluntarily of her own free will and not under duress or coercion of any kind. She understands and agrees that she knowingly and voluntarily has decided to enter into this Stipulation and release any and all potential claims against the Board and surrender any and all tenure rights that she has with the Board after thoroughly reviewing this Stipulation with her attorney.

14. Board Approval. This Stipulation must be approved by the Board by resolution prior to being effective or final.

15. Commissioner's Approval. Pursuant to N.J.A.C. 6A:3-5.6, this Stipulation is subject to the approval of the Commissioner of Education prior to being effective or final.

The Board has reviewed this Stipulation and finds it to be in the best interest of the Board and the taxpayers of the Borough of Sayreville because by settling the tenure charges, the Board and the taxpayers of the Borough of Sayreville will be spared the expense and inconvenience of further litigation. Additionally, the Stipulation contains a release and waiver that are in the public interest because they preclude, to the extent permitted by law, any litigation by Ms. McKnight-Johnson against the Board.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS STIPULATION AS FOLLOWS:

Cordelia McKnight-Johnson
CORDELIA MCKNIGHT-JOHNSON

DATED: 9/9/05

WITNESS:

MICHAEL T. BARRETT

DATED: 9-9-05

BOROUGH OF SAYREVILLE
BOARD OF EDUCATION

BY: Kevin E. Ciak
KEVIN E. CIAK
Board President

DATED: 10/3/05

WITNESS:
BOROUGH OF SAYREVILLE
BOARD OF EDUCATION

Emidio D'Andrea
EMIDIO D'ANDREA
Business Administrator/Board Secretary

DATED: 10/3/05

EXHIBIT A

Borough of Sayreville Board of Education
150 Lincoln Street
Sayreville, New Jersey 08872

Dear Board of Education:

Please accept my resignation as an employee of the Borough of Sayreville Board of Education effective ~~January~~ March 1, 2006. I understand this resignation is irrevocable.

Very truly yours,

Cordelia McKnight-Johnson

CORDELIA MCKNIGHT-JOHNSON

Dated: 9/9/05

2005 OCT 19 P 12:01
OFFICE OF SCHOOL BUSINESS

I – BUILDING AND GROUNDS

A. No report.

II – FINANCE

A. No report.

III – PERSONNEL (NON-CERTIFIED)

A. No report.

IV – PERSONNEL (CERTIFIED)

* A. The Board of Education is requested to approve the following resolution:

The Superintendent of Schools recommends that the Board of Education: (1) APPROVE the Stipulation of Settlement and Addendum thereto, previously submitted, in the matter entitled McKnight-Johnson, Cordelia I/M/O Tenure Hearing, Borough of Sayreville School District, Middlesex County, which is pending before the Commissioner of Education, New Jersey Department of Education as Agency Reference Number 102-5/05, and the Office of Administrative Law as Docket Number EDUTH 02995-2005S; (2) APPROVE, retroactively, the suspension with pay of Cordelia McKnight-Johnson, Guidance Counselor at the Arleth and Eisenhower Schools, effective September 1, 2005 through February 28, 2006, prorated, based on a salary of $73,800 plus a stipend of $125, for a prorated total of $44,355; (3) ACCEPT the resignation of Cordelia McKnight-Johnson, effective March 1, 2006; and (4) AUTHORIZE the Board President, School Business Administrator/Board Secretary, and Board Attorney to take any and all necessary and appropriate steps to implement the Stipulation of Settlement and Addendum.

September 30, 2005

* I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF A RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE AT A MEETING HELD ON SEPTEMBER 30, 2005. THE MOTION WAS MADE BY MR. BARONE AND SECONDED BY MR. LEMBO. ROLL CALL VOTE. SIX YES VOTES RECORDED BY MR. BARONE, MRS. BATKO, MR. DiPOALO, MR. LEMBO, MR. MACAGNONE AND MR. CIAK. MESSRS. CLARK, COX AND RITTENHOUSE WERE ABSENT. MOTION CARRIED.

Emidio D'Andrea

Emidio D'Andrea, Business Administrator/Board Secretary

423-05

OAL DKT. NO. EDU 2795-03
AGENCY DKT. NO. 91-3/03

DEBORA PERMITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/17/05

Date of Mailing: 11/17/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2795-03
AGENCY DKT. NO. 91-3/03

DEBORA PERMITO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,
Respondent.

Ned P. Rogovoy, Esq., for petitioner

Arnold Robinson, Esq., for respondent (Robinson & Andujar, attorneys)

Record Closed: October 25, 2005 Decided: October 25, 2005

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 25, 2005
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

10-27-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 28 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED

2005 OCT 25 A 9:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856)205-9701
Attorney for Petitioner

DEBORAH PERMITO Petitioner v. MILLVILLE BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAK DKT. NO. EDU 2795-03 AGENCY DKT. NO. 91-3/03 **STIPULATION OF SETTLEMENT**

The petitioner, Debora Permito, an employee of the Millville Board of Education, represented by Ned P. Rogovoy, Esquire, filed a Petition with the Commissioner of Education on or about March 17, 2003. The Petition requests the reinstatement of 65 sick days docked to the petitioner as a result of her absences. Petitioner alleged that from September of 1999 through November 18, 2002, the days that she was out of the classroom as a result of sickness were related to her exposure to mold allergens found in the classroom.

The respondent, Millville Board of Education, represented by Arnold Robinson, Esquire, filed a responsive pleading denying the allegations on or about May 2, 2003 and the matter was joined.

Both parties retained experts and as a result of negotiations and to settle all controversies related to the reinstatement of sick days during the petitioner's entire career up until present, it is agreed as follows:

The respondent, Millville Board of Education, shall place 30 sick days into the petitioner's bank, thus causing her bank of saved sick days to be increased by 30, and she shall use them as the Collective Bargaining Agreement and policies of the respondent permit.

Further, this resolves all issues related to the reinstatement of sick days as and through the date of settlement.

It is expressly understood and agreed that the acceptance of the said resolution is in full accord and satisfaction and in compromise of all disputed claims and that the resolution thereof is not an admission of liability but is made for the purpose of terminating all disputes and litigation between the parties.

W. Todd Miller, ALJ

We hereby consent to the within:

Ned P. Rogovoy, Esquire
Attorney for Petitioner

Arnold Robinson, Esquire
Attorney for Respondent

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856)205-9701
Attorney for Petitioner

RECEIVED
2005 OCT 25 A 9:37
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DEBORAH PERMITO Petitioner v. MILLVILLE BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAK DKT. NO. EDU 2795-03 AGENCY DKT. NO. 91-3/03 **STIPULATION OF SETTLEMENT**

The petitioner, Debora Permito, an employee of the Millville Board of Education, represented by Ned P. Rogovoy, Esquire, filed a Petition with the Commissioner of Education on or about March 17, 2003. The Petition requests the reinstatement of 65 sick days docked to the petitioner as a result of her absences. Petitioner alleged that from September of 1999 through November 18, 2002, the days that she was out of the classroom as a result of sickness were related to her exposure to mold allergens found in the classroom.

The respondent, Millville Board of Education, represented by Arnold Robinson, Esquire, filed a responsive pleading denying the allegations on or about May 2, 2003 and the matter was joined.

Both parties retained experts and as a result of negotiations and to settle all controversies related to the reinstatement of sick days during the petitioner's entire career up until present, it is agreed as follows:

The respondent, Millville Board of Education, shall place 30 sick days into the petitioner's bank, thus causing her bank of saved sick days to be increased by 30, and she shall use them as the Collective Bargaining Agreement and policies of the respondent permit.

Further, this resolves all issues related to the reinstatement of sick days as and through the date of settlement.

It is expressly understood and agreed that the acceptance of the said resolution is in full accord and satisfaction and in compromise of all disputed claims and that the resolution thereof is not an admission of liability but is made for the purpose of terminating all disputes and litigation between the parties.

W. Todd Miller, ALJ

We hereby consent to the within:

Ned P. Rogovoy, Esquire
Attorney for Petitioner

Arnold Robinson, Esquire
Attorney for Respondent

#426-05

OAL DKT. NO. EDU 09757-05
AGENCY DKT. NO. 195-8/05

J.C. AND E.C., on behalf of minor child, C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05
Date of Mailing: 11/23/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09757-05
AGENCY DKT. NO. 195-8/05

J.C. AND E.C. ON BEHALF OF MINOR CHILD C.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,
Respondent.

William F. Mueller, Esq., for petitioners (Clemente, Mueller & Tobia, P.A., attorneys)

M.L. Fabian, Esq., for respondent (Dillon, Bitar & Luther, attorneys)

Record Closed: October 21, 2005 Decided: October 25, 2005

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 26, 2005, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings **BE** (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/25/05
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

11-2-05
DATE

M. Kathleen Duncan/ca
Lewis Addus
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed to Parties:

OCT 26 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

da

OCT 21 2005
OFFICE OF ADMINISTRATIVE LAW
30 WASHINGTON STREET
NEWARK, NJ 07102

William F. Mueller, Esq.
Clemente, Mueller & Tobia, P.A.
218 Ridgedale Avenue
P.O. Box 1296
Morristown, NJ 07962-1296
(973) 455-8008
Attorney for Petitioners

JAMES CARPENTER AND EWA CARPENTER ON BEHALF OF THEIR MINOR CHILD, Petitioners, VS. PARSIPPANY-TROY HILLS BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No. EDVOS 09757-2005 N AGENCY REF. NO. 195-8/05 SETTLEMENT AGREEMENT

PETITIONERS JAMES CARPENTER AND EWA CARPENTER , as Guardians Ad Litem for Cristina Carpenter, and PARSIPPANY-TROY HILLS BOARD OF EDUCATION, through Angelo Giuliana and Joy Passalacqua, having met on August 22, 2005, and all parties having agreed that the matter is settled, it is stipulated as follows:

1. Cristina Carpenter will be advanced to the Eighth Grade at Brooklawn Middle School commencing with the September 2005 class schedule;

2. The Parsippany-Troy Hills Board of Education agrees that Cristina Carpenter will be enrolled in a Basic Skills mathematics class in addition to a regular mathematics class;

3. The parents of Cristina Carpenter hereby agree to provide extra tutoring in the area of mathematics to Cristina Carpenter in order to have her reach the adequate level of Eighth Graders;

4. The parents of Cristina Carpenter will make every effort to ensure that Cristina arrives at the school on time on the school-provided bus transportation or otherwise;

5. The parents of Cristina Carpenter state that she is obtaining the necessary medical help so that she is able to attend school regularly commencing in September;

6. The parents of Cristina Carpenter recognize that attendance at the school is vital and that undue absence or tardiness will be considered a violation of this agreement and subject Cristina to fair and reasonable sanctions by the PARSIPPANY-TROY HILLS BOARD OF EDUCATION, including retention.

JAMES CARPENTER

EWA CARPENTER

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

BY: ANGELO GIULIANA,
BROOKLAW MIDDLE SCHOOL

4. The parents of Cristina Carpenter will make every effort to ensure that Cristina arrives at the school on time on the school-provided bus transportation or otherwise;

5. The parents of Cristina Carpenter state that she is obtaining the necessary medical help so that she is able to attend school regularly commencing in September;

6. The parents of Cristina Carpenter recognize that attendance at the school is vital and that undue absence or tardiness will be considered a violation of this agreement and subject Cristina to fair and reasonable sanctions by the PARSIPPANY-TROY HILLS BOARD OF EDUCATION, including retention.

JAMES CARPENTER

EWA CARPENTER

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

BY: ANGELO GIULIANA,
BROOKLAW MIDDLE SCHOOL

#427-05

OAL DKT. NO. EDU 3368-05
AGENCY DKT. NO. 49-2/05

B.T.K. on behalf of minor child, B.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Dismissal of Action with Prejudice and without Costs, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner notes the absence of the terms of the parties' settlement so as to permit her approval pursuant to *N.J.A.C.* 1:1-19.1. The Commissioner has, therefore, determined to consider the Stipulation of Dismissal as a withdrawal of all claims asserted in this matter, pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Commissioner approves withdrawal of the instant matter, which is no longer deemed to be a contested case and is hereby dismissed with prejudice.

IT IS SO ORDERED.

Lucille Edley
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05
Date of Mailing: 11/23/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 3368-05

AGENCY DKT. NO. 49-2/05

B.T.K., ON BEHALF OF MINOR CHILD, B.K.,

Petitioner,

v.

BOARD OF EDUCATION OF UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT UNION COUNTY,

Respondent.

Aimee Torres., Esq. and **Stephen M. Hudspeth**, Esq., for petitioner

Edward J. Kologi, Esq, for respondent

Record Closed: October 19, 2005 Decided: October 20, 2005

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, B.T.K. on behalf of minor child, B.K. contests the denial of admission to the National Honor Society due to an alleged academic dishonesty act and placement of details of this act on child's permanent record.

The matter was transmitted to the Office of Administrative Law (OAL) on March 23, 2005, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. A hearing was held on October 19, 2005 and at that time the parties agreed the matter should be dismissed with prejudice and without costs. A signed copy of the Stipulation of Dismissal is attached hereto and made a part hereof.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 20, 2005

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

OCT 25 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

STATE OF NEW JERSEY

B.T.K. ON BEHALF OF MINOR CHILD, B.K., Petitioners
v.
UNION COUNTY VOCATIONAL-TECHNICAL SCH. DIST BOE, Respondent.

OFFICE OF ADMINISTRATIVE LAW

OAL DKT NO. EDUCS 03368-2005N

STIPULATION OF DISMISSAL OF ACTION WITH PREJUDICE AND WITHOUT COSTS

It is hereby stipulated and agreed by and between the parties hereto that this action, with with prejudice and without costs by either parties ~~to~~ the other, is hereby DISMISSED.

Stephen M. Hudspeth
Attorney for Petitioners

Edward J. Kologi
Attorney for Respondent

Dated: October 19, 2005

SO ORDERED:

The Hon. Jeffrey Gerson, A.L.J.

Jeffers

From: Duncan, Kathleen [kathleen.duncan@doe.state.nj.us]
Sent: Monday, October 24, 2005 11:42 AM
To: Jeffers
Subject: RE: EDU 3368-05 (Dismissal)

This initial decision references an attached signed stipulation of dismissal and therefore must be hand delivered with the stipulation attached. We will calculate our 45 day period for issuing the final from the date we receive the complete hard copy.

Kathy Duncan

Director, Bureau of Controversies and Disputes

609-292-5706

(fax) 609-292-4333

-----Original Message-----
From: Jeffers [mailto:Jeffers@oal.state.nj.us]
Sent: Monday, October 24, 2005 11:47 AM
To: EDU
Subject: EDU 3368-05 (Dismissal)
Importance: High

<< File: EDU 3368-05 (Dismissal).doc >>

AGENCY DKT NO. 311-11/05

IN THE MATTER OF EDMUND J. ZILINSKI,	:	
BLOOMFIELD BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that Bloomfield Board of Education member Edmund J. Zilinski violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he took private action in organizing confidential information containing the names of students suspended from October to November 2004 on an Excel spreadsheet and accidentally transmitted this information as an attachment to an e-mail sent to all Board members on April 4, 2005. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Edmund J. Zilinski be reprimanded as a school official found to have violated the School Ethics Act.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

AGENCY DKT. NO. 311-11/05

IN THE MATTER OF EDMUND J. ZILINSKI,	:	
BLOOMFIELD BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Bloomfield Board of Education member Edmund J. Zilinski violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he took private action in organizing confidential information containing the names of students suspended from October to November 2004 on an Excel spreadsheet and accidentally transmitted this information as an attachment to an e-mail sent to all Board members on April 4, 2005, along with the Commission's recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, Mr. Zilinski was provided thirteen days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were filed either by Mr. Zilinski or counsel on his behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Edmund J. Zilinski be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05

Date of Mailing: 11/28/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
EDMUND J. ZILINSKI	:	**Docket No. C20-05**
BLOOMFIELD BOARD OF EDUCATION	:	
ESSEX COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on April 18, 2005 by Barbara Francisco against Edmund J. Zilinski, a member of the Bloomfield Board of Education (Board), alleging that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act when he sent an e-mail on April 4, 2005 to members of the Board with an attachment that contained confidential information listing the names of students suspended from October to November 2004. Mr. Zilinski submitted a timely answer in which he admitted sending the April 4, 2005 e-mail, but maintained that it was accidentally sent and that four minutes after it was sent he sent another e-mail with the correct attachment.

The Commission invited Mr. Zilinski to attend its July 26, 2005 meeting to present witnesses and testimony, but did not require that he be present. Neither Mr. Zilinski nor the complainant attended the hearing. Instead, on July 22, 2005, the complainant submitted a response to Mr. Zilinski's answer, and on July 23, 2005, Mr. Zilinski replied to complainant's response. At its July 26, 2005 meeting, the Commission voted to find probable cause to credit the allegations that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the School Ethics Act. The Commission also voted to find no probable cause that Mr. Zilinsky violated N.J.S.A. 18A:12-24.1(a). At its August 23, 2005 meeting the Commission adopted its decision finding probable cause.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, advised Mr. Zilinski that it would decide the matter on the basis of written submissions. Mr. Zilinski was invited to provide a written submission to the Commission by September 12, 2005, and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members. Mr. Zilinski was also told that his written submission should include his position on an appropriate sanction should the Commission determine that the Act was violated. Mr. Zilinski filed a timely response to the Commission's probable cause decision. In his response, Mr. Zilinski again admitted that he sent the April 4, 2005 e-mail with an attachment that contained the names of students suspended from October to November 2004, but he argued that his private action did not compromise the Board and that his release of confidential information to Board

members did not needlessly injure individuals or the schools. Mr. Zilinsky indicated that should the Commission find him in violation of the Act, he should only be reprimanded since he inadvertently sent the e-mail and then four minutes later sent the correct file.

FACTS

The Commission based its finding of probable cause on the following facts.

At the time of the allegations in this complaint, Mr. Zilinski and the complainant were members of the Board. The complainant was the Board President at the time Mr. Zilinski sent the e-mail and she recently retired from the Board after being on it for 12 years. Mr. Zilinski is now Board President. Board policy 8330 establishes the process for obtaining and disseminating pupil record information.

In early November, Mr. Zilinski received two anonymous letters regarding student suspensions for dress code violations. He arranged the information from the letter in an Excel spreadsheet so he could better understand it. The Excel spread sheet included the names of the students who were suspended from October to November 2004, the number of days they were suspended, the type of suspension and a reason if the suspension was for a violation of the dress code. Mr. Zilinski named the file "suspensions." After Mr. Zilinski organized the information and reviewed it, he came to the conclusion that it was useless. He made a decision not to turn the information over to the Board President because of a previous negative experience that the Board President had with the administration regarding an anonymous letter. Mr. Zilinski mentioned the letters to a couple of other Board members and they agreed that he should just let the issue die.

On April 3, 2005, Mr. Zilinski found an article in the Star Ledger reporting on how some districts use community service in lieu of out-of-school suspension. He wanted to share this information with the Board so he scanned the article into his computer and named the file "suspensions." On April 4, 2005 at 2:41 p.m., Mr. Zilinski sent an e-mail to the Board and copied himself. The e-mail included an attachment named "suspensions." When Mr. Zilinski reviewed the attachment in the e-mail that had already been sent, he realized that he had mistakenly sent the Excel spread sheet, which contained information regarding the students that had been suspended from October to November 2004. At 2:45 p.m. on April 4, 2005, Mr. Zilinski sent the Board another e-mail with an attachment named "suspensions" that was the Star Ledger article. In the e-mail he said, "Sorry, sent wrong file on previous..... this is the Star Ledger article."

ANALYSIS

The Commission found probable cause that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) when he sent the e-mail to all Board members on April 4, 2005 with an attachment that contained the names of students suspended from October to November 2004. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Mr. Zilinski received the information regarding the students through two anonymous letters and organized it in an Excel spread sheet to make sense of it and then accidentally sent it as an e-mail attachment to the Board. Four minutes after that, he e-mailed the Board with the correct attachment notifying them that the first attachment was the wrong file. Mr. Zilinski did not go to either the Board President or the Superintendent after he had received the two anonymous letters. In his response to the Commission's probable cause decision, he argued that his action did not compromise the Board because only Board members received the e-mail with the confidential information. He also contended that the Board members would otherwise be entitled to the information. However, Board policy 8330 restricts access to pupil records to the pupil's parent or legal guardian, and the Board is permitted access only through the Superintendent. Therefore, the Board would not have been entitled to the confidential information in the e-mail. The Commission also notes that Mr. Zilinski could have inadvertently sent the file containing the confidential information to anyone. His children or spouse could have also accessed the file with the confidential information. The Commission finds that the Board may have been compromised when Mr. Zilinski's inadvertently sent the April 4, 2005 e-mail. Therefore, the Commission finds Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) when he took private action in organizing confidential information containing the names of students in an Excel spreadsheet, which he accidentally sent to the entire Board as an attachment to his e-mail on April 4, 2005.

The Commission also found probable cause that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(g) when he sent the e-mail to all Board members on April 4, 2005 with an attachment that contained the names of students suspended from October to November 2004.N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The April 4, 2005 e-mail contained confidential information regarding students including their names and the reason they were suspended if that suspension was due to a violation of the dress code. In his response to the probable cause decision, Mr. Zilinski argued that his e-mail did not result in injury and could not result in injury. However, the Commission again notes that Mr. Zilinsky's children and spouse could have accessed the file with the confidential information and those he sent it to could have inadvertently sent it to anyone. The Commission further notes that Mr. Zilinsky could have used initials rather than full names when he organized the information into an excel spreadsheet. Therefore, the Commission finds that Mr. Zilinsky violated N.J.S.A. 18A:12-24.1(g)

when he failed to hold confidential the names of students who had been suspended during October and November 2004.

DECISION

For the reasons discussed above, the Commission finds that Edmund J. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of reprimand since Mr. Zilinski immediately advised the Board members that he had sent the wrong attachment.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Zilinski may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C20-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of September 27, 2005, the Commission found that Edmund J. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of October 25, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 25, 2005.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C20-05

450-05

JOHN MANLEY,

PETITIONER,

V.

BOARD OF EDUCATION OF OLD BRIDGE TOWNSHIP, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a tenured special education teacher, alleged that the Board violated his tenure rights by terminating his employment as a Subject Area Coordinator, resulting in a reduction in salary and elimination of one of petitioner's contractually delineated duties. Petitioner contends that he attained tenure in the coordinator position by serving the statutorily-prescribed period in the position. Respondent Board maintains that tenure does not attach to a position compensated by stipend.

The ALJ found that: the matter was ripe for summary judgment; service in the title of Subject Area Coordinator leads to tenure as a teacher, not to the specific position of Subject Area Coordinator; the Subject Area Coordinator position was extracurricular; and the petitioner's stipend for work in the position of Subject Area Coordinator was not treated as salary by the Board, and was granted pursuant to another agreement as "extra compensation". The ALJ concluded that the Board did not violate petitioner's tenure rights by transferring him to another teaching position where he does not receive additional Subject Area Coordinator stipend, and ordered the petition dismissed with prejudice.

Upon a thorough and independent review, the Commissioner determined, pursuant to *Shriner v. Board of Education of Boonton,* 75 *S.L.D.* 939, that the Board had treated petitioner's stipend position monies as an integral part of his salary. However, nothwithstanding petitioner's loss of compensation due to the non-availability of a coordinator stipend position at his newly assigned school, he suffered no reduction in pay. Rather, petitioner's teaching salary for the 2004-2005 school year increased as a result of his progression on the salary guide. The Commissioner, therefore, determined that there was no relief to be accorded petitioner, adopted the Initial Decision as modified above, and dismissed the instant petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 12/19/05

-Mailed 12/20/05

OAL DKT. NO. EDU 10644-04
AGENCY DKT. NO. 368-10/04

JOHN MANLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF OLD BRIDGE TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein. The Board did not file reply exceptions.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that his compensation for functioning as a Subject Area Coordinator was not treated as an integral portion of his salary by the Board and that he, therefore, possesses no entitlement to these moneys. Rather, petitioner argues, compensation for this position was included in the paycheck he received for his teaching duties and was subject to pension contributions. Thus, petitioner maintains that he is entitled to retain the salary for this additional position even though he no longer serves as a Subject Area Coordinator. (Petitioner's Exceptions at 1-2) In support of his argument, petitioner first cites to *N.J.A.C.* 17:3-4.1 which, he avers, in pertinent part specifies:

> (a) Only a member's base or contractual salary shall be subject to pension***contributions***(1) "Base salary" means the annual compensation of a member, in accordance with contracts, ordinances, resolutions, or other established salary policies of the

> member's employer for all employees in the same position, or all employees covered by the collective bargaining agreement, which is reported in regular, periodic installments in accordance with the payroll cycle of the employer. (2) "Extra compensation" means individual salary adjustments which are granted primarily in anticipation of a member's retirement or as additional remuneration for performing temporary duties beyond the regular work day or work year.[1]
> (Petitioner's Exceptions at 2-3)

Although the ALJ determined that "inclusion of his stipend in pension contributions should not affect the tenure analysis" (Initial Decision at 8), pursuant to this regulatory provision, petitioner submits, "such inclusion is the tenure analysis." (*Id.* at 3) (emphasis in text)

Next, despite the ALJ's Initial Decision discussion of the Commissioner's holding in *Shriner v. Board of Education of Boonton*, 75 *S.L.D.* 939, which petitioner advances appears factually identical to the situation here, wherein he recognized

> [t]here it was stated that because the Board incorporated the Petitioner's stipend into his contract salary, and in all other ways treated the stipend as salary (including pension payments), the stipend amount was protected by tenure even though the position for which Petitioner received the stipend was not. (Initial Decision at 8)

the ALJ nonetheless tried to distinguish this matter when he further stated that here "the Respondent did not treat Petitioner's stipend as salary as it was granted pursuant to another agreement and referred to as 'extra compensation.'" (Petitioner's Exceptions at 4) Petitioner maintains that the verbal categorization of these payments utilized by the Board is wholly irrelevant to the analysis. Solely germane, he argues, is that "payment for his duties as Subject Area Coordinator was part and parcel of his salary for his duties as a teacher. The former was an

[1] Petitioner asserts that, pursuant to *Siri v. Board of Trustees of the Teachers' Pension & Annuity Fund*, 262 *N.J. Super.* 147, 152 the term "temporary duties" is only applicable in cases where a teaching staff member is temporarily assigned to substitute for the regular holder of the position. (*Id.* at 3)

integral part of the latter. Petitioner is therefore entitled to this extra compensation for Subject Area Coordinator, even if he is no longer entitled to the position." (*Ibid.*)

Upon careful and independent review of the record, and full consideration of petitioner's exception advancements, the Commissioner concurs with the ALJ that Summary Decision is appropriately granted to the Board. In so determining, the Commissioner is satisfied -- for the reasons detailed in the ALJ's decision at pp. 3-7 -- that petitioner did not acquire tenure in his coordinator position, nor were the duties of this position other than extracurricular in nature. The crux of petitioner's remaining claim of entitlement to the additional compensation is that, pursuant to *Shriner, supra*, because the Board incorporated the stipend for his Subject Area Coordinator duties as an *integral* part of his contractual teaching salary, depriving him of these monies equates to a reduction in salary which -- absent the certification of tenure charges to the Commissioner -- is violative of his tenure rights pursuant to *N.J.S.A.* 18A:6-10. The Commissioner finds that, to the extent that *Shriner, supra,* may be read to provide petitioner relief in this matter, a reasoned reading of this decision in its entirety conclusively demonstrates that, under the circumstances existing here, such is not the case.

In *Shriner, supra,* petitioner -- a tenured teacher -- also served in the stipended position of athletic director/head of the physical education department, for which he received an additional $550 a year. In 1964, at petitioner's request, the Board incorporated his stipend into a single contract salary for teaching. Thereafter, it provided annual notification to petitioner of renewal of his appointment as a teacher and the athletic director/head of physical education department position at a single designated salary for the ensuing year through the 1972-73 school year, at which time his salary was $16,500. Between May and July 1973, the Board acted to assign the duties of athletic director/head of physical education department to another individual

and reduced petitioner's 1973-74 salary by $1,000, the amount he would have received had he continued to serve in his stipend position, which resulted in an overall reduction in salary of $520.[2] On appeal, it was found

> that the Board, having incorporated petitioner's stipend for performing as athletic director into his contract salary in 1964, thereafter treated it as a single salary. Payments that were made to the Teacher's Pension and Annuity Fund on petitioner's behalf were computed on the total amount of the contract salary. Such action by the Board is supportive of the conclusion that the Board, while it did negotiate the amount of stipend to be paid an athletic director, looked upon, and in fact established the additional compensation of its athletic director, as an integral portion of his salary as a teaching staff member. It therefore follows that when the Board established petitioner's salary at $15,980 for the 1973-74 school year, it reduced his salary from the $16,500 he was paid in 1972-73 by $520.
> *Shriner* at 940

As such, the Commissioner held that -- absent the certification of tenure charges -- such reduction was impermissible and must be restored.

However, Shriner's claim of entitlement to a continuing salary that was $1,000 higher than that of other negotiated teaching staff members with equal training, assigned duties and years of experience -- irrespective of the fact that he was no longer performing the duties of the stipend position -- was rejected. Rather, the Commissioner concluded:

> Petitioner has no continuing entitlement beyond 1972-73 to a salary $1,000 greater than that called for in the negotiated salary policy for a teaching staff member of his years and experience, training, and assigned duties. The Commissioner so holds. *Consequently, the Board may establish petitioner's salary at $16,500 subsequent to school year 1972-73 until his years of experience entitle him to receive the next increment on his assigned salary scale.* (citation omitted) *Shriner* at 942 (emphasis added)

---

[2] Such is the case because the Board established petitioner's 1973-74 school year salary at $15,980, which incorporated a scheduled increment progression at the beginning of the school year.

With this background in mind, the Commissioner turns to the factual situation existing in the case at bar. The record reflects that, despite the fact that the within Board did treat petitioner's stipend payment as an integral part of his teaching salary, pursuant to *Shriner, supra,* and -- notwithstanding his loss of compensation due to the non-availability of a coordinator stipend position at his newly assigned school -- *petitioner has suffered no reduction in salary.* Indeed, it is uncontroverted that his salary as a teacher for the 2004-05 school year *increased* as a result of his progression on the negotiated salary guide. Given that petitioner is no longer performing the duties of the coordinator stipend position, and has not been impermissibly reduced in salary, the Commissioner finds and concludes that there is no relief which can be accorded him in this matter.

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/19/05

Date of Mailing: 12/20/05

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10644-04
AGENCY DKT. NO. 368-10/04

JOHN MANLEY,
Petitioner,
v.
BOARD OF EDUCATION,
OLD BRIDGE TOWNSHIP,
MIDDLESEX COUNTY,
Respondent.

Arnold Melk, Esq., for petitioner (Wills, O'Neill & Melk, attorney)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: October 31, 2005 Decided: November 4, 2005

BEFORE **DONALD J. STEIN,** ALJ:

STATEMENT OF THE CASE

John Manley (petitioner) is a tenured teaching staff member who alleges that the school district violated his tenure rights by terminating his employment as a "subject area coordinator" for the 2004-2005 school-year. The issue is whether or not petitioner

acquired tenure in the coordinator position. Petitioner contends that he attained tenure by serving the statutorily-prescribed period in the position. Old Bridge Board of Education (respondent) maintains that tenure does not attach to a position compensated by stipend.

PROCEDURAL HISTORY

On October 21, 2004, petitioner filed a petition of appeal with the Commissioner of Education. On December 3, 2004, respondent filed its answer. On December 16, 2004, the Commissioner forwarded the matter to the Office of Administrative Law (OAL) for handling as a contested case. On June 9, 2005, in lieu of an evidentiary hearing, the petitioner moved for summary decision. On July 6, 2005, respondent filed a brief in opposition to the motion. On July 21, 2005, oral argument was scheduled and heard. The parties requested the record be kept open until the Board had the opportunity to review the settlement proposal by the petitioner. On October 31, 2005, during a conference call, the parties advised that matter could not be settled, and the record closed on that date.

STATEMENT OF FACTS

The facts in this matter are not in dispute.

1. Petitioner is a tenured special education teacher of the respondent, Old Bridge Township Board of Education.

2. From the years 2000 to 2004, the petitioner was assigned to an additional position as a Subject Area Coordinator for which he received additional compensation, and was subject to pension contribution. The job description specifies that the petitioner is required to perform some administrative duties, and is required to have a valid New Jersey Instructional Certificate, and appropriate teaching endorsement or eligibility. The additional compensation was described as a stipend (R-1).

3. The petitioner received a single paycheck for both positions.

4. In the Spring of 2004, the petitioner's new contract included the position of Subject Area Coordinator.

5. At the start of the 2004-2005 school-year, the petitioner was reassigned to the Jonas Salk Middle School, where the position of Subject Area Coordinator was not available. He did not receive compensation for the position of Subject Area Coordinator.

The preceding information is undisputed and is **FOUND** as fact.

CONCLUSION OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of* America, 142 *N.J.* 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for Summary Decision.

Generally, tenure accrues to teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 81 (1982). Initially, it takes employment for three academic years and one day for a ten-month employee to acquire tenure. *N.J.S.A.* 18A:28-5(b). Any previously-tenured teaching staff member "who is transferred or promoted with his consent to another position" obtains tenure in the new position after employment for only "two academic years in the new position, together with employment in the new position at the beginning of the next succeeding academic year." *N.J.S.A.* 18A:28-69(b).

The sole issue to be determined is whether the petitioner acquired tenure in the position of Subject Area Coordinator. In order to resolve this issue, the following must be addressed:

1. Does the petitioner need a separate certificate to acquire tenure for his additional job duties?

2. Was petitioner's position an extracurricular stipend assignment, as opposed to a salaried position, and if so were petitioner's duties as coordinator separate from his teaching position?

3. Was petitioner's compensation treated as salary?

ISSUE ONE - DOES THE PETITIONER NEED A SEPARATE CERTIFICATE TO ACQUIRE TENURE FOR HIS ADDITIONAL JOB DUTIES?

The position presently at issue, Subject Area Coordinator, is an "unrecognized position" because it is not listed in the statutes or regulations. *N.J.A.C.* 6A:9-5.5 (authorizing the use of unrecognized titles). As such, it cannot be one of the separately tenurable positions enumerated in *N.J.S.A.* 18A:28-5 and, consequently, service in that title does not determine the scope of tenure protections. *Gittelman v. Hamilton Twp. Bd. of Ed., supra,* 94 *N.J.A.R.* 2d (EDU) at 268. Instead, the scope of protection provided by tenure will be determined by the certificates and endorsements required to hold the position. *Ibid.*

It is well established that "tenure is achieved in a specific 'position', and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment." *Nelson v. Bd. of Ed. of Twp. of Old Bridge*, 148 *N.J.* 358, 366 (quoting, *Ellicott v. Bd. of Ed. of Twp. of Frankford*, 251 *N.J. Super.* 342, 348 (1991)). The limitation on the scope of tenure protection applies with the same force to both the positions enumerated by the regulations and to the "unrecognized positions" (those not enumerated by the regulations) authorized by *N.J.A.C.* 6A:9-5.5. *Gittelman v. Hamilton Twp. Bd. of Ed.,* 94 *N.J.A.R.* 2d (EDU) 258, 268 (1994) held that the scope of tenure protection for unrecognized

positions is also determined by the certifications and endorsements required to serve in that position.

It is equally well established that no tenure protections flow from extracurricular positions unless the position requires additional certification. *Dignan v. Bd. of Ed. of Rumson-Fair-Haven Regional High School*, 71 *S.L.D.* 336, 343, *aff'd*, St. Bd. of Ed., 74 *S.L.D.* 1376, *aff'd,* App. Div., 75 *S.L.D.* 1083. *Connor v. Bd. of Ed. of Twp. Of Cinnaminson,* 96 *N.J.A.R.* 2d (EDU) 861 held petitioner was entitled to extracurricular stipend, because he achieved tenure in the extracurricular position, and that position required a certification other than the Instructional Certificate required to teach. *Ocasal v. Elmwood Park Board of Education*, 97 *N.J.A.R.* 2d (EDU) 1997, concluded that nothing in *N.J.S.A.* 18A:28-6 can be read to suggest that a district employee working simultaneously in two assignments requiring different certifications should be deprived of tenure in the second position.

However, in the present case, an additional teaching certificate was not required. Thus, all tenure acquired under the Instructional Certificate is achieved in the position of teacher. The tenure achieved through service under that certificate extends only to the position of teacher and excludes extracurricular positions. *Duva v. State Operated School District of Jersey City*, EDU 9801-98, Final Decision, (March 6, 2002), http://lawlibrary.rutgers.edu/oal/search.html.

I therefore **FIND** that since the Subject Area Coordinator only requires an Instructional Certificate (and a subject appropriate endorsement), service in that title leads to tenure as a teacher, not the specific position of Subject Area Coordinator.

ISSUE TWO - WAS PETITIONER'S POSITION AN EXTRACURRICULAR STIPENDED ASSIGNMENT, AS OPPOSED TO A SALARIED POSITION?

Because petitioner is tenured as a teacher, the Board is free to assign him extracurricular assignments that do not entitle him to tenure in that position unless they require certifications beyond those required to teach. As stated above, Subject Area Coordinator does not require any certifications other than those required for teaching.

Thus, "any determination as to whether tenure rights were violated . . . will rest substantially on whether or not the position at issue is, in fact, an extracurricular stipend assignment, as opposed to a salaried position." *Barratt v. Bd. of Ed. of Borough of Glassboro, supra*, EDU 8784-99, Final Decision, (June 6, 2001), http://lawlibrary.rutgers.edu/oal/search.html (remanding case to ALJ to determine whether the details of position qualified it as extracurricular). This determination requires an inquiry into the details of the petitioner's workday and compensation. *Ibid.* If the duties of the extracurricular work are "engrafted" to his duties as teacher, *Boney v. Bd. of Ed. of Pleasantville*, 71 *S.L.D.* 579, or if the Board treats his stipend as an integral part of his salary, *Shriner v. Bd. of Ed. of Boonton*, 75 *S.L.D.* 939, the petitioner may have an entitlement to the extra compensation, even though he does not have an entitlement to the position.

Petitioner asserts that his duties as Subject Area Coordinator were not extracurricular; that they were engrafted to the duties of his service as a teacher because they were performed during petitioner's work day and were related to the duties which he performed as a teacher.

While the record is relatively bare on the duties required of a Subject Area Coordinator, or how petitioner's day was spent filling those requirements, the fact that those duties were merely "related" to his teaching position, and achieved "during" his work day, seems insufficient to be considered "permanently engrafted" to the duties of a teacher such that they are not extracurricular.

In *Boney,* the Commissioner held that the petitioner's service as the "chairman" of a department, a position he held in addition to his regular teaching position and which required the same certification, did not entitle him to the compensation given for that additional service. *Boney v. Bd. of Ed. of Pleasantville, supra*, 71 *S.L.D.* 579 (Comm'r). The Commissioner stated that, "[he] can find no basis for differentiating between petitioner's extra-duty assignment as a department chairman and the many various other kinds of assignments which other teachers perform." *Id.* at 583. Significant to the

Commissioner's finding was the fact that, "the duties of petitioner as a department chair were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment." *Ibid.* In further explanation, the Commissioner pointed out that the duties were independent of the petitioner's duties as a teacher and that the appointment to the position, like the present Coordinator position, was only for one year and had to be renewed annually. *Ibid.*

In *Barrat,* as well as this case, the petitioner performed both his duties as a teacher and his extracurricular duties under a single instructional certificate. Because such service does not generally entitle the employee to tenure protections, an examination of the interaction of the duties was needed to determine whether the non-teaching duties were truly extracurricular. *Boney v. Bd. of Ed. of Pleasantville, supra*, 71 *S.L.D.* 579, *Barratt v. Bd. of Ed. of Borough of Glassboro, supra*, EDU 8784-99, Initial Decision, (January 11, 2001), http://lawlibrary.rutgers.edu/oal/search.html.

The Job Description for Subject Area Coordinator appears to require only "a handful of extra administrative assignments" which are independent of the duties of a teacher (R-2). While there is not the explicit disclaimer setting forth the independent nature of the two positions as there was in *Boney*, the responsibilities of the two positions seem to distinguish themselves. Moreover, it appears that time is set aside for completion of the duties of the Coordinator position so that it does not intermingle or interfere with the petitioner's teaching duties.

I therefore **FIND** that the distinct duties required of each position, and the separate time allotted for each position, indicate that they are sufficiently separate, so that the Coordinator position can be deemed extracurricular.

COMPENSATION IS NOT TREATED AS SALARY

Petitioner can also be found to have an entitlement to the stipend if the Board treated the stipend as an "integral portion" of the petitioner's salary. *Shriner v. Bd. of Ed. of Boonton*, 75 *S.L.D.* 939. Thus, petitioner's claim of entitlement to the Coordinator

stipend rests largely on the position that, because petitioner received only one paycheck from which pension contributions were withheld, the stipend is part of his base salary (P-1). However, *Reinhardt v. Bd. Of Ed. Of Freehold,* 97 *N.J.A.R.* 2d (EDU) 186, 193, stated that it is not relevant how respondent chose to characterize the components of petitioner's compensation package for pension purposes. Thus, petitioner's argument regarding the inclusion of his stipend in pension contributions should not affect the tenure analysis.

This is not to say, however, that the characterization of compensation is entirely irrelevant for tenure purposes. *Connor v. Bd. of Ed. of Twp. Of Cinnaminson, supra,* 96 *N.J.A.R.* 2d (EDU) 861, 865, held that where compensation, even though referred to as a stipend, is treated by the Board as salary, it will be considered as such in the calculation of tenurable salary. *Ibid.*

Significantly, the position for which the "stipend" was paid in *Connor* was acknowledged by the Respondent Board to be a position in which the petitioner had gained tenure independent of his service in the position for which he received his "base salary." *Connor v. Bd. of Ed. of Twp. Of Cinnaminson, supra*, 96 *N.J.A.R.* 2d (EDU) 861, 865. Because Connor had tenure in the stipended position, as acknowledged by the respondent, the characterization of the compensation for the position as a stipend was irrelevant; Connor's tenure in the position entitled him to that compensation regardless of how it was characterized. The same cannot be said in this matter. The petitioner, as discussed above, is not separately tenured in the Coordinator position; he is tenured only as a teacher.

The ruling in *Shriner v. Bd. of Ed. of Boonton,* 75 S.L.D. at 940, did not depend on this distinction, however. There it was stated that because the Board incorporated the Petitioner's stipend into his contract salary, and in all other ways treated the stipend as salary (including the pension payments), the stipend amount was protected by tenure even though the position for which Petitioner received the stipend was not.

Here, the Board did not treat petitioner's stipend as salary; it is granted pursuant to another agreement and is, therein, referred to explicitly as "extra compensation" (R-2).

CONCLUSION

Because petitioner is tenured only as a teacher under the Instructional Certificate, the Board can assign him extracurricular work to which he has no tenure. For the petitioner to have any entitlement to the extracurricular stipend he must show that either: 1) the duties of the coordinator position were engrafted into his duties as a teacher such that the Coordinator position was not truly extracurricular; or 2) the stipend for his extracurricular position was treated by the Board as salary such that *Shriner* applies.

Neither of these exceptions applies. The duties of the two positions are sufficiently distinct, and the Board does not refer to the extra compensation as salary but as a stipend. Consequently, the Old Bridge Board of Education did not violate petitioner's tenure rights by transferring him to another teaching position where he does not receive the additional Subject Area Coordinator stipend.

DECISION AND ORDER

I **GRANT** the respondent's motion and I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 4, 2005
DATE

DONALD J. STEIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 4 2005
DATE

NOV 10 2005

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

Exhibits

For Petitioner

P-1 Petitioner's Brief

For Respondent

R-1 Respondent's Brief

R-2 Statement of Extra Compensation

449-05

OAL DKT. NO. EDU 8636-05
AGENCY DKT. NO. 301-10/05

DOMINICK GIACOBBE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter has been reviewed. A letter dated November 17, 2005 from petitioner's attorney to the administrative law judge (ALJ) represented that petitioner would withdraw his "complaint" by way of stipulation of dismissal. The Commissioner notes that the documents filed in this matter were a petition and answer, and concludes that it is the petition to which the attorney referred in the correspondence.

Further, since respondent filed no counterclaim, only an executed withdrawal by petitioner is required to end the matter. The Commissioner will regard the stipulation of dismissal executed by the petitioner and submitted on or about November 17, 2005, as a formal withdrawal. Respondent's signature is unnecessary under the circumstances.

The matter is accordingly deemed withdrawn.

IT IS SO ORDERED

Lucille Edary
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/19/05

Date of Mailing: 12/19/05

435-05

RAYMOND D. GUALTIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner – formerly employed as Superintendent of Schools by the Somerset Hills Regional School District – claims that his tenure rights were violated when the respondent Board terminated his employment by unilaterally changing the date of his resignation in violation of his contractual rights and school law. Respondent Board argues that petitioner breached his contract by failing to provide the required 90-day notice of his intended resignation.

The ALJ found that: the matter is ripe for summary judgment; the respondent Board's unilateral action in accelerating the effective date of petitioner's resignation violated his statutory rights; and the facts in this matter are virtually identical to those in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, decided by the Commissioner September 24, 2004, *aff'd.* State Board of Education March 2, 2005, wherein the Commissioner found that the Board forced petitioner's premature resignation and terminated his employment without consent. The ALJ concluded that petitioner's motion for summary decision should be granted, and that respondent should be directed to compensate petitioner consistent with the terms of his employment contract, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003.

Upon a full and independent review of the record, the Commissioner concurs with ALJ for the reasons clearly presented in his Initial Decision. Accordingly, the Initial Decision of the OAL granting Summary Decision to the petitioner is adopted. The Commissioner declines to grant petitioner's request for pre-judgment interest 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.

December 16, 2005

OAL DKT. NO. EDU. 6707-03
AGENCY DKT. No. 297-8/03

RAYMOND D. GUALTIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter an the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both petitioner and the Board, and petitioner's reply exceptions -- filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 -- were fully considered by the Commissioner in reaching her determination in this matter.

On exception, the Board essentially recasts and reiterates its arguments advanced below. As the Commissioner determines that a reasoned reading of the Administrative Law Judge's (ALJ) Initial Decision evidences that all material aspects of the Board's proffered contentions have been effectively addressed and resolved, they will not be revisited herein.

Petitioner excepts to the ALJ's failure to award him pre-judgment interest on his damages in light of "the Board's blatant violation of [his] tenure rights in the face of established precedent." (Petitioner's exceptions at 6)

Upon a full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons clearly presented in his Initial Decision,

that the Board's unilateral acceleration of petitioner's resignation date violated his rights pursuant to *N.J.S.A.* 18A:17-20.2. The Commissioner is in full agreement with the ALJ that this matter is essentially factually identical to the situation which existed in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, decided by the Commissioner September 24, 2004, *aff'd.* State Board of Education March 2, 2005, and she emphasizes her acceptance of the applicability of the analysis utilized by the Commissioner in that decision, as modified by the ALJ in his Initial Decision to the situation existing in this matter. Specifically,

> ***regardless of whether this outcome was the result of outrageous connivance, as contended by the Board, or merely a collateral consequence of the [90-day resignation notice required by the contract of employment], as suggested by petitioner, the fact remains that, by unilaterally changing petitioner's proffered resignation date to an earlier one more to the Board's liking, the Board forced petitioner's premature resignation and terminated his employment without consent. Quite apart from the fact that resignation under any circumstances is a voluntary act with which the employee must be in agreement, here, in view of petitioner's undisputed tenure status, unilateral termination of his employment could not be lawfully accomplished in the absence of proceedings pursuant to *N.J.S.A.* 18A:6-10. Simply put, whatever its feelings may have been about the fairness to the district of petitioner's actions, the Board had no authority to do what it did, and petitioner must prevail on his appeal herein as a matter of law. As petitioner correctly notes, in the context of the claim he has made, other considerations are immaterial and no findings with regard to them can be made on the stipulated facts. (*Soriano, supra* at 3)
> (Initial Decision at 8-9)

Finally, the Commissioner declines to grant petitioner's request for pre-judgment interest in this matter, in that the record before her does not support a finding that respondent's actions were taken in bad faith or in deliberate violation of the law. (*N.J.A.C.* 6A:3-1.17(c) 1).

Accordingly, the Initial Decision of the OAL granting Summary Decision to petitioner is adopted. The Board is hereby directed to compensate petitioner consistent with the

terms of his contract of employment, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003.

IT IS SO ORDERED.[1]

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/16/05

Date of Mailing: 12/21/05

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6707-03S
AGENCY REF. NO. 297-8/03

RAYMOND D. GUALTIERI,
Petitioner,
v.
BOARD OF EDUCATION OF SOMERSET HILLS REGIONAL SCHOOL DISTRICT,
Respondent.

Andrew Babiak, Esq., appearing for Petitioner
Philip E. Stern, Esq., appearing for Respondent (Sills Cummis Epstein & Gross, P.A., attorneys)

Record Closed: October 11, 2005 Decided: October 31, 2005

BEFORE **ISRAEL D. DUBIN**, ALJ:

This is an appeal by a Superintendent of Schools who complains that the Somerset Hills Regional Board of Education unilaterally changed the date of his resignation in violation of his contractual rights and school law. In brief, on or about June 9, 2003, petitioner Raymond D. Gualtieri tendered to the Board his letter of resignation to be effective September 2, 2003. Although the Board accepted his resignation during its regularly scheduled meetings on June 9 and June 23, 2005, it subsequently conducted a special meeting on June 30 at which it adopted a resolution terminating petitioner's employment effective immediately.

Petitioner contends that the Board's action constituted an illegal dismissal in violation of his tenure rights under *N.J.S.A.* 18A:28-8 and is seeking compensatory damages in the amount of $35,344.15 for lost benefits and perquisites, as well as consequential damages for lost interest on his pension account. The Board denies it is under any legal obligation to compensate petitioner, arguing that he breached his contract by failing to provide it with ninety days notice of his intended resignation

Petitioner filed his Petition with the Commissioner of Education on August 19, 2003. The Board filed its Answer on September 2, 2003 and the matter was transmitted to the Office of Administrative Law (OAL) on September 29, 2003 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13 and *N.J.S.A.* 52:14B-1 to -15. Petitioner and the Board filed Cross-Motions for Summary Decision on July 13, 2004 and August 13, 2004, and reply briefs on August 26 and September 9, 2004, respectively. Despite the parties' best efforts, the matter could not be amicably resolved and the record was closed on October 11, 2005.

The material facts necessary for disposition of this matter are undisputed and I therefore make the following findings of fact:

On May 25, 2000, the Somerset Hills Regional Board of Education appointed Dr. Raymond D. Gualtieri to the position of Superintendent of Schools for a term commencing August 1, 2000 and expiring July 1, 2005. The contract of employment contained the following "Termination" clause:

> In accordance with law, during the term of this contract, the Superintendent shall not be discharged, dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming of a Superintendent or other just cause, and then only in the manner prescribed by law. The Superintendent agrees that he shall not terminate this contract except upon giving the Board at least ninety (90) days prior written notice of such election to terminate.
>
> [*Employment Contract*, Petitioner's Exhibit A]

On June 3, 2003, the East Hampton Board of Education met and unanimously authorized its president "to sign a four year agreement with Dr. Raymond Gualtieri for the position of superintendent of schools commencing August 1, 2003." *Regular Board Meeting Minutes*, East Hampton Board of Education – June 3, 2003 (attached to *Stern Certification* as Exhibit A).

On June 4, 2003, Dr. Gualtieri sent e-mail to the members of the Somerset Hills Regional Board of Education advising them that he had accepted a position with the East Hampton Board as its Superintendent of Schools. In this e-mail, Dr. Gualtieri acknowledged his obligation to provide the Board with ninety days notice and indicated that "With vacation, I will be leaving in August or there about. I will present a letter of resignation at our Board meeting on Monday (June 9). More details to follow, Ray." *Gualtieri E-Mail*, Petitioner's Exhibit B.

As promised, Dr. Gualtieri submitted his letter of resignation at the Board meeting of June 9, 2003. In the concluding paragraph of this letter, Dr. Gualtieri stated, "I am tendering my resignation to be effective on or about September 2. My last day in the office will be on or about August 1." *Letter of Resignation*, Petitioner's Exhibit C. At that time the Board apparently met in closed session and adopted a resolution accepting Dr. Gualtieri's resignation "effective on or about September 2, 2003." *Minutes – Personnel*, Board of Education Meeting of June 9, 2003, Petitioner's Exhibit D. The minutes also included the following handwritten notation: "BOE accepted resignation without date 6/9/03." There is nothing in the record indicating when or by whom the notation was added.

Later that evening the Board met in public session and, by a unanimous roll call vote of 10-0, approved Personnel motion #18 accepting Dr. Gualtieri's resignation "at a date to be determined." *Public Input & Action Meeting Minutes – June 9, 2003*, Petitioner's Exhibit D, page 2.

On June 17, 2003, the East Hampton Board of Education approved a resolution appointing Dr. Gualtieri as its interim superintendent commencing July 1, 2003 and ending July

31, 2003.[1] Upon learning of the East Hampton Board's action, the Somerset Hills Board met on June 23, 2003 to discuss matters affecting his resignation. Section XV – Personnel – of Addendum I to the *Minutes* of the Public Input and Action Meeting (Petitioner's Exhibit E) indicates that the Board resolved to accept Dr. Gualtieri's resignation effective September 9, 2003. However, a handwritten notation states that the motion was purportedly "tabled, Board (text apparently redacted), resignation but without a date again." As with the previously mentioned handwritten notation, there is nothing in record indicating when or by whom this notation was made.

On or about June 25, 2003, the Board sent Dr. Gualtieri a *Rice* notice indicating that matters affecting his employment would be discussed at a Board meeting to be held on June 30, 2003. At that meeting, the Board adopted a resolution making his resignation effective that evening.[2] Dr. Gualtieri's base salary at that time was $145,600 per year.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a motion for summary decision, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield*, 17 *N.J.* 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). While cautioning that a judge

[1] Although the parties agree that the East Hampton board took this action, the recommendation made in Item 3 of the *Addendum to the Superintendent's Report and Recommendations* (attached to *Stern Certification* as Exhibit B) was not accompanied by an additional entry indicating that a formal resolution had been approved.

[2] Although they agreed that these two actions were taken by the Board, neither party submitted copies of the *Rice* notice or minutes of the June 30, 2003 meeting.

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 (citation omitted).

Here, a careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of America,* 142 *N.J.* 520, 523 (1995), this matter is ripe for Summary Decision.

Dr. Gualtieri asserts that the Board's acceleration of his retirement date violated *N.J.S.A.* 18A:17-20.2, which reads as follows:

> During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by sub-article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

The Board demurs, asserting that Dr. Gualtieri breached the 90-day notice provision in his employment contract and thereby waived any rights he may have had under the statute.

The Board has gone to great pains attempting to establish that Dr. Gualtieri failed to provide sufficient notice. Among other things, it has argued that August 1, 2003, Dr. Gualtieri's last day in the office, must be considered the effective date of his resignation. "Thus, as of his first notice to the Board, Gualtieri was giving notice from June 4, 2003, until August 1, 2003, a mere fifty-six (56) days notice of his intention to terminate his employment." *Respondent's Brief in Support of Motion for Summary Decision*, pg. 4.

Alternatively, the Board has argued that July 1, 2003, the day Dr. Gualtieri began his employment with East Hampton as interim Superintendent of Schools, should be considered the effective date of his resignation. This time, however, it used the June 9, 2003 date of Dr. Gualtieri's letter of resignation as the date of notice to establish that "Gualtieri's ever-dwindling

notice of termination was decreasing from fifty-six (56) days to twenty-one (21) days (June 9, 2003, to July 1, 2003)." *Id.* at 6.

Granted, the June 4, 2003 e-mail may have been inartfully worded and, as a result, left open to interpretation. However, in the context of providing ninety days notice, when Dr. Gualtieri wrote "With vacation I will be leaving in August or thereabout," he must have meant that his last day in the office would be in August and he would thereafter use accrued leave until the effective date of his resignation, which was one of the "details to follow." Otherwise, he would not have deliberately acknowledged that he was required by contract to give such notice.

What is more, Dr. Gualtieri subsequently made his intentions abundantly clear with his June 9, 2003 letter of resignation. In this letter he formally stated, "I am tendering my resignation to be effective on or about September 2. My last day in the office will be on or about August 1." *Letter of Resignation*, *supra*. Using these dates, Dr. Gualtieri gave only eighty-seven days notice, three less than the contractual requirement. Nevertheless, by approving a resolution accepting his resignation, albeit at a date to be determined,[3] the Board waived any right it may have had to claim a breach of the notice provision. And even if its acceptance of his resignation did not constitute such a waiver, the fact remains that the Board subsequently passed another resolution on June 23 accepting Dr. Gualtieri's resignation effective September 9,[4] resulting in ninety-two days notice. I therefore find that the notice requirement was honored, and if violated, that the violation thereof was waived.

Much like *N.J.S.A.* 18A:28-8, which requires a teaching staff member to give at least sixty days written notice of his or her intention to resign, Dr. Gualtieri's contract required him to give the Board at least ninety days prior written notice. And, much like the statute, it did not require the Board to give an equivalent, or for that matter any, notice to him. The one-sided nature of the contract suggests that the underlying intent was to prevent disruption of the students' education. *Carrelle v. Board of Education of the Township of Bloomfield*, EDU 1852-

[3] As mentioned earlier, the minutes from the personnel meeting that immediately preceded the public meeting indicate that the Board resolved to accept Dr. Gualtieri's resignation effective on or about September 2, without any mention of his failure to comply with the contractual notice requirement.

03, Initial Decision (December 24, 2003) http://lawlibrary.rutgers.edu/oal/search.html. Although there may be "no good time" for a superintendent to leave, Dr. Gualtieri submitted his letter of resignation on June 9, giving the Board approximately three months to retain the services of an acting superintendent and begin a search for Gualtieri's replacement. In fact, the Board has not argued that the resignation in any way caused such a disruption.

The Board's *Brief in Support of Motion for Summary Decision, supra*, provides more than ample explanation as to why it acted in such a vengeful fashion, including as it does the following passages:

> Upon receipt of Gualtieri's letter of resignation, the Board immediately recognized that Gualtieri had no intention of honoring his ninety-day notice obligation. Rather, the Board understood that Gualtieri was using the July 1, 2003, date to acquire another year's worth of vacation days, sick leave days, holidays, health care, automobile allowance, medical and visual examinations, disability insurance, universal life insurance, tax sheltered annuity, home office and conversion of benefits, all of which were set forth in his Employment Contract with the Board....
>
> Rather than allow Gualtieri to accomplish his shake down, and benefit from his violation of the Employment Agreement, the Board decided that the prudent course was to wish him good riddance, and, at its Board meeting of June 9, 2003, accepted Gualtieri's resignation....
>
> [*Id.* at 5.]

and

> ... Gualtieri has the audacity to cry foul when the Board decided to send him on his way rather than seek to lift his certification for jumping ship.[5] Gualtieri whines that the Board unilaterally changed his resignation date of September 2, 2003. The Board unilaterally changed nothing – the September 2, 2003, date was a sham,

[4] Given the June 9 resolution accepting Dr. Gualtieri's resignation effective at "a date to be determined," and June 23 resolution fixing that date as September 9, it may well have been that the parties were still in the process of negotiating a mutually acceptable date when the initial resolution was adopted.

[5] *See, N.J.S.A.* 18A:28-8 (should a teaching staff member fail to give a board sixty days notice of his intention to resign, "he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.".

> concocted by Gualtieri to enable him to be paid by both the Board and the East Hampton School District at the same time.
>
> Gualtieri breached his contract by failing to give the Board ninety days' notice. Rather than attempt to pilfer more money from the Board, Gualtieri should count his blessings that the Board was satisfied just to see him leave.
>
> [*Id.* at 3.]

The Deputy Commissioner of Education dealt with virtually the exact same set of facts as these in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, EDU 6708-03, Final Decision (September 24, 2004), *affirmed*, State Board of Education (March 2, 2005) http://lawlibrary.rutgers.edu/oal/search.html. In *Soriano*, petitioner, who had already accepted employment with the East Hampton Board of Education along with Dr. Gualtieri, also submitted his resignation with an effective date that enabled him to invoke the negotiated agreement's provision for immediate accrual of twenty-eight vacation days upon July 1, 2003, then requested leave for the period from July 2, 2003 through the effective date of his proffered resignation.

Rather than attempt to "reinvent the wheel," I hereby concur with the Deputy Commissioner's analysis of the issue and, with substitution of the instant facts where appropriate, incorporate it into the body of this initial decision as follows:

> ... regardless of whether this outcome was the result of outrageous connivance, as contended by the Board, or merely a collateral consequence of the [90-day resignation notice required by the contract of employment], as suggested by petitioner, the fact remains that, by unilaterally changing petitioner's proffered resignation date to an earlier one more to the Board's liking, the Board forced petitioner's premature resignation and terminated his employment without consent. Quite apart from the fact that resignation under any circumstances is a voluntary act with which the employee must be in agreement, here, in view of petitioner's undisputed tenure status, unilateral termination of his employment could not be lawfully accomplished in the absence of proceedings pursuant to *N.J.S.A.* 18A:6-10. Simply put, whatever its feelings may have been about the fairness to the district of petitioner's actions, the Board had no authority to do what it did, and petitioner must prevail on his appeal herein as a matter of law. As petitioner

> correctly notes, in the context of the claim he has made, other considerations are immaterial and no findings with regard to them can be made on the stipulated facts.
>
> [*Charles Soriano v. Board of Education of the Somerset Hills Regional School District, supra*, EDU 6708-03 at 3.]

Based on the foregoing, I **CONCLUDE** that petitioner Raymond D. Gualtieri's Motion for Summary Decision should be **GRANTED** and that respondent Somerset Hills Regional Board of Education's Cross-Motion for Summary Decision should be **DENIED**. I therefore further conclude that respondent should be directed to compensate petitioner consistent with the terms of his contract of employment, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 31, 2005 — DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 31, 2005

DATE

Mailed to Parties:

NOV - 9 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

#454-05

IN THE MATTER OF THE INCLUSION	:	
OF CERTAIN QUESTIONS ON THE	:	
BALLOT FOR THE APRIL 2005	:	COMMISSIONER OF EDUCATION
CAMDEN SCHOOL ELECTION,	:	DECISION
CAMDEN COUNTY.	:	

SYNOPSIS

Petitioner submitted request to the Camden Board of Education (Board) for inclusion of three referendum questions on the April 2005 school elections ballot in the City of Camden; the referendum questions involved, *inter alia,* school prayer and a Bible-based curriculum. The Board countered that the education laws did not require it to place the proposed referendum on the ballot. Petitioner appealed to the State Board of Education (State Board).

The State Board reviewed the record and determined to dismiss the appeal, as the statutory framework requires that the matter be remanded to the Commissioner pursuant to the original jurisdiction conferred upon her by *N.J.S.A.* 18A:6-9.

Upon a thorough and independent review of the submissions in this matter, the Commissioner determined that there is nothing in petitioner's brief that would provide a basis for her to retain jurisdiction over the petitioner's claims, which appear to rest upon federal constitutional and State civil rights laws rather than school law. Accordingly, the Commissioner dismisses the petition for lack of jurisdiction.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 21, 2005

AGENCY DOCKET NO. 303-9/05

IN THE MATTER OF THE INCLUSION	:	
OF CERTAIN QUESTIONS ON THE	:	
BALLOT FOR THE APRIL 2005	:	COMMISSIONER OF EDUCATION
CAMDEN SCHOOL ELECTION,	:	DECISION
CAMDEN COUNTY.	:	

Edward D. Torres, Petitioner *Pro Se*

Harvey C. Johnson, Esq. for Respondent

The submissions from the parties in this case have been thoroughly and independently reviewed, and the Commissioner has determined to decide the matter on a summary basis, pursuant to the authority granted her by *N.J.A.C.* 6A:3-1.12.

The controversy began with a February 2005 request from petitioner to respondent for the inclusion of three referendum questions on the April 2005 school elections ballot in the city of Camden. The questions were as follows:

> 1. Do you as a resident of Camden and a citizen of New Jersey want your Public Schools to open the daily session in prayer in a pledge of allegiance to the god we trust by the children in acknowledgment of God and His son Jesus Christ. The Prayer given to us by His Son Jesus Christ the "Our Father Which art in Heaven hollowed be Thy Name." **Yes or No**
>
> 2. Do you as a resident of Camden and a citizen of New Jersey want a Holy Bible based curriculum in your Public Schools which teaches the truth and the presence of God as creator in alignment with our New Jersey State Constitution where we are Grateful to Almighty God and looking towards Him for a blessing unimpaired in the endeavor to properly educate our children. **Yes or No**
>
> 3. Do you as a resident of Camden and citizen of New Jersey want those fellow Camden, NJ residents who are on probation, or parole, or incarcerated for non violent offenses their civil right to

vote in Camden School District Elections as a part of the rehabilitation process. **Yes or No**

Respondent's answer to petitioner apparently came in the form of a copy of a March 15, 2005 letter from respondent's counsel to respondent, outlining the reasons why it would be improper for respondent to place such questions on a school elections ballot. In summary, counsel advised that: respondent had no jurisdiction over the issue articulated in the third question; respondent had no authority under the school laws to place the first and second questions on the ballot; and that the first and second questions were essentially public polls about actions that likely violated federal constitutional rights.

Petitioner submitted to the State Board of Education (State Board) an appeal of respondent's decision not to put the three questions on the April 2005 school elections ballot, and the State Board remanded the matter to the Commissioner.

On November 9, 2005, the Bureau of Controversies and Disputes (Bureau) advised the parties that -- after careful review of the file, including numerous pleadings and documents submitted to the State Board, and a petition submitted to the Commissioner on or about September 19, 2005 -- it appeared that the respondent's action had been neither an abuse of discretion nor a violation of school law. The Bureau further advised that petitioner's claims appeared to rest upon federal constitutional and State civil rights laws over which the Commissioner of Education has no jurisdiction. Accordingly, the Bureau afforded petitioner until December 2, 2005 to submit reasons why the Commissioner should not dismiss the matter, and allowed respondent twenty days to submit a reply. Petitioner submitted his brief on or about November 30 and respondent replied on December 6.

There is nothing in petitioner's brief that would provide a basis for the Commissioner to retain jurisdiction over petitioner's claims. First, the Commissioner agrees

with respondent that its authority to conduct referenda does not include the issues in petitioner's three questions.[1] Second, petitioner's first and second questions raise federal constitutional issues. While the Commissioner is bound to uphold the federal and State constitutions, she is not empowered to adjudicate constitutional issues. *Christian Bros. Inst. v. Northern New Jersey Interscholastic League et al.,* 86 *N.J.* 409, 416 (1981). "Administrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." *(Ibid.)* Finally, the issue in petitioner's third question has nothing to do with school law, and is consequently outside the Commissioner's authority.

Accordingly, the Commissioner dismisses the petition for lack of jurisdiction.

IT IS SO ORDERED[2]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/21/05

Date of Mailing: 12/21/05

[1] Petitioner's citation to *N.J.S.A.* 1:5-3 is not germane to this controversy. That statute simply calls for double spacing between signatures on petitions advocating referenda questions.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

455-05

455-05

OAL DKT. NO. EDU 8152-05
AGENCY DKT. NO. 246-9/05

Y.R.G., on behalf of minor children, A.A.G. AND C.R.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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 settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/21/05

Date of Mailing: 12/21/05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8152-05

AGENCY DKT. NO. 246-9/05

Y.R.G. O/B/O MINOR CHILDREN,

A.A.G. AND C.R.W.,

Petitioners,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF NORTH

BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Y.G., petitioner, *pro se*

Lisa M. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: November 17, 2005 Decided: November 17, 2005

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 17, 2005
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

11-23-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 28 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

Y.R.G, O/B/O Minor Children, A.A.G & C.R.W. v.
TWP of North Brunswick BOE, Middlesex Cty.

OAL Docket No.: EDV05 08152-2005
Agency Ref. No.: 246-9/05
Judge Donald J. Stein

In full settlement of all claims by both parties, the parties agree as follows:

Minor child A.A.G. will remain in the No. Brunswick school district for the conclusion of the Fall 2005 semester at which time A.A.G. will leave No. Brunswick school district unless Y.R.G. has moved to become domiciled within North Brunswick Twp. prior to the end of the Fall 2005

462-05

462-05

OAL DKT. NO. EDU 5904-04
AGENCY DKT. NO. 172-5/04

ANGELO N. RAIMONDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Westwood Regional School District Board of Education's (Board's) reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching her determination.

Initially it is noted that there are no material facts in dispute in this case. The parties filed cross-motions for summary judgment, jointly stipulated to the facts in this matter and are in agreement that the only disputed issues are legal. As petitioner points out in his exceptions, the issues which the parties agreed by joint stipulation to submit to the Administrative Law Judge (ALJ) were:

> 1. Whether the Board was legally obligated to comply with the provisions of *N.J.S.A.* 18A:17-24.1 before it entered into an interlocal service[s] agreement with the Board of Education of [the] Vocational Schools of the County of Bergen pursuant to *N.J.S.A.* 40:8A-1 *et seq.*, for the services of a school Business Administrator for the period beginning July 1, 2004 and ending June 30, 2006.

2. Whether Raimondi's tenure and years of service in the Westwood Regional School District entitle him to employment as school Business Administrator when the services of a school business administrator are provided by the Board of Education of the Vocational Schools in the County of Bergen under the terms of an interlocal service[s] agreement.

3. Whether the Commissioner of Education's (sic) [has] jurisdiction to hear a claim under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.* (Petitioner's Exceptions at 3, Joint Stipulation of Facts at 1-2)

With respect to the first issue, petitioner contends that the ALJ did not discuss nor decide the primary issue placed before him by the parties, *i.e.*, the relationship between *N.J.S.A.* 18A:17-24.1 and *N.J.S.A.* 40:8A-3. (*Id.* at 5, 11-12) It is appropriate for the Commissioner to make this determination, petitioner reasons, because the Commissioner's concern with the provision of a thorough and efficient education permeates every aspect of school law and the running of a school district. (*Id.* at 5)

With regard to this issue, petitioner sets forth his position that the Board should have complied with the provisions of *N.J.S.A.* 18A:17-24.1 when entering into an interlocal services agreement, and argues that while it may indeed be the case that the interlocal services agreement at issue may have satisfied the dictates of the Interlocal Services Act, that fact is immaterial since Westwood is a school district and the purpose of the interlocal service agreement in this matter was to share the services of a school business administrator. (*Ibid.*) In that *N.J.S.A.* 18A:17-24.1 deals specifically and only with boards of education and only with boards sharing either a superintendent or business administrator or both, at minimum, petitioner claims, the Board was also obligated to comply with the requirements of *N.J.S.A.* 18A:17-24.1 before entering into the interlocal services agreement because -- where there is a conflict between two statutes -- the courts have held that specific statutes take precedence over general statutes. (*Id.* at 6). Moreover, petitioner asserts, it is

possible to interpret the two statutes so that there is no conflict by concluding that the Board is mandated to comply with both statutes. (*Id.* at 7)

Petitioner further notes that *N.J.S.A.*18A: 17-24.1 -- the more recent of the two statutes -- states that "the decision to share a school business administrator shall be made jointly by the boards of education of the districts, in consultation with the superintendents of the respective districts, subject to the final approval of the Commissioner of Education." (*Id.* at 8) Thus, petitioner asserts, it is clear that Title 18A must govern herein. (*Ibid.*) However, the agreement between the two districts in this case was not prepared and submitted for the Commissioner's approval as required by *N.J.S.A.*18A: 17-24.1. (*Ibid.*) Petitioner therefore, concludes that the actions taken by the Board were *ultra vire*s and, thus, *void ab initio*. (*Ibid.*)

Turning to the issue of whether petitioner's tenure and years of service entitle him to employment as the school business administrator when the services are provided under the terms of an interlocal service agreement, petitioner argues that -- assuming the interlocal services agreement is valid -- the Board was required to appoint him as the school business administrator because whenever a tenured employee's position is reduced or eliminated, that employee's ranking gives him preference for the new position within the school district. (*Id.* at 9) Since petitioner is tenured and has more seniority than the business administrator in the other district, petitioner argues, the Board was required to apply his seniority when appointing the business administrator for the shared school district. (*Id.* at 10)

With respect to petitioner's contention that the Commissioner has jurisdiction to hear a claim arising under the Conscientious Employee Protection Act (CEPA), petitioner submits that the Commissioner clearly has primary and exclusive jurisdiction to determine the relationship between the Title 40A statute and the Title 18A statute and that his termination, as a tenured

employee, involves a matter arising under the school laws. (*Ibid.*) Moreover, petitioner asserts that his termination was in retaliation for complaints he made with regard to the Board's failure to balance the budget and that issues of budget appropriation have been found to be under the Commissioner's jurisdiction. (*Id.* at 10-11) Noting that the court found that the Commissioner had jurisdiction to hear and decide a matter arising under the law against discrimination in *Balsey v. North Huntingdon Regional Board of Education*, 117 *N.J.* 434 (1990), a case where a female high school student challenged the school district's refusal to allow her to try out for the football team, petitioner reasons that, as long as an issue is appropriately before the Commissioner – in this instance, petitioner's tenure rights and the relationship between *N.J.S.A.* 18A:17-24.1 and *N.J.S.A.* 40:8A-3 -- the Commissioner must exercise jurisdiction on all aspects of the matter. (*Id.* at 11) Petitioner additionally asserts that the ALJ's reliance on *Picogna v. Board of Education of the Township of Cherry Hill*, 249 *N.J. Super.* 332 (App. Div. 1991), is misplaced because he is a tenured employee and the court's reasoning that the Commissioner did not have jurisdiction to hear a CEPA claim in *Picogna* -- *i.e.*, '[t]he contract claim of a non-tenured school employee does not arise under the school laws simply because its outcome may later enable him to obtain tenure under the school laws" (*Picogna, supra* at 335) -- differs from the situation herein because Picogna was a non-tenured employee. (*Id.* at 10)

Finally, petitioner objects to the ALJ's finding that there was no evidence of bad faith by the Board, pointing out that the issue of bad faith was not before the ALJ. (*Id.* at 12) As a practical matter, petitioner muses, it is difficult to envisage a fashion in which an issue of bad faith could be determined on cross motions for summary judgment. (*Ibid.*)

In reply, the Board submits that what petitioner fails to recognize is the distinction between sharing a business administrator's services and subcontracting those services, which is

significant, because different statutes authorize such actions and there are separate and distinct requirements governing each arrangement. (Board's Reply Brief at 5) The Board contends, *inter alia*, that *N.J.S.A.* 18A:17-24.1 applies only to districts that have determined to share a school business administrator through a joint decision made between two boards of education, in consultation with their respective superintendents, subject to final approval by the Commissioner. (*Id.* at 5-6) In further support of its contention, the Board notes that, "[n]otwithstanding the existence of this statutorily prescribed procedure, the Legislature also stated in the same statutory scheme that:

> Nothing in *N.J.S.A.* 18A:17-24.1 shall prohibit a school district from subcontracting its school business administrator to another school district pursuant to the provisions of [the Interlocal Services Act], ... the provisions of *N.J.S.A.* 18A:17-24.1 concerning the arrangement to share a school business administrator by two or more districts shall not apply when a school district subcontracts its school business administrator to another school district. [*N.J.S.A.* 18A:17-14.1]" (*Id.* at 6)

The Board thus contends that the clear language in the statutes eliminates any doubt that the requirements in *N.J.S.A.* 18A:17-24.1 apply only where two or more districts agree to share a school business administrator and is not applicable to subcontracting such services. (*Ibid.*)

Instead, the Board claims, a decision to subcontract the services of its school business administrator is governed by the Interlocal Services Act, which provides, in part:

> Any local unit of this State may enter into a contract with any other local unit or units for the joint provision within their several jurisdictions of any service, including services incidental to the primary purposes of the local unit which any party to the agreement is empowered to render within its own jurisdiction. [*N.J.S.A.* 40:8A-3] (*Id.* at 6-7)

In this regard, the Board points out that when one district subcontracts the services of a business administrator from another district, there is no employment relationship between the school business

administrator and the subcontracting district, and the district which receives the services pursuant to an interlocal services agreement has no authority over employment decisions as it would if it were sharing the school business administrator pursuant to *N.J.S.A.* 18A:17-24.1. (*Id.* at 7) Moreover, when interpreting statutes, the Board avers that, absent legislative intent, the plain and ordinary meaning of that language should be used, and -- based on the unambiguous language in *N.J.S.A.* 18A:17-24.1 -- it cannot be disputed that the requirements in that statute apply only where two or more districts agree to share a school business administrator, since the Legislature explicitly stated:

> When boards of educations of two or more school districts determine to share a school business administrator, the appointment shall comply with the provisions of section 4 of *P.L.* 1996, *c.* 111 (C. 18A:24-1) . . . The provisions of *P.L.* 1996, c. 111 concerning the arrangement to share a school business administrator by two or more school districts shall not apply when a school district subcontracts its school business administrator to another school district. (*Ibid.*)

Moreover, the Board argues that the Senate Education Commission's Statement on Assembly Bill 1397 (N.J. 1996), which would become PL. 1996, c. 111, provided that:

> The bill would not affect the ability of a school district to subcontract the services of its school business administrator to another school district. The bill makes it clear that should a district choose subcontracting of a school business administrator over sharing, credit towards tenure acquisition accrues only in the primary district of employment. (*Id.* at 8)

Thus, the Board argues, the Legislature recognized the distinction between subcontracting for services and the sharing of services, authorizing either action by different statutes and imposing separate and distinct requirements governing such arrangements. (*Ibid.*)

Contrary to petitioner's argument that *N.J.S.A.* 18A:17-24.1 must be considered an exception to the Title 40 statute and the Board was, thus obligated to abide by the more specific

statute, the Board posits, "*N.J.S.A.* 18A:17-24.1 cannot be considered an 'exception' to the Act where *N.J.S.A.* 18A:17-24.9 specifically acknowledges the provision of the Act and the interrelationship between the two statutory schemes." *(Id.* at 9) Moreover, the Board contends, an analysis under general rules of statutory construction argued by petitioner is not applicable in this instance because the Legislature set forth which statutory provision shall control in *N.J.S.A.* 18A:17-24.9, which explicitly states that:

> The provisions of *N.J.S.A.* 18A:17-24.1 shall govern the sharing of a superintendent or school business administrator by two or more boards of education and shall not be deemed inconsistent with the provisions of the Interlocal Services Act insofar as that act may authorize the subcontracting of school district administrative services. (*Id.* at 10)

Additionally, the Board also points out that *N.J.S.A.* 18A:17-14.1 states that "Nothing in [*N.J.S.A.* 18A:17-24.1] shall prohibit a school district from subcontracting its school business administrator to another school district pursuant to the [Interlocal Services Act]." (*Ibid.*) Thus, the Board concludes, *N.J.S.A.* 18A:17-24.1 and *N.J.S.A.* 18A:17-14.1 *et seq.* resolved any ambiguities between the new procedure for sharing a business administrator and the existing provision for subcontracting for the services of a business administrator. (*Id.* at 11) Moreover, the Board argues, the two statutes at issue are not so clearly in conflict that they cannot reasonably stand together because they apply to different factual arrangements. (*Id.* at 12) Since it is undisputed that the Board complied with the provisions of the Interlocal Service Act and the Legislature specifically stated that the provisions of *N.J.S.A.* 18A:17-24.1 do not apply to an agreement to subcontract for the services of a school business administrator under that Act, the Board contends there is no legal support for petitioner's claim that the interlocal services agreement was *ultra vires* for failure to comply with provisions set forth in *N.J.S.A.* 18A:17-24.1. (*Id.* at 16)

With respect to petitioner's tenure rights to the abolished position, the Board sets forth its argument that neither the Interlocal Services Act nor *N.J.S.A.* 18A:17-24.1 provide for a right of employment to the position of school business administrator based on tenure or seniority. (*Id.* at 18) In support thereof, petitioner asserts that *N.J.S.A.* 18A:17-24.1 states that, in a sharing arrangement, tenure acquisition shall accrue only in the primary district of employment and in *N.J.S.A.* 18A:17-24.5, "[t]he statutory language is clear that 'in no event shall the districts be required to appoint a tenured individual from within any of the districts to fill a shared position.'" (*Id.* at 18-19) Moreover, the Board reasons, in that the Board's interlocal services agreement subcontracting the services of a school business administrator is governed by the Interlocal Services Act, only the provision of that Act would apply and N.J.S.A. 40:8A-5(b) clearly states:

> In the case of a contract for the joint provision of services by an officer or employee of a local unit who is required to comply with a State certification requirement as a condition of employment, the contract 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 for the purpose of that person's tenure rights. (*Id.* at 19)

Additionally, the Board asserts that it has the authority to effectuate a reduction in force for appropriate reasons -- such as economy -- and that once the Board abolished its position of business administrator, there was no position in the District for which petitioner had the right of employment based on tenure and seniority. (*Id.* at 21) Since petitioner did not have seniority or tenure rights with the Vocational Board because he was never employed by it, the Board posits, petitioner could not displace the Vocational Board's business administrator, even if he had more years of service that that individual. (*Ibid.*) Moreover, the Board points out that, even if it could be concluded that petitioner had tenure or seniority rights to the position of school business administrator provided through an interlocal services agreement, petitioner voluntarily resigned from his position for purposes of retirement and, thus, relinquished his rights. (*Id.* at 22)

With respect to the Commissioner's jurisdiction over petitioner's CEPA claim, the Board points to *Bd. of Ed. of East Brunswick v. Tp. Council East Brunswick*, 48 *N.J.* 94, 102-103 (1966) for the proposition that -- where the controversy or dispute does not arise under school laws, even though it may pertain to school personnel -- the Commissioner has no jurisdiction over the matter. (*Id.* at 23) The Board further argues that the Commissioner thus does not have jurisdiction over petitioner's CEPA claim because it was brought under CEPA, which is clearly not an integral part of Title 18A and, therefore, does not arise under the school laws. (*Id.* at 23) In addressing petitioner's claim that *Picogna, supra,* is distinguishable from the matter herein because petitioner had tenure in his position and *Picogna* dealt with a non-tenured employee, the Board avers that, at no time did the Appellate Division limit the prospective application of its holding solely to cases involving nontenured employees. (*Id.* at 24) Moreover, the Board contends the court distinguished cases involving tenured employees only to illustrate that even Picogna's alleged tenure claim was not sufficient to bring his CEPA claim within the Commissioner's jurisdiction. (*Ibid.*)

The Board further argues that, *inter alia*, while a balanced budget is within the jurisdiction of the Commissioner, whether the Board failed to balance its budget is not an issue in this case. (*Id.* at 25) Thus, the Board concludes, petitioner's assertion that the Commissioner has jurisdiction over his CEPA claim of alleged retaliatory conduct for complaints he made in regard to the Board's failure to balance the school budget does not make petitioner's CEPA claim a school law controversy over which the Commissioner has jurisdiction. (*Ibid.*)

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the grant of the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C.* 1:1-12.5(b) and *Contini, supra.* In so determining, the Commissioner finds that the

Board's decision to subcontract its board administrator services is governed by the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.* Notwithstanding petitioner's assertion that the Board should have complied with the provisions of *N.J.S.A.* 18A:17-24.1 *et seq.* when entering into an interlocal services agreement, the Commissioner has concluded, for the reasons that follow, that *N.J.S.A.* 18A:17-24.1 *et seq.* is not applicable where -- as occurred herein -- a Board has decided to subcontract its business administrator services.

A review of the clear language of the statutes at issue, *N.J.S.A.* 40:8A-1 *et seq.* and *N.J.S.A.* 18A:17-24.1 *et seq.*, reveals that these two statutes govern two separate and distinct arrangements for the provision of business administrator services. *N.J.S.A.* 40:8A-1 *et seq.* sets forth the process for school districts wishing to *subcontract* for the services of a business administrator and *N.J.S.A.* 18A:17-24.1 *et seq.* sets forth the provisions for *sharing* the services of a business administrator with one or more other districts. In this instance, it is undisputed that the Board entered into a contract with the Vocational Schools of the County of Bergen for the purpose of subcontracting the services it required. Accordingly, the controlling statute in this matter is *N.J.S.A.* 40:8A-1 *et seq.*

The Commissioner is also not persuaded by petitioner's arguments that the Board should be compelled to abide by the provisions of both statutes. *N.J.S.A.* 18A:17-24.9 explicitly states that *N.J.S.A.* 18A:17-24.1 shall govern the sharing of a school business administrator and shall not be deemed inconsistent with the provisions of the Interlocal Services Act governing the subcontracting of such services. Moreover, in reviewing the legislative history for *N.J.S.A.* 18A:17-24.1 *et seq.,* enacted subsequent to *N.J.S.A.* 40:8A-1 *et seq.*, it is noted that the Senate Education Commission's Statement on the Assembly Bill explained that "the bill would not affect the ability of a school district to subcontract the services of its business administrator to

another school district" and the Statement also made clear that -- for a district choosing subcontracting over sharing of a school business administrator -- credit toward tenure acquisition would accrue only in the primary district of employment.

Additionally, as demonstrated by the Legislative references to *N.J.S.A.* 40:8A-1 *et seq.* above, when enacting *N.J.S.A.* 18A:17-24.1 *et seq.* the Legislature was clearly aware of the earlier enacted statute which provided for the subcontracting of services. If the Legislature had intended that boards of education subcontracting for the services of a business administrator be governed by the provisions of both statutes, *N.J.S.A.* 40:8A-1 *et seq.* and *N.J.S.A.* 18A:17-24.1 *et seq.,* as argued by petitioner, it is reasonably inferred that language dictating such dual compliance would be found in *N.J.S.A.* 18A:17-24.1 *et seq.* Instead, in the same legislation creating the provision for the sharing of business administrator services, *N.J.S.A.* 18A:17-24.1 *et seq., P.L.* 1996, c. 111, the Legislature specifically addressed the relationship between the two statutes in an amendment to *N.J.A.C.* 18A:17-24.1:

> . . . The provisions of *P.L.* 1996, c. 111 (C. 18A:17-24.1 *et al.*) concerning the arrangement to share a school business administrator by two or more school districts *shall not apply when a school district subcontracts its school business administrator* to another school district. (emphasis added)

The Commissioner, therefore, concludes that the board was not required to comply with the requirements of *N.J.S.A.* 18A:17-24.1 *et seq.* when it subcontracted for the services of a business administrator.

Finally, the Commissioner observes that petitioner submitted his letter of resignation "for the purpose of retirement" on April 8, 2004, effective at the end of his 2003-04 contract. (Petitioner's Exhibit B) On April 8, 2004, the Board passed a resolution accepting petitioner's resignation for the purposes of retirement effective July 1, 2004. (Joint Stipulation at 3, No. 6)

There is no assertion that petitioner was pressured or coerced into resigning his position. In that petitioner ended his employment relationship with the Board by voluntarily tendering his resignation, thus relinquishing any rights he may have had, there is no basis upon which relief could be granted with respect to the other claims raised in his petition, and it is therefore unnecessary for the Commissioner to consider them.

Accordingly, for the reasons set forth above, the Board's motion is granted and the petition is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/23/05

Date of Mailing: 12/27/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

STATE OF NEW JERSEY
Office of Administrative Law

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 5904-04

AGENCY DKT. NO.: 172-5/04

ANGELO N. RAIMONDI,

Appellant,

v.

WESTWOOD REGIONAL BOARD OF EDUCATION,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, LLC, attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty and Hara, attorneys)

Record Closed: February 2, 2005 Decided: September 26, 2005

BEFORE **JEFFREY A. GERSON**, ALJ:

The parties in this case have submitted cross motions for summary decision. Resolution of the motions turn on the following questions:

1. Whether the Respondent was legally obligated to comply with the provisions of *N.J.S.A.* 18A:17-24.1 before it entered into an interlocal services agreement with the Board of Education of the Vocational Schools in the

County of Bergen pursuant to *N.J.S.A.* 40:8A-1 to 11, for the services of a school business administrator?

2. Whether the Petitioner's tenure entitled him to employment as school business administrator?

3. Whether the Commissioner of Education has jurisdiction to hear acclaim under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to 8?

DISCUSSION

Facts and Position of the Parties

The Respondent, Westwood Regional School District ("the District" or "the Board"), provides educational services for kindergarten through twelfth grade for students in the Borough of Westwood and the Township of Washington. The Petitioner, Angelo Raimondi, was employed by the Respondent as the board secretary and school business administrator. The Petitioner was employed in this position since 1983 and resigned from this position on April 8, 2004. The Petitioner asserts that his resignation was forced upon him by the Respondent's decision to eliminate his position in favor of an interlocal service agreement with the Board of Education of the Vocational Schools in the County of Bergen ("Vocational Board"). The interlocal service agreement provided that the two boards would share a school business administrator. The Petitioner contends that this agreement is in violation of *N.J.S.A.* 18A:17-24.1[1] and thus is ultra vires. Therefore, the Petitioner argues that under the Conscientious Employee

[1] N.J.S.A. 18A:17-24.1, in relevant part, states that two boards of education:

> may share a superintendent or a school business administrator or both. A shared superintendent or business administrator shall be subject to the same rules governing eligibility for employment as are superintendents or business administrators of a single district. The decision to share a school business administrator shall be made jointly by the boards of education of the districts, in consultation with the superintendents of the respective districts, subject to the final approval of the Commissioner of Education.
>
> [N.J.S.A. 18A:17-24.1.]

The statute requires that the two districts study the feasibility of sharing a school business administrator, provide for community input and prepare a report for the county superintendent outlining the advantages and disadvantages. N.J.S.A. 18A:17-24.1(a). Since the Respondent contends that it was not required to comply with this statute, there is no dispute that no study was conducted, no community input received and no report was generated.

Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to 8, the Petitioner is entitled to the position of shared business administrator by virtue of his seniority and tenure.

The parties have stipulated to the following facts:

1. As a result of his employment with the Board, Raimondi acquired tenure as board secretary/school business administrator in the District.
2. On April 8, 2004, Raimondi submitted a letter of resignation, from the position of board secretary/school business administrator for the purpose of retirement, effective the end of the 2003-2004 school year.
3. On April 8, 2004, the Board passed a resolution accepting the resignation of Raimondi for the purpose of retirement from the position of board secretary/school business administrator, effective July 1, 2004.
4. On April 8, 2004, after passing the foregoing resolution, the Board passed the following resolution:

   WHEREAS, the Westwood Regional Board of Education is desirous of effectuating economies and achieving cost savings to improve the financial condition of the Westwood Regional School District;

   WHEREAS, economies could be effectuated and costs savings can be achieved by entering into an interlocal services agreement with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator; and

   WHEREAS, an interlocal services agreement has been negotiated with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator;

   BE IT RESOLVED that the Westwood Regional Board of Education hereby approves the interlocal services agreement with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator for the period beginning July 1, 2004 and ending June 30, 2006;

   BE IT FURTHER RESOLVED that the Westwood Regional Board of Education authorizes the Board President and the Superintendent of Schools to sign the interlocal services agreement on behalf of the Westwood Regional Board of Education;

   BE IT FURTHER RESOLVED that, effective July 1, 2004, the Westwood Regional Board of Education abolished the position of board secretary/business administrator and the job description of the position;

   BE IT FURTHER RESOLBED that, effective July 1, 2004, the Westwood Regional Board of Education adopts the following job descriptions, effective July 1, 2004:

   1. School Business Administrator
   2. Board Secretary

(Exhibit C)

5. Effective July 1, 2004, the services of a school business administrator for the District was provided by the school business administrator employed by the Board of Education of the Vocational Schools in the County of Bergen (hereinafter referred to as "Vocational Board") in accordance with the provisions of the interlocal services agreement between the Board and the Vocational Board. The school business administrator for the Vocational Board, who was employed by the Vocational Board after Raimondi was first employed by the Board, has acquired tenure with the Vocational Board.
6. Effective July 1, 2004, Dr. Roy Montesano, the Superintendent of Schools for the District, also performed the duties of board secretary for the Board.
7. Prior into entering into an interlocal services agreement, the Board and the Vocational Board did not prepare and submit a report to the County Superintendent which outlined the anticipated advantages to the districts, the feasibility of a shared arrangement and a plan explaining how the shared arrangement would operate. As a result, neither the County Superintendent nor the Commissioner of Education approved or disapproved the plan.
8. A report was not prepared and submitted to the County Superintendent for the approval of the Commissioner of Education because it was the Board's position that the requirements of *N.J.S.A.* 18A:17-24.1 did not apply when two school districts enter into an interlocal services agreement for the services of a school business administrator. It is, however, Raimondi's position that the Board was obligated to comply with the provisions of *N.J.S.A.* 18A:17-24.1.

[Joint Stipulation of Facts, pp. 2-5.]

Because there are no material facts at issue, both parties have moved for summary decision.

The Respondent counters the Petitioner's arguments by asserting that it was not required to comply with *N.J.S.A.* 18A:17-24.1, since the board was subcontracting for the services of the school business administrator from the Vocational Board. Furthermore, the Respondent argues, that it's actions were not ultra vires since it did comply with *N.J.S.A.* 40:8A-1 to 11, which governs the procedures for an interlocal services agreement. Additionally, since the Respondent effectively eliminated the Petitioner's position via a reduction in force for the reason of economy, the Respondent contends that there is no position within the District which the Petitioner is entitled to based upon tenure. Finally, the Respondent challenges the subject matter jurisdiction of the Petitioner's claim under CEPA.

Summary Decision Standard

Summary decision is available in the administrative process pursuant to *N.J.A.C.* 1:1-12.5, which provides that summary decision is appropriate when:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5(b).]

The summary decision rule is substantially the same to that of the summary judgment rule provided by the New Jersey Rules of Court, *R.* 4:46-2. *Contini v. Bd. of Ed. of Newark,* 286 *N.J. Super.* 106, 121 (App. Div. 1995) (recognizing that the summary decision standard in administrative proceedings is substantially similar to that of New Jersey Court Rule 4:46-2). *R.* 4:46-2 permits a party to move for summary judgment 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 judgment or order as a matter of law.
>
> [*R.* 4:46-2.]

The New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520 (1995) has indicated that in the analysis of a motion for summary judgment, a motion judge is required to consider "whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Id.* at 540. Therefore, where a moving party demonstrates by competent evidential material that no genuine and material issue of fact exists, the Court must grant the motion for summary judgment. Similarly, the rules governing administrative

proceedings provide that summary decision may be granted if there is "no genuine issue of material fact and the moving party is entitled to prevail as a matter of law." *Borough of Lincoln Park Bd. of Ed. V. Bd. of Ed. of the Town of Boonton*, EDU 5944-02, Initial Decision, (April 2, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, modified, Comm'r. (May 15, 2003) <http://www.state.nj.us/njded/news/info.htm>. Under *N.J.A.C.* 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits filed with the application. *Ibid.*

In the instant matter there are no material factual issues. The facts in this matter are set out in the Joint Stipulation of Facts and the parties have agreed to cross-motions for summary decision. Thus, the only remaining disputed issues are legal.

The OAL has no jurisdiction to hear claims under CEPA

The Office of Administrative Law, like all administrative agencies, has only the jurisdiction that is conferred on it by statute. *Borough of Park Ridge v. Salimone*, 36 *N.J. Super.* 485, 495 (App. Div. 1955), *aff'd* 21 *N.J.* 28 (1956) (noting that an administrative body has only the authority that is expressly conferred by the legislative enactment); 37 *New Jersey Practice, Administrative Law and Practice* § 7.6 (Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty) (rev. 2d ed. 2000). Under *N.J.S.A.* 18A:6-9, the Commissioner of Education has jurisdiction only over matters arising under the school law. *See Balsley v. North Hunterdon Regional School Dist. Bd. of Educ.,* 117 *N.J.* 434 (1990); *Bd. of Ed. of East Brunswick v. Tp. Council, East Brunswick,* 48 *N.J.* 94 (1966).

CEPA was enacted by the New Jersey Legislature in 1986 to protect employees who "blow the whistle" on employers who engage in illegal activity. "Although CEPA has been described as the most far reaching `whistleblower statute' in the nation, it is still a "Whistleblower Act," and not a "Chronic Complainer Act." *Blackburn v. United Parcel Services,* 3 *Fed. Supp.* 2d 504, 517-18 (D.N.J. 1998). Therefore, in order to prevail on a claim under CEPA, a plaintiff must show that he or she reasonably believed that the employer's conduct violated either a law, regulation, or rule. *Carlino v. Gloucester City High School,* 57 *Fed. Supp.* 2d, 1, 35-36 (D.N.J. 1999). A disclosure that fails to reveal

illegal activity also fails as a cause of action under CEPA. *Ibid.* Here, the Petitioner argues that the basis for his claim is the Respondent's violation of *N.J.S.A.* 18A:17-24.1.

However, the plain language of CEPA does not appear to grant jurisdiction to any administrative entity. *N.J.S.A.* 34:19-5 states that an aggrieved employee may, "within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit." The availability of a jury trial under CEPA points conclusively against a determination that the OAL has jurisdiction because the OAL cannot conduct a jury trial. *See Abbamont v. Piscataway Twp. Board of Education,* 238 *N.J. Super.* 603 (App. Div. 1990) (per curiam), *rev'd by statute on other grounds, N.J.S.A.* 34:19-5, *on remand* 238 *N.J. Super.* 603 (App. Div. 1993), *aff'd* 138 *N.J.* 405 (1994) (noting that CEPA actions do not augment or parallel any administrative remedy). *Abbamont* involved a non-tenured teacher who was allegedly terminated for whistle blowing activities. None of the published opinions in the *Abbamont* case suggested that the Commissioner of Education had jurisdiction over the matter or that any exhaustion of administrative remedies was needed. Consequently, it is clear that under a plain meaning reading of the CEPA statute, the OAL lacks the jurisdiction to hear claims under CEPA. *Przygocki v. New Jersey Department of Environmental Protection,* CSV 4181-01, Initial Decision, (November 12, 2002), *adopted,* Merit System Board (January 13, 2003) <http://lawlibrary.rutgers.edu/oal/search.html> (noting that the OAL has no jurisdiction to hear claims under CEPA).

The Petitioner argues that *Picogna v. Board of Education of Cherry Hill,* 249 *N.J. Super.* 332 (App. Div. 1991), which held that the Commissioner of Education and the State Board of Education had no jurisdiction under CEPA, is distinguishable. In *Picogna, supra*, the Commissioner and the State Board had affirmed the ALJ's determination that the petitioner, a non-tenured school employee, had waived his right to seek relief from the Commissioner by filing a CEPA claim in the Chancery Division. (Under *N.J.S.A.* 34:19-8, institution of an action under CEPA is deemed a waiver of rights and remedies available in other forums). The Commissioner and the State Board determined that they had no jurisdiction over the contract claims by the petitioner. *Id.* at 335. The Appellate Division affirmed. *Ibid.*

In the case *sub judice,* the Petitioner's argument that *Picogna, supra*, is distinguishable and allows CEPA jurisdiction rests upon the premise that the *Picogna* court's decision was based upon the fact that the petitioner in that case had waived his right to seek relief and the contract claim at issue did not arise under the school law. Thus, the Petitioner contends, this implies that jurisdiction under CEPA would exist if the waiver had not occurred and the claim at issue was within the province of school law. This argument fails. The *Picogna, supra,* court went onto say that:

> The contract claim of a non-tenured school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws; **whether petitioner's employment was wrongfully terminated under the contract and under the CEPA is for the court, not the Commissioner to decide.**
>
> [*Picogna, supra*, 249 *N.J. Super.* at 335 (emphasis added).]

Thus, as the Respondent points out, nowhere in *Picogna, supra*, is it implied that the court's conclusion was based upon the tenure status of the petitioner in that case. It seems clear that the court's decision simply followed established precedent that the OAL lacks jurisdiction to hear CEPA claims.

Bad Faith

However, the Commissioner's final decision in *Cheloc v. Bd. of Ed. of Elizabeth,* Initial Decision, (April 24, 2000), *modified,* Commissioner, (June 12, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, supports the position that the Petitioner's termination can be considered in the context of bad faith. In *Cheloc, supra*, the petitioner was a tenured assistant board secretary and director of administration. *Ibid.* The Board reassigned her duties to a new position and the petitioner claimed that this action was retaliation in violation of CEPA for her objections to budget actions. Ibid. ALJ Bari-Brown declined to exercise jurisdiction based upon *Picogna, supra*, stating, "CEPA claims are beyond the jurisdiction of the Commissioner of Education." *Ibid.* In the Commissioner's final decision, the Commissioner declined to reach the ALJ's

findings regarding CEPA jurisdiction but instead considered the Petitioner's claims under the "general assertion that the Board's actions were taken in bad faith." *Ibid.*

"The School Law vests the management of the public school ... 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. Montclair BOE,* 1938 *S.L.D.* 647 (1935), *aff'd., St. Bd.* at 653 (emphasis added). A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. *Quinlan v. North Bergen BOE,* 73 *N.J. Super.* 40, 46 (App. Div. 1962); *see also Schinck v. Westwood BOE,* 60 *N.J. Super.* 448 (App. Div. 1960). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to a reduction in force. *Jamison v. Morris Sch. Dist. BOE,* 198 *N.J. Super.* 411, 415 (App. Div. 1985). Actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. *See Kopera v. West Orange BOE,* 60 *N.J. Super.* 288 (App. Div. 1960). Bad faith has been explained as meaning improper or evil purpose or motive. *Thompson v. Pleasantville BOE*, 95 *N.J.A.R.2d* (EDU) 278, 282 (citation omitted).

The Respondent argues that it eliminated the Petitioner's position for reasons of economy. A local board of education has the authority to engage in a reduction of force, even where tenured positions are affected, if done for reasons of economy. *Klinger v. Cranbury BOE,* 190 *N.J.Super.* 354, 357 (App.Div. 1982), *certif. denied,* 93 *N.J.* 277 (1983); *Trigani v. Monmouth Beach BOE*, EDU 8644-00 and 8645-00, Initial Decision, (Oct. 11, 2002), <http://lawlibrary.rutgers.edu/oal/search>, *adopted,* Comm'r (Dec. 2, 2002) <http://lawlibrary.rutgers.edu/oal/search>. Such decisions are subject to review to determine whether the position has been abolished or merely transferred in violation of the tenure statutes. *Viemeister v. Prospect Park BOE,* 5 *N.J. Super.* 215 (App. Div. 1949). In an unpublished opinion, the Appellate Division affirmed that the deciding tribunal (in that case the State Board) should determine whether the local Board's action is arbitrary or capricious in abridging the tenure rights of a teacher.

Lingelbach v. Hopatcong BOE, A-4783-83, slip op. at 3 (N.*J. App. Div.* May 17, 1985). The applicable statute controlling this issue, *N.J.S.A.* 18A:28-9, states:

> 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.
>
> [*N.J.S.A.* 18A:28-9 (emphasis added).]

A local board of education has the authority to reduce its teaching staff so long as it "is genuinely for reasons of economy." *Impey v. Shrewsbury BOE*, 142 *N.J.* 388, 398 (1995) (citations omitted).

> The determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions. *E.g., Klinger, supra,* 190 *N.J.Super.* at 357. (Concluding that a local school board may alter the full-time status of a tenured employee in order to restructure a department to meet financial constraints while continuing to provide identical services). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. *Cf. Viemeister v. Prospect Park Bd. of Educ.,* 5 *N.J. Super.* 215, 218, (App. Div. 1949) (stating that the "substance" rather than the form of change controls and if position of "principal" was replaced with identical position with different title, it would not constitute a valid reduction in force) ...
>
> [*Impey, supra*, at 399 (internal citations omitted).]

The Petitioner therefore has the burden of proving, by a preponderance of the credible evidence, that the abolition of the position was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of *N.J.S.A.* 18A:28-9.

Dearden v. Trenton BOE, 96 *N.J.A.R.*2d (EDU) 321, 323; *Wollman v. Trenton BOE*, 96 *N.J.A.R.*2d (EDU) 20, 22, *aff'd, Comm'r* at 27.

> [I]n order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be [sic] generally not prevail in situations where there exists any reasonable justification for the reduction absent such proof of bad faith. *See Klig v. Borough of Palisades BOE,* 1975 *S.L.D.* 168, 173-174. *In re Maywood Board of Education, supra.*
>
> [*Wollman, supra*, 96 *N.J.A.R.*2d (EDU) at 24 (emphasis added).]

The Petitioner in this case has offered little to overcome the presumption accorded the Board. The Petitioner asserts that the Board was legally required to comply with *N.J.S.A.* 18A:17-24.1 before it entered into an interlocal services agreement with the Vocational Board. While the Petitioner's assertion might suffice to sustain a claim under CEPA, such a claim must be pursued in the Superior Courts and not in the OAL. Moreover, it does not sustain a claim for bad faith termination. Assuming, *arguendo*, that the Petitioner is correct that the Board was required to follow *N.J.S.A.* 18A:17-24.1 in the Board's agreement with the Vocational Board, the Petitioner has not asserted that the Board failed to follow the dictates of that statute for the bad faith purpose of terminating his employment. Nor has the Petitioner asserted the Board's abolishment of his position was based upon other bad faith actions of the Board.

Furthermore, the Petitioner has offered no assertions that he was pressured or coerced into resigning his position. Since there is no assertion that the Petitioner did not voluntarily resign, any right to a tenure claim is waived. *See Kimless v. Bd. of Ed. of Woodbridge Twp.*, 1978 *S.L.D.* 651. Accordingly, I **FIND** that the Petitioner's termination was not taken in bad faith and grant summary decision in favor of the Respondent.

ORDER

Summary Decision is **GRANTED** in favor of respondent and the 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/26/05
DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

SEP 26 2005
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 27 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

465-05

HONORABLE DANIEL J. REIMAN, MAYOR : OF CARTERET, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND BOROUGH : OF CARTERET, MIDDLESEX COUNTY,

PETITIONERS,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

: COMMISSIONER OF EDUCATION

: DECISION

SYNOPSIS

Petitioners filed a Verified Petition of Appeal alleging that the children of the Carteret School District have been and continue to be denied their right to a thorough and efficient (T&E) education under N.J. Constitution, Article VIII, § 4, ¶ 1. Additionally, petitioners allege that the Borough cannot increase its local tax levy and, as a result, that the *Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA)* is unconstitutional as applied to the Borough. Respondent contends that: the Borough -- as a municipality -- lacks standing to challenge the District Factor Group (DFG) classification of the Carteret School District, and only the District itself, as the entity subject to the rules of the State Board of Education, may raise the claim at issue; the Borough may not raise the claims of its taxpayers; and the Mayor, as both a taxpayer and Borough official, lacks standing to bring the claims in issue. Respondent filed a motion for summary decision seeking dismissal of the petition.

The ALJ identified standing as the threshold issue in this matter, and found that: Carteret Borough -- and Mayor Reiman in his official capacity -- lack standing to challenge the respondent's *Abbott* classification of its school district; the responsibility for asserting T&E claims lies with the Borough's District Board of Education; and citizen Reiman may not maintain this action as a taxpayer because he has failed to allege actual harm or a substantial likelihood of same based on the respondent's classification of the Carteret School District. The ALJ concluded that the respondent's motion for summary decision should be granted, and the petition dismissed.

Upon a full and independent review of this matter, the Commissioner determined that there was no genuine issue of material fact in dispute, and granted summary decision to the Department. In so deciding, she found, *inter alia*, that: petitioners' claim is derivative to the Board's claim; petitioning Borough is barred from bringing its claim as it is a creature of the State; the T&E clause mandates a system of educational opportunity for children, not equitable tax burdens, and accordingly the mayor as an individual citizen is precluded from maintaining this action based on the T&E constitutional provision. The Commissioner adopted the Initial Decision as the final decision in this matter, and dismisses 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 27, 2005

OAL DKT. NO. EDU 8564-04
AGENCY DKT. NO. 344-9/04

HONORABLE DANIEL J. REIMAN, MAYOR OF CARTERET, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Department's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching her decision.

In their exceptions, Petitioners claim that -- although this matter arises in the context of seeking Abbott District status for the Carteret School District (District) -- the relief sought on behalf of the Borough of Carteret (Borough) and its taxpayers in this matter is distinct from that sought in the typical Abbott petition brought by a board of education or parents of school children in the district. (Petitioners' Exceptions at 1) Petitioners submit that the Legislature's enactment of the Comprehensive Education Improvement and Financing Act (CEIFA) of 1996 in response to the Supreme Court mandates in *Abbott v. Burke*, 119 *N.J.* 287 (1990) (*Abbott II*) usurped the control of municipalities and their voting constituents over the portion of the municipal tax levy that must be raised in order to meet pre-calculated and compulsory per-pupil funding levels because, under CEIFA,

the State determines the amount needed to provide the thorough and efficient (T&E) education mandated by the State's constitution and "the Borough has no choice but to exact the obligatory local share from its constituent taxpayers and turn those tax monies over in their entirety to the local school district." (*Ibid.*)

Petitioners assert that the Administrative Law Judge's (ALJ's) determination is fatally flawed and must be rejected because the ALJ mischaracterized the nature of their appeal and the relief sought. (*Id.* at 3) Pointing to the petition at pages 43-58, petitioners aver that their actual claim is that the Department's failure to properly designate the Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers; as a result, the strictures of CEIFA are unconstitutional as applied to the Borough and its taxpayers. (*Ibid.*) Petitioners allege that the ALJ "transposed and otherwise contorted the nature of the claims to make it appear that the Petitioners are asserting that it can no longer suffer a tax levy that has been 'placed' by the 'State Department of Education,' and that '[a]s a result, petitioners contend that the *children of the District*' are being denied T&E.'" (emphasis in text) (*Id.* at 5, quoting Initial Decision at 5) Petitioners maintain that they are not merely asserting a T&E claim on behalf of the District and its pupils, but, instead, are bringing their own claim to vindicate their own interests. (*Ibid.*) According to petitioners, when a municipality is overburdened to an extent that it interferes with its ability to fund a T&E education, it is not just the school district that suffers the consequences, because the municipality itself is now prohibited -- under CEIFA -- from failing to raise the requisite T&E funds for the District. (*Ibid.*)

With respect to the nature of the relief sought, petitioners claim that the ALJ again pigeonholed the Borough's claims into the type that only a board of education may bring by miscasting the relief sought as being limited to a change in the District Factor Group (DFG) ranking of the

District. (*Ibid.*) Petitioners note that districts with a DFG ranking of "B" can be designated *Abbott* Districts if they can demonstrate additional substantial economic hardship and that a DFG ranking of "A" does not automatically confer Abbott status. (*Id.* at 6) The relief they are actually seeking, petitioners maintain, is the relief set forth in the "Wherefore" clause of the petition -- that the District be afforded *Abbott* District status. (*Ibid.*)

Moreover, petitioners argue, in granting the Department's motion to dismiss, the ALJ failed to grant all legitimate inferences in favor of petitioners as set forth by the Supreme Court in *Brill v. Guardian Life Insurance Company of America et al.*, 142 *N.J.* 520 (1995). (*Id.* at 6-7) In this regard, petitioners contend that, instead of inferring that petitioners have a claim of entitlement to the relief sought, the ALJ "approached his analysis from the inappropriate perspective that the Petitioners had failed to state a claim that 'should be granted,' (decision at p.6), rather than observing the requisite standard of failure to state a claim *upon which* relief *can* be granted." (emphasis in text, *Id.* at 7) Petitioners further contend that the discovery necessary to resolve disputed material facts -- "such as the percent differential between the municipality's equalized tax rate and the State tax rate and the use of Free and Reduced Lunch Figures" -- has not even begun, and that the Department based its motion on the premise (disputed by petitioners) that certain indicators are dispositive and insufficient to demonstrate conditions of severe poverty. (*Id.* at 8)

Pointing to *Schierstead v. City of Brigantine*, 29 *N.J.* 220 (1959) (wherein the Appellate Division reversed the Law Division's ruling, stating that the matter should not have been decided on such a barren record by the trial judge) and *Muniz v. United Hospitals Medical Ctr. Presbyterian Hosp.*, 153 *N.J. Super* 79 (App. Div. 1977) (wherein the dismissal was reversed as premature because plaintiffs were not given the opportunity to amend their complaint and to conduct discovery), petitioners maintain that there is no justification for dismissing this matter outright in that

the record in this matter is similarly barren of findings on the key issues. (*Id.* at 7-8) Additionally, petitioners assert that it may be reasonably inferred from their pleadings that they are entitled to the relief sought in that "it is clear that such relief is within the authority and ability of the Department to grant," and the process outlined in the Commissioner's April, 2003 "Designation of Abbott Districts, Criteria and Process" document permits relief to be granted on a sliding scale. (*Id.* at 8) Since petitioners have stated a claim on which relief -- whether partial or absolute -- may be granted, petitioners argue that there is no justification for dismissing this matter outright. (*Ibid.*)

With respect to the petitioning Borough's standing to bring its claims against the Department, the Borough takes issue with the Department's assertion that it lacks standing to bring its claims because it is a "creature of the state," asserting that the Borough has as much right to bring a claim as a board of education does. In support thereof, the Borough points to *Board of Ed. of Twp. of East Brunswick v. Township Council of Twp. of East Brunswick*, 48 *N.J.* 94, 108 (1966), citing *Botkin v. Mayor and Council of Borough of Westwood*, 52 *N.J. Super.* 416 (App. Div. 1958), app. dismissed 28 *N.J.* 218 (the Borough herein avers the borough in *East Brunswick* "was found to be the sole party in actual interest to proceedings challenging its issuance of a referendum on a school governance issue" [1]), in arguing that an independent governing body that will be adversely impacted by an erroneous action of another governing body has the right, if not the obligation, to seek review. (*Id.* at 9) Moreover, the Borough contends it has a direct interest sufficient to afford it standing to do so. (*Ibid.*) Referencing *East Brunswick, supra*, citing *Inglewood v. Los Angeles*, 451 *F2d* 948 and *Rogers v. Brockette*, 588 *F2d.* and *Botkin, supra*, the Borough avers that it is well-settled that municipalities may sue and be sued in civil actions and that "a municipality may maintain an action, including constitutional claims against another municipality, a county, the State, or State department, such as here, provided the municipality is not attacking the laws which created it. (*Id.* at 9-10) The

[1] It is noted that the Commissioner was unable to locate this finding in the *Botkin* decision.

Borough asserts that there is no dispute that the Borough was not created by either the Department of Education or the State's education laws, but has been unfairly impacted by them. (*Id.* at 10)

Moreover, the Borough contends that the *Abbott* cases, specifically *Abbott II*, *supra* at 300-301, stand for the premise that "an Act of the Legislature, even having been declared facially constitutional, may be *** 'unconstitutional as *applied'* to individuals, and/or to local governmental entities." (emphasis in text) (*Ibid.*) Thus, the Borough contends, the ALJ misapplied the decision in *Stubaus v. Whitman,* 339 *N.J. Super.* 38 (2001), cert. den. 171 *N.J.* 442 (2002), because he failed to acknowledge that the *Stubaus* matter involved a claim that CEIFA was unconstitutional on its face, a claim not being asserted by petitioners herein. (*Ibid.*) The Borough also maintains that the ALJ failed to recognize that what the Appellate Division in *Stubaus* actually found was that "the *school district* could not assert a claim for tax relief on behalf of the taxpayers of the municipality, *not* that a municipality was prohibited from asserting such a claim," nor does *Stubaus* stand for the proposition that a municipality must first demonstrate that the taxpayers are incapable of bringing their own claim. (*Ibid.*)

Additionally, the Borough points out that three boroughs raised legal challenges to the equities of the taxation scheme with respect to the funding of the Manchester Regional High School District on their own behalf and that of their constituent taxpayers in matters that were litigated this year before the Appellate Division and the Supreme Court in *In the Matter of the Petition for the Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District,* Dockets No. A-2901-01 and 5788, respectively. (*Id.* at 11) At no time during this litigation, the Borough contends, was the question of the boroughs' standing to bring the action raised nor have the boroughs ever been required to show that the taxpayers would have difficulty challenging their respective school tax burden on their own.

(*Id.* at 11-12) The petitioning Borough herein asserts that, in the *North Haledon* matter, standing was conferred as a matter of course, notwithstanding the status of the boroughs as "creatures of the state." (*Id.* at 12) Accordingly, the Borough reasons, petitioners in this matter have a similar right to challenge the school tax burden being imposed on the Borough and its taxpayers. (*Id.* at 12)

The Borough also notes its disagreement with the ALJ's conclusion that standing should be denied to the Borough because no court in this State has yet recognized a borough's standing in a case of this nature. (*Ibid.*) The Borough submits that the absence of any precedential decisions does not preclude standing in a case of first impression, such as the one herein, and argues that "in *In re Camden County, A Body Politic of the State of New Jersey,* 170 *N.J.* 439 (2002), the New Jersey Supreme Court made it clear that the '*only*' requirement needed to confer standing is a substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." (emphasis in text) (*Ibid.*) In *Camden County*, the Borough avers, the Supreme Court reversed an Appellate Division determination that had denied standing to a governmental entity which was obligated by statute to contribute to funding operations run by that agency but were not within the entity's purview, finding that "'[a]lthough the mere assertion of a public interest -- even by a governing body -- ordinarily is not sufficient to acquire standing to seek judicial review of an administrative agency decision, *the existence of a financial interest that is affected directly by the agency action will confer standing on a governing body.*'" (emphasis supplied in text) (*Id.* at 13-14, citing *Camden County* at 448) The petitioning Borough, therefore, contends that the Court's holding in that matter -- that the County was entitled to standing in an administrative hearing where a full record could be developed before the State agency made a final determination on the challenged statutory entitlement -- should be applied in this matter so as to permit the Borough to participate in the development of a record, and to argue its case on the merits of its claim. (*Id.* at 15)

The Borough further excepts to the ALJ's conclusion that its petition should be dismissed because the Carteret Board of Education has a more direct interest in protecting its students' right to a thorough and efficient education. (*Ibid.*) Petitioners note, as clarified above, that their "claim arises from allegations of harm to the taxpayers and the public fisc, in which the interest of the Borough is clearly more direct than the Board," and argues the Borough is thus properly pursuing this claim on behalf of the taxpayers and other citizens and residents to whom it stands as *parens patriae* within the ambit of its political responsibility. (*Id.* at 15-16) The Borough emphasizes that it is the Borough's responsibility to provide mandatory governmental services and competing local service and that its responsibility includes a fiduciary responsibility to the individuals from whom funds are collected, and on whose behalf they are administered and disbursed. (*Id.* at 16) In this regard, the Borough claims that it meets the requirement for standing because it has a real and sufficient stake in the outcome of whether a district has *Abbott* status because the gap between educational funding and educational need must be bridged with local taxes, which results in a demonstrable impact upon both its constituent taxpayers and its own municipal finances. (*Id.* at 16-17)

With respect to whether the petitioning Mayor has standing to bring this action, petitioners vigorously except to the ALJ's conclusion that the Mayor lacks standing because "'he has not alleged that *his* current tax burden is ...disparate.'" (emphasis in text) (*Id.* at 17, quoting Initial Decision at 12-13) Petitioners note that it is undisputed that the Mayor is a resident and a taxpayer of the Borough and petitioners have alleged that the Borough's taxpayers are suffering an ongoing disparate tax burden. (*Id.* at 17-18) Thus, it follows, petitioners argue, that the Mayor's tax burden is disparate by definition. (*Id.* at 18) Moreover, petitioners point out that the ALJ made this finding having denied standing to the Borough to bring an action such as this on the basis that such taxpayers should bring their own claims, and the Mayor -- as just such a taxpayer – therefore does

have standing. (*Ibid.*) In this regard, petitioners aver that the ALJ misapplied *Carlin v. City of Newark*, 36 *N.J. Super.* 74 (Law Div. 1955) as precluding the Mayor from bringing his claims in his official capacity on the basis that his right to bring his action "flowed from his private right to sue," and then failing to apply that same premise to the Mayor's right to maintain the within action in his private capacity. (*Ibid.*, quoting Initial Decision at 8)

Petitioners also take exception to the ALJ's conclusion that the Mayor lacks standing "because he failed to demonstrate which and how municipal services will be impacted by an unfavorable decision," claiming that *Brill, supra*, requires an assumption that the alleged adverse impact is actionable for purposes of the Department's motion. (*Id.* at 19) Petitioners assert that the Supreme court in *Printing Mart-Morristown v. Sharp Electronics, Inc.* 116 *N.J.* 739, 746 (1989) established the standard for determining the adequacy of a pleading as "whether the cause of action is suggested by the facts" and that the Commissioner in *George Osborne v. Board of Education of the City of Lakewood, Ocean County,* decided by the Commissioner August 26, 2003, *aff'd* State Board April 7, 2004, *aff'd* App. Div. A4775-03T2 May 4, 2005, concluded that "the petitioning taxpayer, *merely by virtue of being a taxpayer*, was able to demonstrate a sufficient stake in the outcome of the proceedings to confer standing to pursue his constitutional challenge." (emphasis in text) (*Ibid.*) Petitioners thus conclude that the Mayor herein has similarly demonstrated that, as a taxpayer, he is and will be directly impacted by the Department's determinations as to the District's *Abbott* status, which governs the calculation of the Borough's local share under CEIFA of 1996. Petitioners, therefore, request that the Initial Decision be rejected in its entirety and this matter be returned to the OAL for proceedings on the merits. (*Id.* at 19-20)

In response, the Department maintains that the ALJ correctly found petitioners' claim to be derivative to the claims brought by the Carteret Board of Education in that petitioners' appeal

alleges that: 1) the Borough's children have been denied their right to a T&E education under the New Jersey Constitution; 2) the school district has been unable to provide a T&E education and its inability to do so can not be remedied by different programmatic and fiscal choices; 3) the Borough's children have been denied a T&E education on a continuing basis; and 4) there are alleged District educational failures. (Department's Reply Exceptions at 1-2) Notwithstanding the raising of separate allegations regarding the effect of CEIFA on the Borough and its taxpayers in the petition, the Department argues, the relief sought by petitioners herein is identical to that sought by the Board; namely, that CEIFA as applied to the District violates the T&E clause of the State constitution. (*Id.* at 2) Accordingly, the Department contends, petitioners' claim arises under the T&E clause and is, thus, derivative to the Board's claim. (*Ibid.*)

Citing *Robinson v. Cahill*, 62 *N.J.* 473, 513 (1973), cert. denied, 414 *U.S.* 976 (1973), the Department asserts that the T&E clause was not intended to "insure statewide equality among taxpayers," but, instead, was to insure that students be equipped to compete with relatively advantaged students so that they could become citizens and competitors in the labor market. (*Id.* at 2-3) In that it is the school district which is enlisted by the State to provide its students with a T&E education and it is the State which ensures that school districts have the means to satisfy the constitutional obligation, the Department argues, it is the District, not petitioners herein, that has standing to raise a T&E claim. (*Id.* at 3) Moreover, the Department argues, contrary to the petitioners' implication that CEIFA somehow changes the scope of the court's discussion of the T&E clause in *Abbott II*, nothing within CEIFA suggests that a Borough has a direct interest under the statute to support a T&E claim against the Department. (*Id.* at 4) Since CEIFA focuses on the child receiving a T&E and the school district that must deliver the constitutionally-guaranteed education, the Department contends, petitioners' attempt to distinguish their claim from the T&E claim raised by the Board must be rejected. (*Ibid.*)

The Department also takes issue with petitioners' contention that CEIFA directly affects the Borough because the Borough is prohibited from failing to raise the required T&E funds for the District, claiming that such contention is wholly without merit because it is the District, not the municipality, which creates the school budget and the initial determination of the amount of local tax levy to support the budget, pursuant to *N.J.S.A.* 18A:7F-5 and *N.J.A.C.* 6A:23-8.1(b). (*Id.* at 5) Moreover, pointing to *Stubaus, supra,* at 45-46, the Department avers that districts have some limited discretion in determining the amount of local tax levy and that a district may increase the local tax levy by going beyond the T&E minimum or decrease the local tax levy by spending below the T&E minimum budget. (*Ibid.*) The Department notes that the school districts -- not the municipalities -- must submit their budgets to the voters for approval and that, in the event that voters reject a proposed budget that is within the T&E range and the municipality reduces the budget, the district may appeal the reductions to the Commissioner on the grounds that the amount is needed to meet core curriculum content standard or long-term planning and budgeting. (*Id.* at 5-6) Thus, the Department reasons that the Borough's argument should be rejected in that it is the District that must act under CEIFA. (*Id.* at 6)

The Department further points to the Court's discussion in *Abbott II* at 355-357, where municipal overburden was discussed in the context of how the poor urban school districts were laboring under tax rates at a level well-above the State average; the Court noted that the school district suffers the consequences of municipal overburden, and it is the school district that is prevented from raising additional funds for its education program. (*Id.* at 6) Accordingly, the Department concludes, the ALJ properly concluded that petitioners' claim was derivative to the District's claim. (*Ibid.*)

With respect to petitioners' argument that the ALJ did not grant all inferences in favor of the Borough in determining whether petitioners had failed to state a claim for which relief could be

granted as set forth in the Department's motion to dismiss, the Department maintains that the ALJ did not rule on the Department's argument that petitioners failed to demonstrate the educational and poverty failure necessary to bring their claim under the T&E clause, but decided the Department's motion solely on the issue of standing. (*Id.* at 7-8) Citing *New Jersey Citizen Action v. Riviera Motel Corp.*, 296 *N.J. Super.* 402, 422 (App. Div. 1997), *appeal dismissed*, 152 *N.J.* 361 (1998), the Department contends that a dismissal for lack of standing amounts to a refusal by the court to resolve the matter as opposed to dismissal for failure to state a claim, which occurs only after the court has agreed to resolve a controversy. (*Id.* at 8) Thus, the Department concludes, the ALJ applied the correct standard in dismissing petitioners' claim. (*Id.* at 9) Moreover, the Department avers, petitioners' argument that the ALJ failed to apply the proper standard of review must be rejected because the ALJ accepted the allegations in the petition as true for purposes of reviewing the Department's motion, and that petitioners failed to support their argument that the ALJ did not draw all legitimate inferences in their favor in that they did not cite to any specific factual conclusions within the Initial Decision that support their assertion. (*Ibid.*)

Turning to the question of the Borough's standing, the Department argues that the Borough is barred from bringing its T&E claim because it is a creature of the State and -- as found by the ALJ -- is, thus, not entitled to invoke the protections of the New Jersey Constitution against the State. (*Id.* at 10) In so arguing, the Department points to *Williams v. Mayor and City Council of Baltimore*, 289 *U.S.* 36, 40, 53 *S.Ct.* 431, 432, 77 *L.Ed.* 1015 (1933), providing that a municipality, created by the state, may not invoke constitutional privileges or immunities against its creator; *City of Newark v. New Jersey*, 262 *U.S.* 192, 196, 43 *S.Ct.* 539, 540, 67 *L.Ed.* 943 (1923), providing that a municipality cannot challenge state action on Fourteenth Amendment equal protection grounds; and *City of Trenton v. New Jersey*, 262 *U.S.* 182, 188, 43 *S.Ct.* 534, 537, 67 *L.Ed.* 937 (1923), providing

that a municipality holds its powers and privileges subject to the sovereign will. (*Ibid.*) Moreover, the Department notes its agreement with the ALJ's analysis that *Board of Educ. of the Township of E. Brunswick v. Township Council of E. Brunswick*, 48 *N.J.* 94 (1966) does not support petitioners' argument that they have standing to bring their constitutional claim against the Department in that the *E. Brunswick* matter involved a municipality and a school district wherein the court found that the board of education was not prevented from bringing its claim against the municipality because the local board had a direct interest in its claim, and previous cases had occurred between municipalities and autonomous municipal agencies. (*Id.* at 11)

Additionally, the Department notes that the ALJ distinguished petitioners' claim from *Bergen County v. Port of New York Authority*, 32 *N.J.* 303 (1960), wherein Bergen County (County) brought a claim alleging that a State statute exempting the Port Authority property from taxation was unconstitutional. (*Id.* at 11-12) The court therein found that a "local governmental body may act with respect to property or power it holds for the benefit of its citizens but it may not generally bring a claim on behalf of its citizen taxpayers." (*Id.* at 12) Moreover, the Department avers, no court has recognized that a Borough or mayor in his official capacity may bring a claim that CEIFA is unconstitutional as applied on behalf of its taxpayers. (*Ibid.*) The Department observes that previous T&E claims were either brought by the individual students and their parents or the school districts. (*Id.* at 12-13)

With respect to petitioners' argument that *Stubaus, supra*, is distinguishable because it involved a school district's standing to bring a third party claim on behalf of its taxpayers, not a municipality, the Department argues that the overriding principle derived from *Stubaus* is that litigants should be discouraged from asserting the constitutional rights of third parties. (*Id.* at 13-14) The Department emphasizes that the ALJ noted the limited circumstances where litigants may assert the

rights of third parties as set forth in *Stubaus*, as follows: 1) when a plaintiff finds it difficult to assert his/her own claims; 2) when the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party; and 3) when a non-profit organization has sued on behalf of its injured members. (*Id.* at 13) In that none of these circumstances are present in this matter, the Department concludes that the ALJ properly applied *Stubaus* to petitioners' appeal. (*Id.* at 14) The Department also contends that petitioners' reliance on *North Haledon, supra*, is misplaced because that matter involved a withdrawal of a municipality from a regional high school district, not a municipality bringing a claim against a state agency for an alleged T&E claim. (*Id.* at 14) Standing was not an issue in that matter, the Department maintains, because standing was conferred by *N.J.S.A.* 18A:13-54 and -55. (*Id.* at 15) Moreover, the Department points out, *North Haledon* did not involve a municipality bringing suit against the State, but, instead, was a dispute between the constituent districts and their municipalities. (*Ibid.*)

The Department contends petitioners' reliance on *Camden County, supra*, is also unpersuasive because that matter arose from the County's claim that its statutorily authorized contractual obligation to provide a substantial portion of the cost of health benefits for employees who become disabled and are incapacitated. Thus, it did not involve a County bringing a constitutional claim against the State or one of its agencies. (*Id.* at 16) Moreover, the Department maintains, the Department has not ordered the Borough to directly pay for the District's provision of T&E, and it is not the Borough -- but the taxpayers -- that will be required to pay more money if the local tax levy is increased to accommodate the District's educational needs. (*Id.* at 17) The Department argues that petitioner's claim, however, falls squarely within the limitations of standing as set forth in *Camden, supra* at 447, wherein the court found that: 1) "a claim brought based on a perceived public interest is too 'generalized' to confer standing;" 2) "a real and direct interest must be present before

granting a third party standing to seek a judicial review of agency action[,]...[c]ounty or local governing bodies generally lack standing to challenge actions of governmental agencies merely because they represent the public;" and 3) "[p]rotecting public interests is important, but it does not take precedence over the need to prevent one governmental body from interfering with the actions of another pubic body." (*Id.* at 17-18) In this matter, the Department avers, petitioners' interest is the general tax burden. (*Id.* at 18) Thus, the Department argues, petitioners assertions with respect to the alleged injury to their taxpayers are "too generalized" and do not take precedence over the State's interest in maintaining order within its governmental structure. (*Ibid.*)

Additionally, the Department asserts that petitioners cannot ignore that they "brought their claim asserting a constitutional educational violation," and that a claim brought pursuant to the T&E clause is not concerned with the Borough's ability to manage its fiscal and political obligations. (*Id.* at 19) Thus, the Department reasons, "the Borough's ability to manage its financial and political obligations does not make its interests more direct than the District's interests under a T&E claim." (*Id.* at 20) Moreover, the Department reiterates that municipal overburden as discussed in *Abbott II* refers to overburden with respect to a school district, not a municipality, and to accept such a remote interest as a basis of standing to bring a T&E claim would divert the focus from the education received to general financial issues of the municipality, which is outside the intent of the T&E clause. (*Ibid.*)

Finally, with respect to the Mayor's standing to bring his claim, the Department avers that the Mayor is precluded in his official capacity from bringing a claim in this matter, noting that the situation herein differs from that in *Carlin v. City of Newark*, 36 *N.J. Super.* 74 (Law Div. 1955) because the claim brought by the Newark Mayor was not a constitutional claim, and his claim was brought by that mayor in his individual capacity. (*Id.* at 21) Moreover, the Department's position is that Mayor Reiman also does not have standing to pursue a claim in this matter as an individual

taxpayer because he has not demonstrated how he will be adversely affected by an unfavorable decision by the Department. (*Ibid.*) In this regard, the Department notes its disagreement with the Mayor's assertion that he will have to pay the costs of a rising tax levy to support the District's T&E obligation, citing *N.J.A.C.* 6A:24-7.1(d)5 and *Board of Education of the Township of Neptune v. Department of Education,* decided by the Commissioner October 20, 2003, in support of its contention that the grant of *Abbott* status does not guarantee that the tax levy will not be increased. (*Id.* at 21-22)

Upon a thorough and independent review of the record, the Initial Decision, the parties' exception arguments and the relevant case law, the Commissioner has determined that grant of summary decision to the Department is appropriate in this instance. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill, supra)*, summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law.

In this regard, notwithstanding petitioners' assertion to the contrary, there are no "material facts" in dispute in this matter with respect to the threshold issue of whether petitioners have standing to pursue their claims. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." The issues characterized by petitioners as "material facts that remain in dispute" as set forth in petitioner's exceptions, such as "the percent differential between the municipality's equalized tax rate and the State tax rate and the use of Free and Reduced Lunch Figures," are facts related to the underlying merits of the case, not to the threshold issue of standing. "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil*

Service, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Additionally, the Commissioner agrees that the Department prevails as a matter of law for reasons provided in the Initial Decision and explicated below.

Initially, the Commissioner rejects petitioners' contention that the ALJ mischaracterized the nature of their appeal and the relief sought. Petitioners' appeal alleges, *inter alia*, that: 1) the children of the Carteret School District have been denied their right to a T&E education on a continuing basis under the New Jersey Constitution (Petition at 9, No. 44); 2) the District has been unable to provide a T&E education, and its inability to do so cannot be remedied by different programmatic and fiscal choices (*Id.* at 9, No. 43); 3) socioeconomic conditions make it impossible or overly burdensome for the Borough to raise the additional taxes necessary to meet the District's special funding needs (*Id.* at 9, No. 46); 4) the Borough is prohibited under CEIFA from failing to meet the District's funding requirements (*Id.* at 9, No. 48); 5) the Department's failure to properly designate the Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers (*Id.* at 8-9, No. 41) and 6) CEIFA as applied to the District violates the T&E clause of the State constitution (*Id.* at 10, No. 51).

Notwithstanding petitioners' argument that the raising of separate allegations applicable to the Borough's taxpayers -- *i.e.*, that the Department's failure to properly designate the

Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers and, as a result, the strictures of CEIFA are unconstitutional as applied to the Borough and its taxpayers -- the underlying premise of petitioners' claim, as pled in their petition and noted above, is that CEIFA as applied to the District violates the T&E clause of the State constitution. As set forth in *Robinson, supra,* at 513, the T&E clause was not intended to ensure statewide equality among taxpayers, but, instead, was to ensure that disadvantaged students were able to compete with those who were relatively advantaged. Accordingly, as the ALJ properly determined, petitioners' claim is derivative to the Board's claim.

Moreover, since it is the school district, rather than the Borough, that has the obligation to provide its students with a T&E education, it is the District that has the authority to challenge Department determinations that it believes have had an adverse impact on its ability to provide its students a T&E education. It is instructive that in *Abbott II* at 355-357, the Court noted that the school district suffers the consequences of municipal overburden, and it is the school district that is prevented from raising additional funds for its education program. Thus, although the Borough argues that the adverse and disparate tax impact of the Department's failure to classify the Borough's school district as an *Abbott* district gives it standing to challenge the Department's *Abbott* classification of the District, the Commissioner finds that such argument is beyond the weight of authority.

Additionally, as thoroughly discussed in the Initial Decision, New Jersey courts have consistently held that municipalities have limited grounds upon which to challenge State action. As noted in *Stubaus, supra* at 48, "courts generally recognize 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" (citations omitted). Moreover, the Commissioner concurs that the Borough is barred from bringing its claim because it is a creature of the State and, thus, cannot

challenge State action on equal protection grounds. See *Williams, supra,* (a municipality, created by the state, may not invoke constitutional privileges or immunities against its creator) and *Newark, supra,* (a municipality cannot challenge state action on Fourteenth Amendment equal protection grounds). With respect to petitioners' reliance on *Camden, supra,* and *North Haledon, supra,* the Commissioner finds these cases are inapplicable to this case. *Camden* arose from the County's statutorily-authorized contractual obligation, not a constitutional claim against the State or one of its agencies; and in *North Haledon,* a matter involving the withdrawal of a municipality from a regional high school district, standing was conferred by *N.J.S.A.* 18A:13-54 and -55.

Moreover, it is noted that the Appellate Division in *Stubaus* concluded that the only parties who possessed standing to challenge the CEIFA funding mechanism were the taxpayers residing in the various school districts. *Stubaus, supra,* at 52. That court also set forth the limited circumstances where litigants have been permitted to assert the constitutional rights of third parties, *i.e..*, where third parties find it difficult to bring their own claims, where the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party and where a non-profit organization sues on behalf of its injured members. *Stubaus* at 51. Even assuming, *arguendo*, that the Borough and the Mayor in his official capacity are not precluded from raising a constitutional claim challenging CEIFA as noted above, neither the Borough, nor the Mayor in his official capacity, satisfies these limited circumstances so as to raise these claims on behalf of the Borough's taxpayers.

Finally, with respect to the Mayor's standing as an individual taxpayer to assert his own constitutional rights and to seek invalidation of CEIFA, the Commissioner concurs that, while the "liberal application of the standing rules is particularly appropriate in taxpayer suits" (*Stubaus* at 52, citation omitted), in this particular matter, petitioner, in his individual capacity, has failed to allege

actual harm or a substantial likelihood of same. Furthermore, the essence of such harm as he does allege is not the harm against which the T&E clause protects. T&E mandates a system of educational opportunity for children, not equitable tax burdens. "...[T]he T&E constitutional mandate does not protect taxpayers." (*Id.* at 56) The Commissioner, therefore, agrees with the ALJ that the mayor as an individual citizen is precluded from maintaining this action based on the T&E constitutional provision.

Accordingly, as articulated above, the Commissioner adopts the Initial Decision granting the Department's motion and dismissing the within petition for the reasons set forth therein.

IT IS SO ORDERED.[2]

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/27/05

Date of Mailing: 12/27/05

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION – STANDING
OAL DKT. NO. EDU 8564-04
AGENCY REF. NO. 344-9/04

HON. DANIEL J. REIMAN, MAYOR, AND BOROUGH OF CARTERET, MIDDLESEX COUNTY,
Petitioners,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Nicholas Celso, Esq., for Petitioners (Schwartz, Simon, Edelstein, Celso & Kessler, L.L.P., attorneys)

Michael C. Walters, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: April 4, 2005 Decided: August 26, 2005

BEFORE **ISRAEL D. DUBIN, ALJ**:

On May 27, 2004, the Borough of Carteret Board of Education filed a Verified Petition of Appeal[1] asking the Commissioner of Education to redesignate the Carteret School District as an *Abbott* district on the basis that the *Comprehensive Educational Improvement and Financing Act of 1996* (*CEIFA*), *N.J.S.A.* 18A:7F-1 *et seq.*, is unconstitutional as applied to the District. The matter was transmitted to the Office of Administrative Law (OAL) on October 14, 2004 for determination 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, and assigned OAL Docket No. EDU 8565-04.

On September 27, 2004, the Hon. Daniel P. Reiman, individually and in his official capacity as Mayor of the Borough of Carteret, and the Borough of Carteret itself, filed a Verified Petition of Appeal alleging that the children of the Carteret School District have been and continue to be denied their right to a thorough and efficient education under *N.J. Const.*, art. VIII, § 4, ¶ 1. Petitioners also allege that the Borough cannot increase its local tax levy and as a result, that *CEIFA* is unconstitutional as applied to the Borough. This matter was transmitted to the Office of Administrative Law on October 14, 2004 for determination 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, and assigned OAL Docket No. EDU 8564-04.

The enactment of *CEIFA* was in response to the State Supreme Court's ruling in *Abbott v. Burke*, 199 *N.J.* 287 (1990) (*Abbott II*) and its progeny.[2] *N.J.S.A.* 18A:7F-2(a)(2). The purpose of the Act is to ensure "a through and efficient system of public education which is uniformly applicable to all" school districts through a definition of thorough and efficient educational (T & E) programs, as well as the appropriate funding model to enact such programs. *N.J.S.A.* 18A:7F-2(b). The *CEIFA* funding model is based upon a core curriculum and has been explained as follows:

[1] The Board subsequently filed an Amended Petition of Appeal on July 8, 2004.
[2] A chronology of *Abbott* school funding decisions may be found in *Abbott v. Burke*, 153 *N.J.* 480, 490-93 (1998) (*Abbott V*).

> The core curriculum standards provide a substantive framework detailing what children need to know in order to participate as workers and citizens in contemporary society, which is the goal of a T & E public education system. *Abbott v. Burke*, 100 *N.J.* 269, 280-81 (1985) (*Abbott I*). CEIFA also established a model or prototypical school district that efficiently provides the programs and services necessary for students to achieve the core curriculum standards. Thus, CEIFA established a prototypical program that the Legislature believed would satisfy the T & E constitutional requirements. The per pupil cost to implement the prototypical model, combined with the school district's ability to contribute to that cost, is the basis under CEIFA for distributing State educational aid.
>
> [*Stubaus v. Whitman*, 339 *N.J. Super.* 38, 45 (App. Div. 2001), *cert. denied*, 171 *N.J.* 442 (2002).]

CEIFA also includes detailed budgeting provisions that are to be used in arriving at a district's T & E budget. *Id.* at 46. It is this T & E budget that is used to calculate each district's State educational aid. *Ibid.* The budget formula is used to establish the local budget share that each district must pay toward the T & E budget and is dependent on "the relative wealth of the school district based on aggregate property values and income." *Ibid.* As a result, wealthier districts pay a larger share of the T & E budget than poorer, or so-called *Abbott*, districts. *Ibid.*

Designation as an *Abbott* district is "a remedy for poverty and educational failure so substantial, pervasive and durable that targeted efforts simply cannot produce a constitutionally sufficient result." *Bacon v. New Jersey Dep't of Edu.*, Comm'r. Decision (Feb. 10, 2003), at 137[3] <www.state.nj.us/njded/legal/index.html>. To qualify for *Abbott* status, a district "must show that *it* has done all it can do with statutorily available resources and improvement mechanisms, yet *still* cannot provide T&E because the statutory funding scheme generates insufficient monies for this purpose." *Id.* at 141.[4]

The Department of Education contends that the Borough, as a municipality, does not have standing to challenge the DFG classification of the Carteret School District since it is the District itself, as the entity subject to the rules of the State Board of Education, that may raise the claim at issue. The Department further contends that the Borough may not raise the claims of its

[3] PDF image at 6.
[4] PDF image at 10.

taxpayers. And finally, it contends that Mayor Reiman, both as a taxpayer and Borough official, lacks standing to bring the claims in issue. It therefore seeks to have the Verified Petition of Appeal filed by the Borough and Mayor Reiman dismissed.

Petitioner Daniel J. Reiman has brought this action as a citizen, resident and taxpayer of the Borough of Carteret, as well as in his official capacity as Mayor. The Borough, which joins with him in bringing this action, is a public body corporate and politic of the State of New Jersey. An urban municipality with a high population density and poverty rate, it has been designated an Urban Enterprise Zone. Because it is located adjacent to Newark Liberty Airport and the port and rail yards of Newark, which have been designated as "hot spots" by the Department of Homeland Security, it must maintain a specially trained police force. And since it has been cited as having critical infrastructure by the State Division of Fire Safety, it must also maintain a professional Fire Department.

In 2003, the Borough had an equalized property value of $1,485,619,545.00, with an equalized property tax value of $1,303,872,886. The Borough's 2003 equalized tax rate was 2.574, a number higher than the State's average equalized tax rate of 2.094. The voters have defeated thirty-three proposed annual budgets and one building referendum in the past thirty-three years.

The Borough's per-pupil market value in 2003-2004 was $398,125.00, an amount less than the State average of $605,507. The District's free and reduced lunch eligibility rate this past school year was approximately 49%, and more than 20% of the District's students also qualified for free or reduced cost breakfast.

The Department has assigned the School District a New Jersey Department of Education District Factor Group ("DFG") classification of "B." Under *CEIFA*, the Borough was therefore obligated to provide 46 percent of the District's budget for the 2002-2003 school year and 45.10 percent of the District's budget for the 2003-2004 school year.

Seventy percent of the District's student population consists of minority students. The mobility rate of the District's elementary school students was 20.95 percent and the mobility rate of the District's secondary school students was 22.7 percent during the 2002-2003 school year,

when the State averages were 12.8 percent and 10.9 percent, respectively. The dropout rate at the District's high school was 2.7 percent, while the State average was 1.9 percent.

The District's standardized test scores have also been consistently lower than the State average. The standardized tests include the Elementary School Proficiency Assessment (ESPA) in Language Arts Literacy and Mathematics; New Jersey Assessment of Skills and Knowledge – Grade 4 (NJASK4) in Language Arts Literacy and Mathematics; Grade Eight Proficiency Assessment (GEPA) in Language Arts Literacy, Mathematics and Science; and the High School Proficiency Assessment (HSPA) in Language Arts Literacy and Mathematics. The following table summarizes the percentage of the District's students who failed the standardized tests:[5]

Percentage of Carteret Students Who Did Not Achieve Passing Scores

	2001-2002	2002-2003	2003-2004
ESPA-LAL	33.7	---	---
NJAKS4-LAL	---	32	27.5
ESPA-Mathematics	49.4	---	---
NJASK4-Mathematics	---	35.9	33.7
GEPA-LAL	42.4	37.2	49.7
GEPA-Mathematics	51.2	54.7	57
GEPA-Science	37.5	35.4	34.1
HSPA-LAL	25.7	22.7	---
HSPA-Mathematics	38.4	34.5	---

Petitioners argue that *CEIFA* requires the Borough to certify a general fund tax levy to meet the District's needs. *N.J.S.A.* 18A:7F-5(b). They further argue that by failing to certify Carteret as an *Abbott* district, despite poverty levels and educational failures that fall within the criteria for certification as such, the State Department of Education has placed a continuing disparate and burdensome tax levy upon the Borough and its taxpayers that can no longer be suffered. As a result, petitioners contend that the children of the District have been and continue to be denied their right to a thorough and efficient education under the New Jersey Constitution.

The Department contends that the Borough and Mayor Reiman, in his official capacity, do not have standing to bring this action. The Department also contends that Mayor Reiman,

[5] The chart summarizes data from the *Petitioner's Amended Petition*, pp. 8-9.

even in his capacity as a private citizen and taxpayer of the Borough, lacks standing to prosecute this claim. It has therefore filed a Motion for Summary Decision seeking dismissal of petitioners' appeal for failure to state a claim that should be granted.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield*, 17 *N.J.* 67, 74 (1954).

Recently, 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 America*, 142 *N.J.* 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." *Id.* at 540.

Here, a careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of America,* 142 *N.J.* 520, 523 (1995), this matter is ripe for Summary Decision.

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 et seq.*, 372 *N.J. Super.* 61, 85 (App. Div. 2004). In fact, the issue of standing may be addressed even if the parties have not raised it. *U.S. v. Hayes*, 515 U.S. 737, 742, 115 *S.Ct.* 2431, 2435, 132 *L.Ed.*2d 635 (1995). In order for a party to have standing, the party must have a sufficient stake in the outcome of the litigation, there must be "real adverseness with

respect to the subject matter of the litigation," and there must be a "substantial likelihood that some harm will fall upon [the party] in the event of an unfavorable decision." *In Re New Jersey Board of Public Utilities*, 200 *N.J. Super.* 544, 556 (App. Div. 1985), *citing N.J. Chamber Commerce v. N.J. Elec. Law Enforce. Comm.*, 82 *N.J.* 57 (1980).

The courts of this State have set a relatively low threshold for standing that is more expansive than that found in the federal courts. *In re Six Month Extension of N.J.A.C. 5:91-1 et seq., supra*, 372 *N.J. Super.* at 85. And this approach to standing is even more liberal within the State's administrative system. Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty, 37 *New Jersey Practice, Administrative Law and Practice* § 7.4, (rev. 2d ed. 2000); *Osborne v. Township of Lakewood Board of Education*, EDU 6348-02, Initial Decision (May 16, 2003), *modified*, Comm'r. (August 26, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>.

However, standing is not automatically conferred, and a litigant will not normally be granted standing to assert the rights of a third party. *In re Six Month Extension of N.J.A.C. 5:91-1 et seq., supra*, 372 N.J. Super. at 85. Nor will the courts "entertain proceedings by plaintiffs who are 'mere intermeddlers' or are merely interlopers or strangers in the dispute." *Stubaus v. Whitman*, 339 *N.J. Super.* 38, 48 (App. Div. 2001), *citing Crescent Pk. Tenants Ass'n. v. Realty Equities Corp.*, 58 *N.J.* 98 (1971).

As a municipality, the Borough is "a creature of the State" and is therefore prohibited from invoking constitutional claims against its creator. *See, City of Newark v. New Jersey*, 262 *U.S.* 192, 43 *S.Ct.* 539, 67 L.Ed. 943 (1923) (municipality cannot invoke Fourteenth Amendment claims against the State); *City of Trenton v. New Jersey*, 262 *U.S.* 182, 43 S.Ct. 534, 67 *L.Ed.* 937 (1923) (State may delegate powers to or withhold powers from a municipality as it sees fit); *Kessler v. Tarrats*, 194 *N.J. Super.* 136 (App. Div. 1984) (as creatures of the State, municipalities retain only those powers granted by the State). To allow a municipality to bring a claim against a state agency would be to disrupt the intergovernmental relationship between municipalities and the State and should therefore be discouraged. *County of Bergen v. Port of New York Authority*, 32 *N.J.* 303, 315 (1960) (a municipality may not attack state agencies "solely on the thesis that it represents citizen taxpayers.").

Still, petitioners assert that since the Borough will be adversely affected by the actions of another governmental entity, it has a direct interest in challenging those actions and may even raise constitutional issues in doing so, as long as it is not attacking the very laws under which it was created. However, their argument that the Borough maintains standing to challenge the Department's *Abbott* classification of the Borough's School District is beyond the weight of authority.

New Jersey courts have consistently held that municipalities have limited grounds upon which to challenge State action. *See, e.g., Stubaus v. Whitman*, *supra*, 339 *N.J. Super.* at 48 ("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") (citations omitted). And this is particularly true where, as here, a municipality's cause of action is essentially derivative.

The Borough's claim against the Department is based upon its assertion that the Carteret School District is unable to provide its students with a thorough and efficient education based upon its DFG classification. However, it is not the Borough, but rather its school district, that has the obligation to provide its students with a free and appropriate education. And it is also the District that is subject to the rules adopted by the State Board of Education. Therefore, it is the District that must have, and has, the ability to challenge those determinations of the Department that it believes will have an adverse impact on its ability to provide its students with a thorough and efficient education.

Petitioners' assertion that *Carlin v. City of Newark*, 36 *N.J. Super.* 74 (Law Div. 1955), supports Mayor Reiman's right to bring this action is unpersuasive since the mayor in that case did not bring the action in his official capacity, but rather as a "private citizen, property owner and taxpayer of the city." *Ibid.* Acknowledging that Carlin had the right to "prosecute [the] suit in the interest of the taxpayers," the court went on to state that this right flowed from his private right to sue, not any right that he may have enjoyed in his official capacity as mayor. *Id.* at 86.

Similarly, petitioners' argument that the Borough may maintain a constitutional claim against a State agency based upon the holding of *Board of Educ. of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966), is flawed. In *East*

Brunswick, the district board of education brought suit against the township council following the council's reduction of the district's budget by $195,000. Citing Justice Hall's opinion in *Botkin v. Mayor and Borough Council of Borough of Westwood*, 52 *N.J. Super.* 416 (App. Div. 1958), *appeal dismissed*, 28 *N.J.* 218 (1958), the Supreme Court held that

> a board of education ... is an independent governmental entity which is substantially free of any controls by the local governing body. It has been vested by the Legislature with the responsibility of providing suitable school facilities and accommodations and with the right to sue. Where, as here, it was satisfied that the governing body's action was erroneous and would deprive the local school system of necessary teaching staffs and physical facilities, *it had the right*, if not the obligation, to seek review; *clearly, the interest of the local Board of Education was more direct than various interests which have recently been recognized as sufficient under our broad judicial approach to problems of standing.*
>
> [*Board of Educ. of the Township of East Brunswick v. Township Council of East Brunswick, supra,* 48 *N.J.* at 108 (citations omitted; emphasis added)]

As in *East Brunswick*, the interests of the Borough of Carteret District Board of Education must be deemed "more direct" that those of the Borough.

Finally, petitioners' reliance on *Bergen County v. Port of New York Authority*, *supra*, 32 *N.J.* 303, is misplaced. In that case, the county brought an action against the Port Authority seeking a declaratory judgment that the Port Authority lacked legal authority to enter into a lease for property located in the Borough of Moonachie, and that the statute, insofar as it purportedly granted the Port Authority tax exemptions, was unconstitutional. The Supreme Court held that the county did not have an interest sufficient to support the action since the building in question was located in Moonachie, which was the real party with interest. *Id.* at 311. As the Court concluded:

> It is difficult to foresee all eventualities. It may be that situations will arise in which despite the absence of an intrusion upon the property or political powers of a county or municipality, it may appropriately speak with respect to some hurt experienced generally by its inhabitants. We need not and do not foreclose that possibility. It is enough for present purposes to say that a county

> may not sue to determine the jurisdiction of another political agency of the State solely to vindicate the general public right.
>
> [*Id.* at 315-316.]

Thus, the Court's primary criterion for a municipality to maintain standing is that it have a sufficient interest and act "within the orbit of its own political responsibility." *Id.* at 311. Under this criterion, the Borough of Carteret does not have sufficient interest since its T & E claim does not protect the property and power of the Borough. More importantly, the claim is not within the "orbit" of the Borough's political responsibility. *Ibid.* The responsibility for asserting T&E claims lies with the Borough's District Board of Education, not the Borough or the Mayor in his official capacity.

Petitioners have advanced a rather novel theory of standing, arguing that the Borough's interest lies in the fact that its taxpayers will suffer from the consequences of municipal overburden due to the District's DFG classification.[6] That is, since it is the Borough that must provide the "local share" under *N.J.S.A.* 18A:7F-5(b), and that burden will be funded through local tax revenues, the Borough has a responsibility to bring this action on behalf of its taxpayers. However, no court in this State has yet recognized standing based on such a tenuous relationship.

To the contrary, in *Stubaus v. Whitman*, *supra*, 339 *N.J.* Super. 38, the Appellate Division concluded that school districts did not have standing to bring suit on behalf of their respective municipalities' taxpayers. The plaintiffs in *Stubaus* were forty-two middle-income school districts and seven individual taxpayers who challenged the public school funding model established by *CEIFA*. The gravamen of their complaint was that the funding system "caused disparate tax burdens constituting violations of the equal protection ... and thorough and efficient" clauses of the State Constitution. *Id.* at 44.

The *Stubaus* plaintiffs allowed "that a government agency's *parens patriae* interest in protecting the general public, standing alone, is generally insufficient to support standing to challenge an exercise of power by another agency of the government." Yet, having

[6] The Borough's sufficient interest argument only peripherally addresses the "orbit of political responsibility" requirement previously discussed.

acknowledged that, they also argued that there is standing when "a public body sues to vindicate its ability to function as contemplated by its enabling legislation." *Id.* at 49.

The court, however, did not accept the plaintiffs' claim, premised as it was on the argument that middle-income school districts are "irrationally burdened by *CEIFA*'s calculation of local share." *Id.* at 47. While the school districts may have had standing to challenge T & E educational requirements, they did not have standing to challenge the funding of the "local share." *Id.* at 50. Rather, the only parties who possessed the standing to challenge the *CEIFA* funding mechanism were the taxpayers residing in the various school districts. *Id.* at 52. The court went on to explain its decision to prohibit the school districts from asserting the rights of their taxpayers as follows:

> Although we have allowed litigants to assert the rights of third parties, we have only done so in limited situations. For example, when a plaintiff suffers direct impairment of constitutional rights, that plaintiff may also assert the rights of third parties who find it difficult to bring their own claims. Plaintiff(s) may also raise the constitutional rights of a third party when the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party. Finally, we have also permitted a non-profit organization to sue on behalf of its injured members. Here, plaintiff school districts have not suffered any direct injury, the individual taxpayers are capable of bringing suit on their own, and the school districts are not members of any non-profit organization. Thus, the districts do not have standing to sue on behalf of the taxpayers.
>
> [*Id.* at 51.]

As was the case with the plaintiffs in *Stubaus*, the Borough and Mayor have not demonstrated that the Borough's taxpayers are having, or have had, difficulty in bringing an action on their own. Nor have they established that they have a confidential relationship with the taxpayers. And it is undisputed that the Borough is not a non-profit organization, as that term is commonly defined. Consequently, neither the Borough, nor Mayor Reiman in his official capacity, possess the requisite standing to raise these claims on behalf of the Borough's taxpayers.

This is not to say that the Mayor, as an individual taxpayer, lacks standing to bring this action. In *Stubaus,* the court determined that taxpayers had "a sufficient stake in the matter

because an adverse decision [would] continue the disparate tax the taxpayers must pay." *Id.* at 52. In essence, "they [would] be harmed by an unfavorable decision." *Ibid. citing In re Charter School Application of Englewood*, 320 *N.J. Super.* 174, 222 (App. Div. 1999), *aff'd* 164 *N.J.* 316 (2000). What is more, "liberal application of the standing rules [is] particularly appropriate in taxpayer suits." *Stubaus v. Whitman, supra*, 339 *N.J. Super.* at 52, *citing Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ.*, 284 *N.J. Super.* 427, 431 (App. Div. 1995). The Court therefore concluded that individual taxpayers had standing to assert their own constitutional rights and seek to invalidate *CEIFA*.

In *Stubaus,* the taxpayers argued that the *CEIFA* funding system not only violated the T & E mandate, but also resulted in a range of property tax rates that established a "system of school funding [which] is irrational and grossly discriminatory." *Stubaus v. Whitman, supra*, 339 *N.J. Super.* at 56-57. This, they claimed, violated the equal protection clause *on its face.* However, the court was not convinced, expressed "unease about pronouncing a willingness to decide the claim on an equal protection basis, and ... reject[ed] any attempt to project equal protection into the school funding dispute." *Id.* at 60. After expressing "grave doubts about the merits of plaintiffs' equal protection argument," *Ibid.*, the court affirmed the trial court's dismissal of the complaints, stating that even if it were to consider the merits, it would still have difficulties with plaintiffs' claims and would be unable to conclude that plaintiffs had set forth "a viable constitutional challenge based on the equal protection clause." *Id.* at 61. Based upon the foregoing, the only remaining task is to examine whether citizen Reiman will be harmed by an unfavorable decision.

Mr. Reiman[7] has alleged that the Department's assignment of a DFG classification of "B" to the School District will have an adverse impact on him since "any gap in educational funding must be bridged with local taxes, at the expense of other important municipal services." *Petitioners' Supplemental Brief on the Issue of the Mayor's Standing*, pg.6, ¶2. However, he has failed to articulate what that adverse impact will be. While he has alleged that he will be injured if forced to pay more taxes, he has not established that the DFG classification will, in fact, result in a tax increase or, at the very least, make one substantially likely. Nor has he identified the "other important municipal services" or demonstrated how they will be affected. Finally, he has

[7] In the interest of clarity, Mr. Reiman will not be referred to as "Mayor" in this section of the Initial Decision.

not alleged that his current tax burden is presently disparate, or that the failure of his claim will result in a future disparate tax burden. Since he has failed to allege actual harm, or a substantial likelihood of same, he does not have taxpayer standing.

Based upon the foregoing, I **CONCLUDE** that the New Jersey State Department of Education's Motion for Summary Decision should be **GRANTED,** and that the Petition of Appeal filed by the Borough of Carteret and the Hon. Daniel P. Reiman, individually and in his official capacity as Mayor, should be **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 2005
DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 26, 2005
DATE

AUG 3 0 2005
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

469-05

OAL DKT. NO. EDU 4936-05
AGENCY DKT. NO. 160-6/05

Y.R.L., ON BEHALF OF MINOR CHILD, K.L.,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, ET AL., SOMERSET COUNTY, : DECISION

RESPONDENT. :

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner observes that neither the file nor the Stipulation of Settlement contains a copy of the Board's resolution approving the settlement and designating Valarie A. Gogar, Yorven R. Liou and Francis T. Howlett to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating the above-noted persons to sign on behalf of the Board. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/30/05
Date of Mailing: 12/30/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4936-05

AGENCY DKT. NO. 160-6/05

Y.R.L. ON BEHALF OF MINOR CHILD K.L.,

Petitioner,

v.

FRANCIS HOWLETT, PRINCIPAL OF WILLIAM ANNIN MIDDLE SCHOOL, BERNARDS TOWNSHIP, AND BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

Respondents.

Y.R.L., petitioner, *pro se*

Steven M. Fleischer, Esq., for respondents (Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: November 14, 2005 Decided: November 14, 2005

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 19, 2005 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

11-14-05
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

11/16/05
DATE

Kathy Duncan (KK)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 2005
DATE

Joyce Anders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondents,
Bernards Township Board of Education
and Francis T. Howlett

RECEIVED
2005 NOV 14 P 1:56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

YORVEN R. LIOU o/b/m K.L.

Petitioners,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION and FRANCIS HOWLETT

Respondents.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO.: 160-6/05

STIPULATION OF SETTLEMENT

WHEREAS, on or about April 19, 2005, petitioner's son, K.L., was assigned two Saturday detentions; and

WHEREAS, Yorven R. Liou filed a Verified Petition against the Bernards Township Board of Education ("Board" or "District") and Francis T. Howlett (collectively "Respondents") on or about June 22, 2005 appealing this discipline on behalf of his son; and

WHEREAS, respondents expressly deny any wrongdoing and assert that the discipline was properly imposed; and

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue litigation; and

WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. Petitioner agrees to withdraw the Petition with prejudice.

2. In complete and full satisfaction of his appeal, petitioner will have the opportunity to have a meeting with the Superintendent of the Bernards Township Schools and Francis T. Howlett to discuss the discipline which is the subject of this appeal. If petitioner would like to avail himself of such a meeting, he will contact the Superintendent within 30 days of the date that this settlement is approved by the Commissioner of Education (assuming such approval is granted). If no request is made by the end of such 30 day period, it will be assumed that petitioner does not wish to have such a meeting and petitioner will have forfeited his right to a meeting.

3. Petitioner expressly understands that the purpose of the meeting is to allow petitioner to express his views on the discipline that was imposed and that respondents may take whatever action they deem appropriate in response to this meeting and that respondents may adhere to their previous position and allow the discipline to stand.

4. Petitioner acknowledges that he has entered into this Agreement voluntarily and entirely of his own free will and that he was not subject to any duress and/or coercion. Petitioner further acknowledges that he has been advised to seek the advice of counsel in connection with the execution of this Stipulation.

5. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

For the Bernards Township
Board of Education

By: _____
VALERIE A. GOGER

Dated: October 31, 2005

By: _____
YORVEN R. LIOU

Dated: October 19, 2005

By: _____
FRANCIS T. HOWLETT

Dated: October 31, 2005